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AND  
REVIEW;

FOR BOTH BRANCHES OF THE  
LEGAL PROFESSION AT HOME AND ABROAD.

*New Series.*

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# THE LAW MAGAZINE AND REVIEW.

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No. I.—FEBRUARY 1, 1872.

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## INTRODUCTORY.

THE LAW MAGAZINE can boast of an existence of upwards of forty years. Its first number appeared in June, 1828. Its original size and form was not unlike that which it possessed at its last issue as a quarterly in November of the past year. During this long existence it has witnessed changes which have almost wrought a revolution in English law and procedure. Towards the bringing about of these changes it has contributed much. To say that it has been the principal advocate in the Press of such well-considered Law Reform as has commended itself to the great bulk of the profession is not to put its case strong enough, for at times it has been almost the only advocate. A list of the contributors to its pages would include not only a fair share of the most prominent legal authorities, living and dead, of the last forty years, but conspicuous among them would be the names of almost every law reformer by whom the great changes we have alluded to have been brought about. A glance at the earliest number of the MAGAZINE will show what a perfect array of abuses there then existed for law reformers to attack. Those were the days when John Doe and Richard Roe were still in vigorous existence; when "a ~~few~~ in the in-

dictment" might allow a notoriously guilty criminal to escape; when the wrong spelling of a word, or a trifling misdescription, might cause the loss of an action. Chancery suits, begun in the previous century, were then hopelessly dragging their slow lengths along; the courts being apparently of Eldon's opinion, that so long as a right decision was arrived at, it mattered little comparatively whether the suitors were beggared in the process, or how long the suit lasted. The County Courts were not then established, and the thousands of persons who now seek redress by their aid were mostly without relief. The Court for Divorce and Matrimonial Causes had not yet come into existence, and the great bulk of such petitioners as are now relieved in that Court were altogether without redress. Wherever we turn we find that the changes brought about in the law since 1828 have been enormous.

That the LAW MAGAZINE set itself manfully to work to destroy existing abuses, and to improve the law, a glance at the first number clearly shows. The first article dealt with the "Principles and Practice of Pleading." It was partly in review of a "Speech by Henry Brougham, Esq., M.P., on the Present State of the Law." The famous speech of Brougham dealt with the whole range of law and procedure; the MAGAZINE limited itself for the time to attacking the old cumbersome, inconsequent, and unnecessarily technical pleading. An article on "Reforms in Chancery" follows. The late J. W. Smith came next, with one on Mercantile Law. Mr. Cornish contributed another on the Bankrupt Laws. It is altogether superfluous to do more than mention these subjects to remind our readers of the distance along the path of law amendment which we have travelled. An article on "Wages and the Poor Rates" recalls to our memory that we are still in the days before the new Poor Law was passed. The MAGAZINE attacks vigorously the "custom of making allowances out of the poor-rate to able-bodied labourers in increase of their wages;" a custom which, while clearly illegal, is still not altogether got rid of.

The LAW REVIEW appeared for the first time in November, 1844, and gave to the world many valuable contributions. The old favour of the profession continued, however, to be shown to the MAGAZINE, and the REVIEW gradually languished until in the year 1856 it became merged in the older publication. From that day until November last the name stood as the LAW MAGAZINE AND LAW REVIEW. For the sake of convenience we now propose to drop the second "law," and in future to appear under the somewhat shorter title.

And now, as to the reason of our change from a quarterly to a monthly. During the last half dozen years we have been repeatedly urged to make it. It has been pointed out that the newspapers and other publications appealing to the general public constantly discuss legal topics. No one can doubt that it is to the public interest that they should discuss them. Sometimes they do this in such a way as to show that they are calling to their aid men with special knowledge of the subjects on which they write. More often they do it in such a way as to show their conspicuous want of knowledge. The latter are checked no doubt by the able weekly legal newspapers. But it is desirable that legal questions should be discussed from the point of view of the profession in a more complete and satisfactory manner than it is usually possible to do under the exigencies of a weekly issue. At the same time it is felt that in many instances much of the interest in prominent legal questions has gone before the expiration of a quarter. We hope that a monthly issue will enable us to discuss legal topics in a complete and unhurried manner, and to do so before the interest of the subject has evaporated.

Our relations with other legal publications in various parts of the world are as wide as the British empire itself. We have now before us legal journals from every part of Her Majesty's dominions. Ireland provides an excellent *Irish Law Times*; Scotland sends her *Journal of Jurisprudence*; Canada her *Revue du Droit* and *Law Journal*; New



York the amusing *Albany Law Journal*; Washington the *United States Jurist*; Boston her excellent *American Law Review*; Chicago, up to the fire at least, her *Legal News and Bench and Bar*; Philadelphia her *Legal Gazette* and *American Law Register*; Iowa the *Western Jurist*; and Pennsylvania *Legal Opinion* and *Pittsburg Legal Journal*. We recently received from California the *Pacific Law Reporter* and the *Law Bulletin*. India furnishes two or three legal journals, and recently we have been furnished with an *Australian Jurist*. Apart from publications of a purely legal character, there are others partaking rather of a semi-legal description, treating on subjects closely allied to the law—such as the *National Bankruptcy Register*, the *Insurance Law Journal*, and others which reach us from widely different quarters. We have long since ceased to be surprised at the enterprise of various members of the profession in different parts of the world, and should not be in the least astonished to see a *Law Times* from Timbuctoo or a *Law Journal* from Enderby's Land. The fact of so many legal publications being able to maintain an existence is good evidence of the increased interest which is taken by the profession in the discussion of public topics, and, connected with the other facts we have mentioned, may stand as one explanation why we consider it certain that the profession, to whose support we appeal, requires to have its views reflected, and legal topics of general interest and questions of special interest to itself discussed, at briefer intervals than our former issue allowed.

The Editor is called to his task at a time when, in the interest both of the public and the profession, it is of vital importance that the various questions with which he will have to deal should be ably and temperately discussed. Every lawyer feels that the changes coming upon us both in regard to law and procedure are of the very gravest possible nature. The fusion of Law and Equity, the alteration of the procedure of our courts, the reform of our system of appeals, of our land laws, of our jury system, are sufficient to indicate how important are the questions which are already to the front.

Other journals will discuss them from the point of view of the public, the **LAW MAGAZINE** from that of the legal profession.

The **LAW MAGAZINE** has from its commencement done its best to furnish biographies of the leading lawyers who have passed away from amongst us. Its last issue gave a notice of Sir John Rolt. Our present number contains a sketch of the life of the late Edwin Field, the friend of Rolt, of Crabb Robinson, and of many other illustrious men in and outside the profession to which he belonged. We propose still to continue this feature of the **MAGAZINE**, and as death takes one honoured name after another from the list of those familiar in our courts, we hope to take note of their careers, and to record what they have done to make their names worthy of remembrance.

From time to time we shall notice such topics of interest to the profession as affect Scotland, Ireland, and our Colonies. We hope to place before our readers a statement of the position and prospects of the Bar in India, Australia, Canada, and other parts of the British dominions. We contemplate also doing what we can to gather information regarding the profession to which we appeal, from other countries. The United States possibly presents something like a forecast of what English institutions, legal and others, have a tendency to drift into. In many States, they, as well as some of our colonies, have tried the experiment of a union of both branches of the profession. They have codified their laws. They have established systems of law teaching superior to what exists in this country. Several European countries are ahead of us in the study of the civil law. Their experience is ready for our use, and it will be our duty to gather it together and place it before the profession.

The articles which will appear in the **LAW MAGAZINE** will some of them have the author's name attached, and others not. After careful consideration the Editor has come to the conclusion that this is the course which will allow the

widest freedom of discussion. It is for the opinions expressed in the unsigned articles only that the Editor will hold himself responsible.

As in the days which are past this Journal has done much at once to check ill-considered legislation, and to promote sound and useful law reforms, so it hopes to do much in the future in the same directions. It has sketched out many legal changes. It has materially influenced others. Though it has not before it the prospect of so many abuses to be dealt with as it has seen swept away, there are signs that the coming changes will be in their ultimate effect, both upon the public and the profession, of even greater importance than those which have already been accomplished. Whether the two branches of the profession shall be united; whether our law is to be moulded into a code; whether Courts of First Instance are to be established and the itinerant system of assizes got rid of; whether our whole judicial arrangements are to be remodelled, and, if so, in what form; whether land can be made as easily transferable as stock; these are some of the questions which the public and the profession are considering. We hope to deal with these in such a way as to entitle our utterances to respect. At the same time, we appeal to the past history of the MAGAZINE as showing that we have given earnest that we shall have the honour of the profession at heart, that we shall attack abuses wherever we discover them, and that we shall do all in our power, while aiming at such abuses, to maintain the ancient dignity of a profession which has produced from its ranks more illustrious names than any other, and the integrity, independence, and ability of which form a necessary factor of the welfare of the British empire.

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## I.—THE LEGAL EDUCATION QUESTION.

By ANDREW EDGAR, LL.D.

**V**ARIOUS circumstances would seem to indicate that the difficult problem involved in the question of legal education is approaching to a solution. The recent enactment of the Inns of Court, making an examination compulsory before a student is called to the Bar, is the most decisive step which has yet been taken in the matter, and implies important consequences, which must sooner or later arise. There were arguments in favour of such an examination, and arguments against it, but the preponderating consideration which presented itself, and which, no doubt, brought about the result which has taken place, was the force of public opinion, which had decreed that the entrance to the profession of the Bar should be subject to the same conditions as the entrance to other professions. It had been obvious for some time, that it was impossible to resist the demand, that those who occupied the *status* of barrister-at-law should give some evidence of their qualifications which could not be regarded as illusory. As early indeed as May, 1859, a committee of the Four Inns of Court, appointed to reconsider the whole subject of legal education, had reported in favour of a compulsory examination, and this recommendation had been approved of by the Benchers of the Inner Temple, but the opposition of Lincoln's Inn stayed any attempt at that time to carry it into effect. It is a matter of congratulation, however, that wiser counsels have now prevailed with those who formerly dissented from the proposal. Without attaching any undue importance to an examination for the Bar as a test of legal ability and learning, there can be no doubt that the profession itself suffered in public estimation from its absence; and as much of the influence of the Bar must necessarily arise from the estimation in which it is held, we must express our hearty approval of the course which has been adopted by the Inns of Court.

In giving in our adhesion to the new system, however, we must state our belief that the education of students, who are really preparing for practice at the Bar, will not be substantially altered by it. No examination can supersede a practical training for the profession. Whatever amount of legal knowledge a man may acquire by a few years of study will be of little avail, unless he has been taught to apply it practically. The exceptions are very few, where men have succeeded at the Bar who have not enjoyed the advantage

of training in chambers. Lord Cairns very truly said, when examined before the Royal Commission of 1854, that "it is as absurd to think of any one practising as a barrister without that kind of training, as it is to think of any one practising surgery without walking the hospitals." The special character of the training necessary will, no doubt, depend on the kind of practice to which a man intends to devote himself, but whatever this may be, any real knowledge of it is only to be obtained in chambers. Nor will all this be affected by any changes which our system of judicature is likely to undergo. Under any system which is conceivable, the division of labour in the profession is likely to be as strongly marked as it is at present; and although it were greatly lessened, the distinction between a mere theoretical knowledge of the law, and a sound practical knowledge of it, would still be certain to be as momentous as ever. Even with respect to accurate knowledge of the law, it is scarcely to be doubted that this is more readily to be obtained from a practical training, than from any amount of study, however careful and thorough; and in so far as the power of grasping principles is concerned, this must depend very much on the capacity of the individual, and is as likely to be developed by practice, in which the power will be felt to be invaluable, as by any kind of study, in which the tendency of all but the highest order of minds is to be merely recipient.

But strongly convinced as we are of all this, we are not prepared to say that no advantages will result from the system of compulsory examinations, even in the case of those whose object is to prepare themselves thoroughly for the practice of the law. It is always of importance for a man at the Bar to have got up a few subjects well, and to have acquired tolerably exact views of a large number of others, which it is impracticable to go into minutely, except as occasion may require. It is impossible for a student to profit properly by attending the chambers of a special pleader or conveyancer without a good deal of private reading, and it is all the better that this reading should be systematically directed. The studies to which the examinations will give rise will be at least ancillary to what we must still regard as the true professional training. The difficulty of acquiring a thorough knowledge of any department of the law is so great, that whatever tends to ensure it is not to be despised; and although we do not think that the new system will produce any decided change on the character of the Bar, we are convinced that its effects, so far as they go, will be beneficial and useful.

An important question arises as to the means of providing

instruction for students under the new system. The mere institution of a compulsory examination will necessarily lead to a demand for legal tuition, and the demand will no doubt produce the supply. There is a sufficient number of men in the Inns of Court possessing the leisure and the qualifications adequate to prepare students for any examination which may be required on any of the subjects that can possibly come within its range. Given a good board of examiners, a proper selection of subjects for examination, and a high standard of knowledge, and it will certainly follow that suitable instruction will be ready without the institution of a single new lectureship. For ourselves, we have no hesitation in saying that we should be abundantly satisfied with such a state of matters. Admitting, however, that it might be advisable to have public lectures on each of the subjects of examination, a slight extension of the present system would sufficiently provide for all that was necessary in this respect. We do not deny that public lectures on such a subject as law have some advantages, but these, it is obvious, are of a limited and partial character. In so far as any teaching can be of avail in the study of the law, private tuition is the only really effective mode; and the best way to obtain a sufficient supply of competent teachers amongst members of the Inns of Court is to leave it open to any man who may choose to engage in such work. Nor would students have much difficulty in making a selection. Men engaged in legal tuition, who were successful in preparing pupils for examination, would very soon acquire a reputation for knowledge and skill, which would render it an easy matter for students to know where to go. The danger would lie perhaps in the latter crowding too much to certain favourites, because even the most competent men could only deal successfully with a limited number of pupils. There would be no difficulty, however, in finding a remedy for this, without unduly interfering with the liberty of teaching. We should therefore be perfectly content with a system of tuition which, under proper regulations, would render available the services of the many able and accomplished men at the Bar who would be willing to engage in preparing pupils for examination.

But it is impossible to suppose that at the present time this settlement of the question will be generally considered as satisfactory. The extensive and growing popularity of the Legal Education Association, and the views which prevail in the public mind on the subject, render it certain that something more will be required to meet the demands that are likely to be made. The real point at issue now is, whether a Law University, as proposed by the Associa-

tion, is to be instituted, or whether the Inns of Court are to supply the instruction which the Association contemplates. Now, we have no hesitation in avowing ourselves in favour of the latter course. It seems to us to be quite needless to rear up a new structure from the foundation, when there is one in existence which, by certain improvements and additions, might be made to serve every purpose that is required. The obvious tendency of the proposal of the Law Education Association is to reduce the Inns of Court to a subordinate position; and we must say that, with all their faults, we think them worthy of a better fate than to be absorbed in a new and nondescript body, in which other interests would clearly predominate. And we must further take leave to say, that we have no faith in the probability of any such scheme ever being carried into effect. Such a scheme could scarcely be expected to be instituted until the Inns of Court were generally regarded as entirely antiquated, and utterly effete. We can hardly suppose that several eminent members of the Bar who have allowed their names to appear on the list of the Council of the new Association, have calculated the serious consequences which the proposal put forth involves; and we feel sure that if ever the matter came to a practical issue, very few of them would be inclined to give a hearty support to a scheme which would not only at once injuriously affect the Inns of Court, but would introduce an element which would be likely to change, not for the better, the whole character of the legal profession in this country.

Dismissing, then, the plan of the Legal Education Association, the question comes to be, What ought to be done by the Inns of Court, after having taken the important step of making an examination for the Bar compulsory? Our own opinion, as we have already stated, is that private tuition would sufficiently meet every want, and would supply in abundance the means of legal education. But it is quite obvious that the public will require the Inns of Court to do something in the matter, and to devote part of their revenues to the object of preparing students for the examination now instituted. It is one of those things on which it is of no use to argue, and the only question to be considered by these learned and honourable societies is the method which is best calculated for carrying this object into effect. In our opinion the plan adopted by the Benchers of the Inner Temple is eminently wise and judicious. In order to assist the students of the Inn in preparing for the compulsory examination, the Benchers have instituted a course of instruction which is open, without any fees, to every student of the Inn. Lincoln's Inn and the Middle Temple cannot

do better than follow this example, Gray's Inn uniting with one of the other Inns. In this way the Inns of Court will show that they are alive to the question, and are prepared to do whatever they can in promoting legal education. By making so good a beginning they will prove that they are fully deserving of the confidence of the public, and may be relied on for completing a scheme which will satisfy all just and rational demands.

We should certainly by no means be disposed to support the plan of tutorships in the different Inns of Court, if we thought that its effect would be to prevent private tuition. The gentlemen who may be appointed as tutors may be the best qualified who are to be found, but practical efficiency can only be judged of by experience. The Benchers of the Inner Temple have wisely appointed their tutors for one year only; and this would no doubt be followed by the other Inns of Court, if they instituted a similar course of instruction. It is scarcely to be supposed, however, that a man would be dismissed at the end of a year unless he proved signally inefficient; and at the best, with so many able men as we have, qualified to give instruction in the different branches of Law, it would be unfortunate if the Inns of Court tutors enjoyed a monopoly. The salaries which the Benchers of the Inner Temple have granted their tutors can scarcely be considered likely to have the effect of weighting private tutors very heavily in the race, because, as the student will have to pay no fees for the instruction of the former, he will the more easily be able to pay for the instruction of the latter, if he find it necessary to have recourse to their assistance. At all events, the field will be left open for men who have sufficient ability and acquirements to compete with the Inns of Court tutors; and if we mistake not, private tuition will be mainly relied on by those who are endeavouring to prepare themselves for the examination, if it is actually to test their knowledge of the law. With a really satisfactory examination there is room for all instructors in legal learning—for the public lecturers, for the Inns of Court tutors, and for private tutors.

Everything, it is obvious, will depend on the character of the examination. We are strongly of opinion, with the present Solicitor-General, that the examination ought to be "searching and thorough." The very idea of an examination for the Bar implies a high standard. The only *raison d'être* of such an examination makes it necessary that it should be of no superficial or formal character. Formerly barristers were very much like bullion, which the public had to assay for themselves, but when they are to be sent out in the form of coin, there must be no doubt as to the quality of the gold. Any other result would be derogatory to the dignity of the



profession, and must be guarded against in every possible way by the most stringent provisions, the most inflexible rules, the most unqualified restrictions, and the most peremptory requirements and prohibitions.

Assuming, therefore, a high standard, the next question is as to the subjects of examination. Now, the matters which such an examination would embrace naturally divide themselves into two branches, as pointed out in the Report of the Committee of the Four Inns of Court in 1859. The first comprehends:—(1.) Constitutional Law and Legal History. (2.) Jurisprudence, especially Private and Public International Law. (3.) Roman Civil Law. The second comprehends:—(1.) Common Law. (2.) Equity. (3.) The Law of Real Property. The former branch relates to subjects which are on the whole in the nature of accomplishments, although occasionally of use in legal practice; the latter relates to subjects, a knowledge of one or other of which is necessary to any man who presumes to engage in practice at all, according to the department of the law to which he attaches himself. As one object of the compulsory examination is to give a more scientific character to the Bar, the obvious plan would be to require every student to pass an examination in one subject in each branch. As, however, those who were wise in their generation would chiefly look to practical utility, we think it should be allowed to any candidate to go in for real property, along with either of the other subjects in the second branch, in lieu of any subject in the first branch. This would be only fair to men whose whole ambition was to prepare themselves for practice, and who were unwilling to spend time in acquiring what was mainly ornamental.

Much of the value of the examination, however, will depend on the examiners. A great responsibility will, therefore, rest on the Council of Legal Education who have to appoint them. In the report of the Committee of the Four Inns of Court in 1859, to which we have already referred, there appeared the following resolution, "That it is expedient that no person be appointed to examine candidates for admission to the Bar who has been engaged in giving lectures or private instruction to any of such candidates within two years before such examination." We may fairly presume that this resolution will be carried into effect under the new system. Nothing can be more fatal to the character of an examination than that it should be to any degree in the hands of those who have been engaged in preparing candidates. Suspicions of unfairness will arise even where there is not the slightest ground for anything of the kind. The examination is apt to run in the groove of the lectures,

and thus to become a mere test of memory. Another evil is, that it gives an unfair advantage to the examiners in the preparation of pupils for examination. We would also strongly recommend, that a resolution of the sub-Committee appointed by the Committee above-mentioned, and approved of by them, should be followed. The resolution is, "That the Examiners be selected from the Barristers, and that no Benchers shall be an Examiner." There are obvious reasons in favour of this, on which it is unnecessary to make any observations.

When the Inns of Court have carried into effect some such plan as we have proposed, they will have satisfied a large portion of the demands which have been made upon them. There are other questions no doubt which will still remain unsettled, but for the proper solution of these time is an important element. The admission of students, who do not intend to enter the profession, to the instruction provided by the Inns of Court is no doubt desirable, but the urgency of this will depend to some degree on the quality of the instruction given. It may be that the effect of the proposed changes will be to give the study of jurisprudence a position in this country which it has never yet attained, and that numbers of ambitious young men who intend to devote themselves to public life will think it desirable to spend some time in the acquisition of such knowledge. Every facility would, we doubt not, be afforded by the authorities in the Inns of Court to the gratification of so laudable a wish, and generally in making the learning within their walls available for the public benefit. The admission of students intended for the other branch of the profession is a question which deserves every consideration, but looking at the very efficient staff of lecturers provided by the Incorporated Law Society for such, it can scarcely be said that this is a matter which presses. We would add also that the affording of greater facilities to members of the other branch of the profession who wish to be called to the Bar requires to be very fully considered.

We have abstained from entering on the learning of the question of legal education, the original character of the Inns of Court, their history as schools of law, and the various suggestions which have been made for improving their constitution. We have confined our remarks entirely to the present aspects of the question, and to the more obvious improvements which can without difficulty be introduced as supplementary to the great change in the terms of admission to the Bar, which has now taken place. It is an easy matter to put forth extensive schemes of legal education, and to construct on paper a great Law University.

But ancient and solid bodies like the Inns of Court are not to be shuffled as a pack of cards, or tossed about like a child's playthings. The wisest course is to take them as they are, and to make the best of them. They have their strength, and their weakness, and, with a clear perception of their capabilities, our policy is to draw forth all their strength.

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## II.—THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, WITH SPECIAL REFERENCE TO INDIA. By CHARLES COLLETT, late one of the Puisne Judges of the High Court of Madras, Barrister-at-law, Lincoln's-Inn.

THE question to which I purpose to direct attention is whether it may not be practicable and expedient to restrict the right of appeal to the Judicial Committee or other Court of Final Appeal in this country, so as either to diminish the number of cases appealable, or to circumscribe the scope and grounds of the appeals. This question may be discussed without going into the details of the constitution of the Judicial Committee of the Privy Council (either as heretofore, or as now temporarily organised) or of that Supreme Court of Appeal which law reformers long to substitute for it and the House of Lords together. The cases from India constitute more than three-fourths of the cases before the Judicial Committee; last Michaelmas term out of 336 appeals, 274 were from India. My remarks will be confined to appeals from that portion of our empire, and if my suggestions are of practical use as regards that vast dependency, I shall be well satisfied. The principle I wish to insist upon is that nothing can safely be done to restrict the right of appeal to the court here without full consideration, firstly, of the procedure of the courts in India and, secondly, of the gradation of the courts there. We must know not only what process each suit undergoes in India, but also what grades of courts it will have ordinarily gone through before we can safely limit the appeal to the court here; and if need be, we must amend the law in India when we alter it here. Hence what I suggest as to appeals from India is not intended to be made applicable to appeals from other parts of the empire. I insist on the principle because I believe that it is in danger of being lost sight of in the present official eagerness to devise some plan to check the appeals from India.

There are two modes of limiting the right of appeal; first, there is the pecuniary limitation, or limitation as to value; and, secondly, there is the limitation as to the scope and grounds of the appeal.

As to the first mode of limitation not much need be said. It is a rough and ready, and, for practical purposes, often a very useful mode of restricting endless litigation about small matters. But it is not theoretically very defensible, for the difficulty and general importance of the legal questions involved in a suit are unaffected by the value of the subject-matter in litigation. With regard to appeals from India, the existing pecuniary limitation of 1000*l.* is, I think, a reasonably fair one, and the Judicial Committee have the power, which they occasionally exercise, of giving special leave to appeal where the value of the suit may be below that sum, but the importance of the legal questions involved in it, or its bearing upon other suits, render it one of exceptional difficulty or importance. It has, I believe, been proposed to raise the pecuniary limitation from 1000*l.* to 5000*l.* • I certainly think (though it is difficult to give very definite reasons for the opinion) that the alteration would work very oppressively, and be an undue favouring of rich suitors as compared with poorer ones. Property valued at 1000*l.*, especially when it represents the estate of a Hindu family, is generally of more importance to the owners than property of the same nominal value is in England. Considering how property is generally distributed in India the existing pecuniary limitation upon the right of appeal is, I think, as high as can fairly be fixed.

It is the second mode of limitation which I propose to apply to Indian appeals. As preliminary to my proposals, it seems essential first to notice what must always be the practical defects of the Bench and the Bar of a Court of Final Appeal located in this country, for so far as judges abroad may be better placed or fitted to decide safely than judges here, it will be useful and safe to leave them uncontrolled on appeal. Next I shall sketch cursorily the procedure and course of appeals in the courts in India, and state the different gradations of the courts in India subject to the several High Courts; and in doing so I shall suggest an amendment of the procedure on appeals in India, and propose an uniform gradation of the courts throughout India. In conclusion I shall submit my proposal to limit in certain cases the scope of the appeal to the Court here to questions of law.

I assume it to be beyond question that nothing short of the court being located in England, with a Bench mainly composed of tried English judges, and a Bar frequented by the leading members of the profession here, could give satisfaction to our colonial fellow-subjects. It has, I am aware,

been suggested, as one way out of the difficulty as to Indian appeals, to establish the Court of Final Appeal in that country, but it is not worth while now to digress in order to demonstrate how, even for so vast a dependency as our Indian empire, such a scheme must turn out to be utterly unsatisfactory and inefficient. It would not, I presume, be even suggested that a like scheme would be practicable in the case of such dependencies as the Cape, Ceylon, or the West Indies. The court, therefore, must be located in this country; its Bench must be mainly composed of home-bred judges; and the home Bar will inevitably furnish the great bulk of its practitioners. Now, with all respect for home-bred English judges, it will, I think, be allowed by their admirers (and I am certainly one of them) that their professional experience as advocates, or as judges, is defective in two respects; first, they are rather municipal lawyers than jurists, and secondly, they have never been judges of fact. As to the first point, the legal education of the English lawyer is neither scientific nor profound; with very rare exceptions no one studies general jurisprudence, or attempts to compare our own with other systems of law, either ancient or modern. Then, whilst in practice as an advocate, or presiding as a judge, the English lawyer seldom acquires any real acquaintance with other systems of law; substantially he knows nothing of any law except his own, and even of that he has a practical—though not always a complete—rather than a scientific knowledge.

The greatest admirers of English law can scarcely boast that it is either systematic or scientific. When, therefore, we place home-bred English lawyers as judges in a Court of Final Appeal for our colonies and dependencies, we shall no doubt find that we have got men of cultivated acuteness, and often profoundly learned in a single, very intricate municipal law; but it is almost inevitable that they will be without sympathy for other legal systems, and will be perpetually measuring and moulding the ideas of alien systems of law so as to square with the often discordant ideas of the only law with which they are practically acquainted. There is no way that I can see of moderating this defect except an admixture of retired colonial judges, practically skilled in some one or more of the alien systems of law which the court here will have to administer. It will not be often that such a judge will be found who is otherwise also a fitting compeer with the home-bred judges, but certainly the Legislature ought not to make it impossible to give him a seat in the court when such a judge is forthcoming. That this defect in home-bred English judges is not a fanciful one will, I think, be acknowledged by those who have watched the Judicial Committee.

To speak only of those now dead and gone, we have had there judges such as Lord Kingsdown, and Lord Justice Knight Bruce in his better days, who were quick in grasping the idea of the alien law. But who has not heard some learned and patient judge in that Court struggling with a fundamental notion of the Hindu or Roman-Dutch law, and misleading himself as to its nature and extent by perpetually comparing it with the English legal notion apparently similar, and alone familiar to his mind. Then it would be as well also that the Court of Final Appeal should be saved from the ridicule attending those blunders which the Judicial Committee sometimes commit from their ignorance of the languages of our foreign dependencies. Such a passage in a judgment as the property in dispute "was then held by a family of the name of Naidoo" (9 Moore's I. A. C., 86) could not, of course, be read out in any court in the Madras Presidency without exciting laughter. Occasionally these blunders come near to mistakes of substance, as in the case where the Judicial Committee are said to have mistaken the honorific prefix "Rája-sri" in a petition for "Registrar" and held that there had been a sufficient application to that officer.

The second defect in the professional experience of home-bred English judges, to which I referred, is their want of experience as judges of fact. The objection applies as much to Equity judges as to the others, considering the absurd system of recording and discussing evidence in the Chancery Courts. To present as an advocate a one-sided view of the evidence for the acceptance of the jury, or to sum up as a judge both sides, and then tell the jury if they believe one view they will find one way, and if they believe another they will find the opposite, is an entirely different task from that of having to fill, at the same time, the double office of judge and jury, not only to apply the law to the facts, but to rightly characterize the witnesses, and justly appreciate the probabilities of the evidence, and then to give satisfactory reasons in a judgment for the conclusions arrived at. Now, the Judicial Committee, as at present constituted, are judges of fact as much as of law. To be sure, it used to be a maxim of the Judicial Committee not to dissent from the local courts in our foreign dependencies upon conclusions of fact, except in very clear cases; but of late years, at least, there has been a marked abandonment of this rule, and I think that this is one of the main reasons why of late the judgments of the Judicial Committee have given less satisfaction abroad than they used to do. In any Court of Final Appeal that may be constituted in this country, most of the judges must be without practical experience in deciding questions of fact, and to this must be

added the further difficulty that the evidence on which they will be required to decide, will very generally be that of foreigners, with whose habits of thought, morals, manners, and languages, they are utterly unacquainted, and to whose evidence it would be in the highest degree dangerous to apply the like tests, or the same standard of credibility that may be used in judging the evidence of witnesses in England.

It would thus far seem probable that a restriction upon the right of appeal as to questions of fact might be imposed. I pass on now to consider whether the process which suits undergo in the courts in India may point to the same mode of limitation as safe and useful.

All the courts which are subject to High Courts, and the High Courts themselves in their appellate jurisdiction, are governed by the Code of Civil Procedure. The system of appeals therein provided is, that from the decision of the Court of First Instance there is one appeal, technically called a *regular* appeal, upon the whole case to the next superior court. The decision on regular appeal upon the issues of fact in the suit is final, though the court come to conclusions upon the evidence quite different from those of the Court of First Instance, and this is the defect in Indian procedure above alluded to as needing amendment. From a judgment on regular appeal there is an appeal (except in certain petty cases) to the High Court, but limited to the questions of law in the suit, technically called a *special* appeal. This system of appeals is supplemented by provisions for the new trial of a suit wholly or in part. If the decision is based upon some preliminary question and is reversed upon appeal, the suit is remanded to the lower court for trial upon the merits. If the case has been imperfectly investigated the appellate court may itself receive further evidence if sitting on regular appeal or may require the lower court to receive and transmit it, or may retain the suit on its file but remit one or more issues of fact for the decision of the lower court. The issue remitted may be one already recorded in the suit or one newly framed by the appellate court, and the finding in either case may be required either upon the evidence already recorded, or partly upon such evidence excluding something improperly admitted or including something improperly rejected as evidence, or partly upon existing evidence and partly upon fresh evidence, or wholly upon fresh evidence to be received by the lower court. The finding when returned may be objected to, and the hearing of the appeal then proceeds in the superior court. But a High Court sitting on special appeal cannot decide any issue of fact, but must (if needed) require the lower court to record its finding, and is concluded by it. Hence this result of the

present discordance between the law of the Judicial Committee and of the courts in India, that if the suit comes home on appeal, the questions of fact may be re-opened, and the dilemma arises that either the process of special appeal was waste of time, or the re-opening of the facts here is wasteful litigation.

But the Code of Civil Procedure does not prescribe the jurisdiction of the several grades of courts nor regulate the order of appeal from one to the other. All this is done by local laws, and great and needless variety exists in this respect in the several presidencies of India. The following facts are sufficient to indicate this variety of laws. The lowest Court of First Instance is everywhere that of the Munsiff, but the pecuniary limit of its jurisdiction varies. In Bengal and the North-West Provinces the limit is a subject matter not exceeding 100*l.* in value; till lately it was 30*l.* In Madras the limit is also 100*l.* in value, but is not for all suits calculated in the same mode. In Bombay the limit is 500*l.*

The highest local court subordinate to a High Court is everywhere that of the Zillah or Civil Judge. But between this court and those of the Munsiff there is in Bengal and the North-West Provinces everywhere one intermediate court. In Bombay there are two grades of intermediate courts, while in some provinces of Madras there is one such intermediate court, and in others there is none at all. In Bengal, the North-West Provinces, and Bombay, the original jurisdiction of the intermediate court is unlimited, and practically the Zillah Judge exercises no original jurisdiction. In Madras his original jurisdiction always begins at 1000*l.* in value, and, where there is no intermediate court, whenever the value exceeds 100*l.*

Further, the order of preferring appeals from one court to the other varies. Thus, in Bengal and the North-West Provinces the regular appeal lies to the High Court in all suits above 500*l.* in value, in the rest it is to the Zillah Judge and there is only a special appeal to the High Court. In Bombay the regular appeal lies in all suits to the Zillah Judge, who may refer certain of them to intermediate courts, and it may be said with practical accuracy that the High Court in Bombay hears nothing but special appeals. In Madras the regular appeal to the High Court lies only from a judgment of the Zillah Judge, and what is the value of the suit so appealable depends upon whether or not there is an intermediate court in the province from which the suit comes. In all other suits the regular appeal lies to the Zillah Judge, and only a special appeal to the High Court.

I have purposely abstained from speaking of the courts in the Punjab or in other provinces of India, not considered to be sufficiently advanced to be fully subject to the ordinary



legal procedure. But as to all courts subordinate to High Courts, there seems to be no reason why the gradation of courts and the order of preferring appeals from one court to the other should not be uniform and be prescribed in the Code of Civil Procedure by which all those courts are now alike governed.

I have alluded to a practical defect in the Indian procedure law which needs amendment both for the purposes of litigation out there, and as an essential preliminary to a restriction upon the right of appeal to the court here.

Considering that the courts in India try civil suits without the assistance of a jury, and that, except in the High Court, only one judge presides in each court, it is undesirable that, where the judgment of the Court of First Instance upon the issues of fact is overruled on regular appeal, there should be no further appeal upon the facts. Without going into any lengthy reasons why this should be, I content myself with appealing to the experience of those acquainted with the system of special appeals whether it is not so. But if the Court of First Instance and the Court on Regular Appeal have concurred in their view of the evidence, there is then, I consider, a reasonable certainty that the right conclusion has been arrived at. It is not possible, in any human system of law, to provide absolutely against all miscarriage; there must be a limit to litigation somewhere, and it is a reasonable, and will generally be a safe restriction, after two courts have concurred in their conclusions upon the facts, to limit the right of further appeal to a special appeal upon the law of the case. On the other hand, anything short of the concurrence of two courts upon the facts of a case has, I maintain, been practically proved to be unsafe and unsatisfactory. It must be remembered that the Code of Civil Procedure provides that, at a certain stage of the suit, the parties or their advocates are to appear before the judge of the Court of First Instance, who proceeds to ascertain and settle, in a series of formal issues, the questions of fact and of law which are in dispute between them. The issues in the Indian system of pleading, state in a single explicit form of words each question of fact or law in dispute in the suit, and the judgment of each court upon each issue is or ought to be discernible. It would thus be quite practicable, where the court on regular appeal concurred with the lower court upon some of the issues of fact and differed from it as to others, to limit the right of further appeal upon the facts to those issues of fact upon which a different view of the evidence was taken by the lower appellate court.

It is obvious that if we are to apply some limitation to the

right of appeal to the Court in this country, suits in India should not only have been subjected to the same procedure, but should have been adjudged by similar grades of courts. It would occupy too much space to suggest in detail the best gradation of the courts in India. I will only say generally that the rule in Bengal, that the regular appeal in suits above 500*l.* in value lies to the High Court seems a desirable one. In Bombay the High Court must certainly hear fewer regular appeals than it ought, and in Madras the rule is so variable that the suitors in some provinces are unduly favoured. The rule in Madras, that the Civil or Zillah Court is the Court of First Instance in all suits from 1000*l.* in value upwards is greatly to be preferred to the rule in Bengal and Bombay, where an unlimited jurisdiction is given to an intermediate court. The limit in Bombay for the jurisdiction of Munsiffs is, I certainly think, too high, and the limit, as it exists in Bengal or in Madras, is better, though it might, I think, be advantageously extended to 200*l.* in place of 100*l.*

In conclusion, I recur to the principle that the law of the Court of Appeal here must be regulated so as to harmonize with the law of the courts appealed from; and what I propose as to appeals from India is to extend to the Court here the principle which governs the right of appeal in India. The result would be that where two courts in India had concurred in their conclusions upon the issues of fact in a suit, the right of appeal to the Court here would be restricted to a special appeal upon the law in the case, assuming the facts as concurrently found by the two courts in India. Let us now see what would be the probable practical operation of this principle upon appeals to the Court here. The effect would be, that in all suits from 1000*l.* in value, that is in all suits now appealable as of right to the Judicial Committee, the right of appeal upon the facts would be restricted only when and so far as the High Court had concurred in its appreciation of the evidence with the Court of First Instance, which would ordinarily have been the Zillah or Civil Court. In suits between 500*l.* and 1000*l.* in value, special grounds would have to be shown, as now, to have an appeal allowed at all to the Court here, and then the right of appeal upon the facts would be restricted only when and so far as the High Court had concurred with the lower court in its findings upon the issues of fact. Lastly, in suits below 500*l.* in value, the appeal to the Court here, even when special leave to appeal had been obtained, would always be limited to an appeal upon the law of the case, as such a suit would (with an uniform gradation of courts in India, such as I have suggested) have gone through three courts in India, and some two of them (though not necessarily including a High Court) would have

concurred in the findings on the issues of fact. Taking these three classes of suits in order, is the operation of the principle I have proposed unreasonable, or likely to be unsafe? Surely, if the application of the pecuniary mode of limitation is justifiable at all, it may be well applied to suits below 500*l.* in value, so as to prevent the facts being discussed before the Court here for, always the third, and for generally the fourth, time in the course of the litigation.

Not much objection can, I think, be made as to the operation of the restriction upon the second class of suits, in value between 500*l.* and 1000*l.* At present special leave must be given to admit an appeal in such a suit at all, and it would not be unreasonable to lay it down as a rule that only the special importance of the questions of law involved can justify the admission of the appeal. But supposing the rule to be, as I have suggested it should be, that in suits of this value the regular appeal should lie to the High Court, the whole case upon the facts, as well as the law, would still be open on the appeal before the Judicial Committee, excepting only when and so far as the High Court had concurred with the lower court in its findings upon the issues of fact.

There remains only the first class of suits, amounting in value to 1000*l.* It has, I believe, been discussed in this country, whether it would not be advisable to restrict all appeals from India to appeals upon the law. It is urged, I believe, in favour of the proposal that in suits from India the evidence is almost entirely that of foreigners whose languages and manners are unknown to the judges of the court in this country; that the courts in India which have tried the suits are, on the contrary, presided over by judges who, if not natives of the country, are almost always men who have spent many years there, and are thoroughly acquainted with the languages and habits of the people, and further, that it is already a maxim of the Judicial Committee, never, except under very peculiar circumstances, to reverse a judgment of the courts in India upon the facts, and that to restrict the right of appeal to questions of law would not be any practical limitation of the existing right. Those who oppose this proposal, and desire to retain in its entirety the present right of appeal upon the whole case, as well facts as law, allege that it is necessary, for the sake of security against injustice, to do so, as not unfrequently, even in the High Courts, the duty of sifting the evidence is performed in a very perfunctory manner, and they assert that appellate courts in India are found by experience often to deal with evidence in a one-sided and unsatisfactory manner, so that it is of frequent occurrence that the Judicial Committee restores the judgment of the Court of First Instance upon

the facts, in reversal of the view of the appellate court—It is undeniable that instances can be produced in support of these latter arguments, though, like most thorough-going arguments, they are a good deal overdrawn.

It is true that appellate courts in India, presided over by a single judge, often differ from the Court of First Instance on issues of fact upon grounds that are most unsatisfactory. The High Courts in India know and feel this perfectly, and it is for this very reason that I have urged the necessity of altering the procedure in India as to special appeals, and allowing a further appeal upon the facts where the first appellate court has differed in its view of the evidence from the Court of First Instance. One consequence of the existing procedure is that suits are often appealed home where the facts are open again to discussion, in which the High Courts would have done complete justice had not their hands been tied by the law as to special appeals, and their judgment is reversed in this country, and an apparent slur cast upon the efficiency of the High Courts which is really wholly undeserved. It is also true that the Bar of the High Courts is not equal to that of the Judicial Committee, and a burden is sometimes cast upon the judges which would in reality be borne by the Bar in this country; the evidence is sometimes imperfectly laid before the High Courts, but I can answer for it that the judges are then in the habit of studying in private the evidence that ought to have been discussed before them in public. This is a disadvantage, no doubt, but in suits amounting to 1000*l.* in value, it is rare indeed that the parties do not retain efficient and conscientious advocates.

A special circumstance has recently lent force to these arguments. The Government in India, stimulated by the financial panic, has of late been far too eager to reduce the number of judges in the several High Courts in India. In one at least of those courts—and that the most important—the judges have been unduly urged to regard the reduction of the files as the one great object to be kept in view, and hasty decisions have, as usual, begot increase of litigation in the Court of Appeal here. This spirit of false economy, for which this country is now paying in new judicial salaries, still exists in India, but it is a temporary and removable cause of evil. With High Courts not unfairly overworked, it is unreasonable to suppose that the facts in suits amounting to 1000*l.* in value would not be fully discussed at the Bar, and carefully considered by the Bench. If two or more judges of a High Court have fully concurred with the judge of a Zillah Court in their view of the facts in a case, it seems a needless precaution to leave all the facts open to further

discussion in the Court of Appeal here. It seems a reasonable and safe course to check undue litigation by restricting in such cases the right of further appeal to the law of the case. Those least disposed to regard favourably the efficiency of the courts in India, must admit that the judges are experienced in dealing with native evidence; and if we secure a certain concurrence of judgment upon the evidence in the courts there, we may, I consider, reasonably rest satisfied with the correctness of the conclusions arrived at. The restriction upon the right of appeal which I have now suggested does not involve any sweeping or radical change of system; and if it should not materially affect the number of appeals to the court in this country (though I confidently expect that it would have this effect), it will certainly, in a large number of cases, greatly diminish the time necessary for their discussion and disposal.

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### III.—INTERNATIONAL COPYRIGHT.

THE Anglo-American question of copyright is the subject of this article, revived as that question has been, although probably not much advanced, by the epistolary skirmishing of American and English publishers and authors, which took place in the months of September, October, and November last, upon the pages of our contemporary the *Times*. Our contemporary himself deigned, on two several occasions, to interpose his good offices in the strife; exhibiting, however, on each occasion, the characteristic one-sidedness of the English advocate, and not the even-balance of the international mediator. The affray was provoked by a random but offensive shot, fired from the English quarters, under the ambush of the pseudonyme or anonyme of "Traveller," by some English gentleman, who, fancying he had conceived a witty thing, was not deterred by the injustice of it from pronouncing it, and therefore boldly taunted the Americans with the depredations of their "literary Alabamas." Some brisk and heavy firing immediately ensued, a firing which was vigorously maintained on the side of the Americans, and as petulantly replied to, as it was pettishly provoked, upon the English part; in short, the only good English shots were directed against the English side. The attack, we need not mention, is one which has been long anticipated, and long premeditated; and even apart, therefore, from the opprobrium of the epithet

"American pirates," by which the unknown traveller was pleased to designate the publishing houses of America, the encounter would, in all probability, have diminished little in its briskness. Our opinion of the conflict at the time was, and now also upon recollection is, that the American batteries silenced the English ones, and poured out in the letter of Mr. Stillman, who had succeeded to the post of Mr. Appleton, in the enforced absence of the latter, the last triumphant volley of American uprightness and fairness.

But it is not our purpose to pursue this matter in its personalities or nationalities; neither is it our duty to adjudicate between the rival English and American contentions. Our purpose (as our duty also) rather is, first, to state the question in the clearest and correctest possible manner; and, secondly, to investigate the causes which have hitherto prevented (whether or not they may still prevent) the adoption of an international law of copyright between England and America. Our hope (as also our most reasonable desire) is that our statement and investigation of the question may prove of service to the public, both general and legal, of either nation, by contributing in its own way to the amicable and mutually beneficial settlement of the matters most commonly in dispute between English authors (or their publishers) on the one hand, and American publishers and authors on the other.

The question in dispute briefly stated is this—An English author or his English publisher have no legal rights against an American publisher in respect generally of any matter whatsoever, and, therefore, neither in respect of the particular matter of copyright in a published book (in the absence, we mean, of some treaty or convention between the two countries designed to regulate the particular matter). Therefore immediately an English work is transmitted to America in the ordinary course, whether of business or of opportunity, an American publisher or firm of publishers may reproduce it with impunity, for the English jurisdiction over the infringement of the copyright of its subjects is limited to English territory (domestic or colonial), and the American infringer is sheltered under the international maxim derived from the civil law of Rome—"*Extra territorium jus dicenti impune non parebitur.*" The English publisher, or author, has indeed the fullest nominal protection against the use of the American reproduction of his work by English subjects resident within the English jurisdiction, it being as great an infringement of English copyright to import from abroad as to produce at home unauthorised (*i.e.* pirated) copies of an English author's work; but the rub is not there. but here,—namely, the American publisher in general supplies with his own copies

of the English author's work the whole body of his American countrymen who are interested in the work, and as the American reading public is infinitely more numerous than the English one, the English author finds not unfrequently that while he makes nothing, or next to nothing, in England from his labours, some utter stranger to him makes a large profit of those same labours in America. For example, the work of Dr. Erichsen, on Surgery, which has produced hitherto in England a return of profits entirely incommensurate with its merits, has enjoyed in the American unprotected reproduction of it a popularity so extensive as to procure for its American reproducer—the so-called pirate of it—a profit which is enormous. Now, it is true, that the English publisher may in like manner, and (for the like reason) with the like impunity, reproduce a work first published in America by an American publisher, and supply the English reading public who may be interested in it with these reproduced, *i.e.*, pirated, copies of it; but whereas the American producer finds the thing in general to pay, the English would-be producer is deterred from the attempt by the well-grounded fear that the English reproduction would prove a pecuniary failure. Thus numbers have it; and the question is seen to be entirely one of numbers, and not a question of legal rightfulness or wrongfulness at all.

At the same time, however, nations generally exercise habitually towards each other and to the subjects of each other a certain comity or friendliness; and nations in particular which, like the American and the English, have a community both of origin and of tendency exercise (and are bound to exercise) habitually towards each other and to the subjects of each other a comity or friendliness of a livelier and readier character than can reasonably be expected from nations which are less allied. And if the Americans had, therefore (as they have successfully asserted), a claim to the more officious protection of the English against injury to themselves from causes over which the English had some control, then by parity of reasoning the English also have (and may, we imagine, at any time successfully assert) the like claim upon the Americans under the like circumstance of the possibility of control. In short, claims which are strictly of a *moral*, as distinguished from a *legal*, character, are become enforceable between these two nations mutually, having now in one instance been enforced by one of them against the other. Copyright, therefore, one might conclude, was the proper subject of such enforcement, the English author suffering (although not injuriously) an admittedly heavy loss through the American reproduction and *quasi* infringement of the copyright of his

work. But is copyright really such a subject after all? We fancy not—in the particular circumstances of the English and American relation.

The abstract question of an international copyright is by no means either difficult to settle or unsettled. It is not difficult to settle, because all nations who have any pretence to civilisation are agreed in recognising on the one hand, in their municipal or state enactments, the property of an author in his literary works, and also and further in recognising on the other hand, in their general international maxims and conventions, the sacredness of the private properties of aliens, or foreigners; and it is not unsettled, because an international law of copyright does in fact in two instances, at least, exist already; for example, between England on the one hand, and France and Prussia on the other. But the question in the concrete application of it to the international relations between England and America in particular is by no means either settled or of easy settlement.

We shall endeavour to indicate the causes of difficulty and of hesitation in settling the question in this its proposed particular concrete application; we shall conclude upon the whole against the expediency of establishing an international law of copyright between England and America, and against the possibility even of its effectual establishment and maintenance; lastly, we shall suggest some simple means of obviating the losses which accrue to English authors from the absence and impossibility of any legal international arrangement.

Now of the causes which have hitherto prevented the establishment of any international convention regulating copyright between England and America, the principal one is the great disparity of interest which the two countries would respectively derive from any such arrangement. The number of readers in America is greatly more numerous than it is in England; moreover, the number of English writers whose works are largely read is also much greater than that of American ones. The United States reaps, therefore, a sort of quadruple advantage over England from the absence of any international law of copyright between the two countries, inasmuch as not only has she more room for reproduction on her part and is less liable to be reproduced in turn by England, but she also has a larger demand at home for the reproduced works of English authors, while the reproductions of American works (barring those of a legal and historical character) are much less in demand in England. This disparity of interest becomes still more apparent when it is set beside the parity of common or mutual advantage which is derived in the instances of an actually existing international law of copyright by the respective nations who



have voluntarily submitted themselves to it. These instances are only two in number, being the international convention between England and France which was established in 1851, and the like convention between England and Prussia which was established in 1856. For in the cases both of France and Prussia, the demand for the productions of English authors and the reciprocal demand for the productions of French and German ones, are nearly equal; and the measure of the mutual and respective interests is also very fairly balanced, a result which may safely be attributed to the comparative equality of all three nations as well in respect of the numbers of their populations as in respect of the quality of their authors and the general tone of the reading and enlightened portions of their public. But in America it is all the other way, the respective populations of England and of the United States being not only greatly disparate, as we have said, in respect of numbers, but the latter country being also greatly backward in the fertility, and even (although with some marked exceptions) in the quality of its authors.

Now where the several prospective interests from the adoption of one principle or policy are so greatly different between two countries, it seems mere folly to expect the country which would suffer by that policy or principle to adopt it. And herein lies, it appears to us, the element of difference between the Alabama Claims (as they are called), which are now the subject of arbitration, and any claims for the *quasi* infringement of an author's copyright; for in respect of the former class of claims England has admitted, and has repeated and reiterated (we shall not stay to ask with how much remembrance or forgetfulness of dignity), that she is induced to make the concessions which she has made to America in connection with these claims from a regard to the prospective advantage to her own commerce which she reasonably anticipates from making them, if at any future time she should be at war with some one or more of the European powers, while America was (as she probably would be) neutral.

But it is clearly asking more than the English are entitled to upon the strength of these concessions to insist upon the establishment of an international law of copyright between England and America, as a corollary to the existing Alabama arbitration. It is wonderful how much self-interest determines right, and how readily a community of interest paves the way for right; but it is also and as much wonderful how much self-interest, in the absence of the requisite community of interest, blinds us all to what is right, and makes us bandy mutual reproaches, which fit equally upon ourselves as on our neighbours. For instance, Mr. Anthony Trollope, in the

paper on International Copyright which he read at Manchester in 1866, upon the occasion of the Social Science Association meeting at that town, used the following arguments (among others): Admitting the disparity of interest between the two countries, and the vastly greater proportion of interest in America, he proceeded:—"But what if it be so? In a great international question shall interest override honesty?" and again:—"For myself I will say that I cannot see how any interest, however great, can override justice."

Now in both these arguments, Mr. Trollope has assumed the point which gives them pith and which he wanted to demonstrate, namely, that the appellatives *honesty* and *justice*, with their opposites *dishonesty* and *injustice*, are applicable to the case; and that an English author has any right or claim against American publishers, of such an extent and character as that the denial or refusal of it to him is *injustice* or *dishonesty*, for if not, the conflict between interest and justice or between interest and honesty does not arise. It is admitted on all hands, that throughout the question of an Anglo-American law of copyright there is no *legal* right to question or to withhold: the right (if any) being admittedly one of *morality* or *comity* alone. But if the right which is insisted on be merely of this latter character, then it must be taken to be like other matters subject to the well-known limit to the extension of the principle of international comity, which was formulated by Huberus in the third of his three celebrated maxims, namely, that comity is not to extend to prejudice the rights of the citizens of the State exhibiting it. In short self-interest, it would seem (in spite of Mr. Anthony Trollope), is the only and the sole criterion with States in determining upon and in developing a policy, however much the commoner principles of a large commercial intercourse, or the higher and vaguer maxims of religion or of morality, may occasionally operate to the temporary abandonment of the more customary principle. But, indeed, even in private life it is incumbent on the person who claims a benefit for himself to prove the probability of a reciprocal or compensating benefit accruing from it to the party who is asked to give it; at all events, the man who grants his favours without remuneration appears in general to be a fool, and also generally finds he is one.

It will further assist us towards a just conclusion in this matter, if we consider the manner in which the question of an international copyright has been settled between England and those foreign countries which, as being colonies or dependencies of her own, were more amenable to her influence and control. And for this purpose, it is necessary to premise that in virtue of the English Copyright Act (being the Act 5 & 6 Vict. c. 45, commonly quoted as the

Copyright Amendment Act, 1842) the copyright in every book published after July 1, 1842, "endures for the natural life of the author and for the further term of seven years," or for the term of forty-two years, in all, whichever of such two terms shall prove the longer; and if during the continuance of the term of such copyright "any person in any part of the British dominions prints or causes to be printed, whether for sale or for exportation, any book in which copyright is so subsisting without the consent in writing of the proprietor, or if any such person imports for sale or hire any such book so unlawfully printed as aforesaid from foreign parts, or if he sells, publishes, or causes to be sold or published, any such book so unlawfully printed and imported as aforesaid," knowing the character of the book, that person so offending shall be liable to an action upon the case at the suit of the proprietor of such copyright, in the place where the offence shall have been committed (ss. 3, 15). The Act, moreover, declares that for the purposes of the Act the expression "British Dominions" shall include "all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and all the Colonies, settlements, and possessions of the Crown which now are and hereafter may be acquired" (s. 2).

Now it appears from the above given brief extract from the Copyright Act of 1842 that, although primarily intended as a municipal enactment only, it had an operation which was practically international between England and her colonies (including therefore Canada); and as Canada will readily compare with the United States in all those before-mentioned respects of population and general enlightenment which are material to this question, it became an anxious consideration with us to ascertain what the effect had been of the *quasi* international law between England and Canada which was thus established. Well, we have ascertained that the effect was pretty much derision, the Act being simply disregarded. Accordingly the mother country resorted to a further Act of a more coercive character, that of 8 & 9 Vict. c. 93, whereby (amidst other enactments intended to regulate the colonial trades) the importation of "pirated copies" (or, speaking more correctly, of unauthorized reproductions) of works of British authors enjoying British copyright was absolutely and more stringently prohibited. But the effect of this second Act was equally derisive; and accordingly in 1847, or barely two years afterwards, the mother country, abandoning the principle of her former inter-colonial copyright regulations, enacted by the 10 & 11 Vict. c. 95, in substitution of them, that it might be lawful to suspend by order in Council the Act of 1842 so far as the latter Act purported to prohibit the impor-

tation of the copyright works of British authors into the colonies; but such suspension in the case of each particular colony was made conditional upon that colony "making due provision by local legislation for protecting the rights of British authors there."

The last mentioned alteration in the English Inter-Colonial Copyright regulations was scarcely made when it was rapidly seized upon by Nova Scotia, New Brunswick, and Prince Edward's Island in 1848, by Newfoundland in 1849, and by Canada in 1850. The provision for the protection of the rights of British authors, which these colonies respectively have made for the purpose of entitling themselves to the benefit of the relaxation, before alluded to, is, roughly speaking, of the following nature, that is to say, the particular colony has imposed a protective *ad valorem* duty, averaging 10 or 12 per cent., upon the importation of every work in which there is a subsisting British copyright, and has directed its officers of the Custom House to levy and exact the same. The proximity of Canada to the United States wants only to be remembered to suggest the quarter from which the unauthorised reproductions of British works are chiefly, if not exclusively, imported into Canada and the adjacent provinces, and we are informed in fact that the importation is freely and vigorously carried on from the United States. Yet the British author, although he is the party entitled to the duties, reaps either nothing or some paltry and insignificant amount from the trade; and the letter of the Archbishop of Dublin, which was published in the *Times* of the 25th October last, furnishes a characteristic instance and a conclusive proof of the barrenness of this source of an author's revenue, the excellent and very popular writings of the most reverend gentleman not having fetched in the amount of the colonial duties that were levied on them the sum of five shillings as their total during a period of years. The whole system, therefore, of the English Inter-Colonial Copyright system, as well in its original as in its substituted character, has clearly proved a failure; and the inference to be derived from the course and the collapse of the legislation which has been attempted in the matter, is certainly one not favourable to the extension of the like legislation to the United States by means of some international copyright convention between that country and Great Britain couched in a similar spirit.

It is, however, one great step towards a knowledge or apprehension of the right, to have clearly known the wrong; and the failure of past legislation with reference to British copyrights in Canada would prove to be experience cheaply purchased should it suggest a better plan for securing the rights of British authors, not in Canada alone, but in the

United States as well, for neither of these two latter countries, and certainly not the latter one of them, is either hostile or averse to the reasonable protection of these rights within its territory. Both countries possess, moreover, a municipal law of copyright which is admirably simple in its clauses, and also perfectly efficient in its operation. The period for which copyright is given is eight-and-twenty years in either country, and the other provisions of the respective copyright Acts of the two countries present a wonderful resemblance to each other—so wonderful, indeed, as to suggest, when contrasted with the English Act especially, some probable diversity in the utility of the copyright protection of authors' works, according as the country in which the works are published is old or new. But not to dwell upon that matter for the present, it will be conducive to our purpose in this article to mention—(1.) That by the Canadian Copyright Act (which was assented to so recently as the 22nd May, 1868) "*Any person resident in Canada, or any person being a British subject and resident in Great Britain or Ireland, who is the author of any book, &c., printed and published in Canada*" may have the full benefit of the Canadian Copyright Act upon complying with the requisitions of the Act regarding the registration and presentation of his work (ss. 3, 9). And (2.) That by the United States Act of Congress of February 3, 1831 (as altered and amended by subsequent legislation) citizens of the United States, *or persons permanently resident therein*, being the authors of any book, &c., may have copyright therein and be entitled to the protection of the Act of Congress upon complying with the requisitions of the Act regarding the registration and presentation of their works (c. 16).

The difference between the Canadian and the United States' enactments in the clauses lastly above quoted from those Acts respectively is patent from the comparison itself, residence of a permanent sort being made a requisite by the one, and dispensed with by the other. But we desire particularly to point out that the Canadian Legislature by being merely left alone appear to have devised a simple and efficient means of remedying the evil which English authors have complained of, namely, that they derive a merely barren and insignificant return from the protection of the local Canadian provisions; for now and since the Act of 1868 they have only to authorize the reproduction of their works in Canada simultaneously with, or within a reasonable period after, their first publication in England, in order to entitle themselves to complete protection against the piratical importation into Canada of unauthorized reproductions of them. Moreover, the stipulation before referred to as contained in the Canadian Act, that

the work which seeks protection shall have been reproduced in Canada, seems only a fair protection to the Canadian publishers. The last-mentioned stipulation seems also to suggest a mode of removing the difficulty which the United States' Legislature opposes to the due protection there of the British or foreign author's rights. For that difficulty, as we understand it, is mainly this—That the rights of the American publishers as well as of the American population generally would be endangered, and even seriously affected, by the negotiation of any international copyright treaty of the sort which England is alleged to have generally desired with the United States, the particular kind of treaty which is sought being one (it is alleged) in the interest not merely (nor even principally) of the English author, but also and chiefly of the English publisher. And for the nonce we admit the allegation, without examining it; for we know not whether it be true or not. But, then, it seems to us, that by adopting the spirit of the Canadian Act, and in particular by insisting upon some stipulation corresponding to the stipulation which we have mentioned to be contained in the Canadian Act, the United States, might at once modify their Act of Congress of 1831 in such a manner as to secure at once their own domestic interests, and also the British or foreign interests of authors, by allowing (say) the protection of his copyright to an English or foreign author, although not even temporarily, much less permanently, resident at any time within their jurisdiction, requiring, however, of him as a condition that he should, either simultaneously with, or shortly after, the first publication of his work abroad, republish it in the United States through an American house, (whether or not "a branch" of some English or of some foreign house); for in this manner the United States would both follow out consistently on the one hand the principles of free trade in commerce, so far as the publishing houses were concerned, and would also, on the other hand, accord such protection to the rights of authors (whether home or foreign) as reason would suggest, and as good policy would seem to indicate. For the property rights of the publisher are properly confined to the jurisdiction of the country of the publication [or republication], being bound up within the corporeal substance of the book, but the property rights of the author, like other personal property, accompanying his person everywhere, ought to be, it is admitted, equally sacred on both sides of the Atlantic and Pacific; his spiritual person may, indeed, be taken to be omnipresent. By the simple expedient which we have now suggested, the whole benefit of an international convention would be secured, and secured moreover in the interest of all concerned, both States and individuals, and both

publishers and authors, by local legislation, the facility of enforcing which greatly recommends it in preference to the cumbrous and inexact proceedings of international assemblies.

Perhaps, however, the United States may object to dispensing with the qualification of residence as a preliminary condition to the enjoyment of the rights of copyright within the States; and we are not prepared to say that the objection would be unreasonable; certainly we could not insist upon their making any such concession to ourselves, without our tendering a like concession in return to them. But England would be prepared to tender such a concession; perhaps even it may shortly become a point of rivalry between the United States and England which of the two countries (our own or theirs) shall be the first to make the concession voluntarily; for to make it will harm neither (as far as we can see), but will more probably aid either, securing as it would in a properly discriminative manner the rights of the respective publishers of both countries equally and also the rights of the much toiling and in general ill-requited author, who, though nominally of one country, is in reality (as we have said) of no country in particular, but of all countries equally. But supposing that, notwithstanding considerations and proposed or probable concessions of this sort, the United States should still (as they have a sovereign right to do) retain the qualification of permanent residence as an indispensable preliminary to the enjoyment of the rights of copyright in the States, then they might at least enact (were it in the interest of their own citizens and people only), that the publishing house which should first reproduce an English or foreign work within the States should be taken to be within the States practically the author of the work, and should be entitled to a *quasi* copyright therein accordingly, to the extent, that is to say, of being protected in respect of the particular republication for eight-and-twenty years, or less or more, against the competition of other American publishing firms. For even if this secondary point were gained, we should be nearly, if not entirely, satisfied; as we might safely trust to moral causes for the rest. The English or foreign author might then safely contract with some American house to furnish it with the original or a duplicate of his manuscript at the same time that he handed the duplicate or the original to some English firm; and the publishers of either nation might then bring out the work in whatever style they might conceive to be most suitable for their own particular nation.

The suggestions we have made may probably be thought to want development; they seem, however, to be deserving of consideration, as well from their simplicity as from this other circumstance, that they are a natural deduction

from and evolution of the unassisted methods which the practical experience of publishers has already in part devised. Nor is the partition of the copyright into the *dominium strictum* of the proper author and the *dominium utile* of the first republisher, a distinction that is either novel or impracticable; for indeed the times in which we live are already such and are increasingly becoming such as necessitated the like distinctions in the Roman jurisprudence—when the foreigner was raised to an equality with the citizen in respect of all property matters, through the useful fiction of the *uti* or *quasi* rights which were allowed him, and the *uti* or *quasi* actions which were accorded to him for their vindication.

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#### IV.—THE LATE EDWIN WILKINS FIELD.

MR. EDWIN WILKINS FIELD was born at Leam, near Warwick, on October 12, 1804. His father, the Rev William Field, the friend and biographer of Dr. Parr, was for many years a dissenting minister at Warwick, and kept a school, which attained a considerable reputation. There are many still living who remember his fine vigorous old age. The mother, whose maiden name was Mary Wilkins, was a woman of remarkable spirit and energy. Mr. and Mrs. Field had a large family, of whom Edwin was the eldest. John Field, the father of the Warwick minister, was a medical practitioner in the City of London, and founder of the London Annuity Society. He married Anne, the great-granddaughter of Henry Cromwell, son of the Protector.

Having been educated at his father's school, Edwin W. Field was articled, on March 19, 1821, to Messrs. Taylor and Roscoe, solicitors, then of King's Bench Walk, Temple. The late Joseph Parkes persuaded the parents to risk sending their son to London, and the trouble he took in the matter was always remembered with gratitude. Towards both of the heads of the firm the pupil entertained strong feelings of regard, which increased with the lapse of years. With Mr. Robert Roscoe, whose father was William Roscoe, of Liverpool, the author of "The Life of Lorenzo di Medici," he was brought into close personal relations by residing in his house for some years after coming to London; and with this "dear old master," as he was wont to call him, he was on intimate terms till the close of Mr. Roscoe's life in 1850.



Owing to the custom, now discontinued, of evening consultations at barristers' chambers, the hours of attendance at business used to be much longer than they are at present; but throughout the period of his clerkship, and during the early years of his professional practice, Mr. Field made a point of devoting several hours in the day to professional reading, sitting up far into the night, if his other duties or occupations rendered it necessary. From the 1st of April, 1823, to the 5th of August, 1825, he kept a journal, which gives a clear impression of his way of life. His industry may be judged of by one entry: "Perdidi diem. I did nothing before breakfast, nothing at dinner, nothing at tea, and very little in the evening." At another time he says he must consult his "lawgiver," as to whether he might not have half an hour after midnight "for writing, gymnastics, and prayers." His principal companions were Bryant, who died of consumption in 1825, W. Sharpe (afterwards a partner), H. Roscoe, James Booth, Yate Lee, C. Fellows (afterwards Sir Charles), M. Pearson, T. F. Gibson, Baron Field, Crompton (afterwards Mr. Justice Crompton), William and Henry Enfield, and James Robinson (afterwards of the firm of Lowndes and Robinson, of Liverpool). With Bryant, W. Sharpe, and Robinson, successively, he was in the habit of reading law; and at one time he and several of his young legal friends used to meet at one another's rooms for the purpose of discussing knotty points of law, and of acquiring the power of public speaking.

In his general reading, "the standard of knowledge which his secret thoughts formed for him," included, in addition to an acquaintance with the chief English writers, increased facility in reading Latin, French, and Italian (they were all taught in his father's school), and some knowledge of the most distinguished writers in these languages. On one occasion, when he was at the house of a friend, and was going to church with the family, his friend said, "I am sorry that the only spare prayer-book we have is in Italian." The reply was, "That will do."

The great activity of his mind showed itself, from the first, in the earnest practical interest he took in a wide range of subjects. He found time to help Mr. Roscoe in the editorship of a monthly periodical, the *Palladium*, translating Italian sonnets for it, and writing notices of recent books. The diary contains, moreover, modest references to original poetry and readings on chemistry and geology.

Desirous for his father's sake to avoid unnecessary expense, and busy, too, with his own pursuits, he appears to have indulged very little in London amusements. The recreations he was most fond of were those of swimming and boating

in the Thames. He writes, "Swam from Waterloo to Blackfriars Bridge, and could have gone twice as far with the greatest ease;" and several boating parties are described with manifest zest.

In the Michaelmas term of 1826, Mr. Field was admitted an attorney and solicitor, and shortly afterwards commenced business in Bread Street, Cheapside, in partnership with his former fellow-clerk, Mr. W. Sharpe. There had been some question of his settling in Warwick, near his native place; and he attributed his determination to remain in London to the advice of his friend, Mr. James Booth, then entering on his career as a barrister. The first clerk of Messrs. Sharpe and Field was Henry Ellwood, who remained with Mr. Field, and was greatly and increasingly valued and esteemed by him, till they died together through the same accident. In 1830 or '31 the firm of Sharpe and Field removed from Bread Street to the Old Jewry, where it made steady progress. Meanwhile, Mr. Roscoe having retired from practice on account of the state of his health, Mr. Taylor had associated with himself Mr. James Turner, nephew of the late Lord Justice Turner, and the late well-known conveyancer, Francis Turner, and of Sir Charles Turner, a retired Master of the Court of Queen's Bench. Soon, however, Mr. Turner's health also failed; and in 1835 overtures were made by Mr. Taylor, which ended in Messrs. Sharpe and Field becoming partners in the firm in which they had both been articled clerks. But there were already in Mr. Taylor himself the seeds of fatal disease, and in 1838 he died, at the early age of forty-six, at the head of one of the most extensive agency houses in London.

In the following year we find Mr. Field ardently giving his mind to the subject of Law Reform, in which his labours have been so honourable to his profession, and so beneficial to the public. Before Mr. Field was admitted an attorney and solicitor, the attention of the profession and of the public had been especially drawn to the state of the Court of Chancery, the costs and delays of which were such as to amount to an absolute denial of justice in many cases falling exclusively within its jurisdiction. In reforming the procedure of the Court, it was necessary to begin with the Six Clerks' Office. The Six Clerks were in early times the only persons who were allowed to practise in the Court of Chancery; it being supposed that by restricting the number of legal practitioners in the various courts the growth of litigation would be effectually checked. The business of the Court did, however, increase, and the Six Clerks had clerks appointed under them, called Sworn Clerks, or Clerks in Court, the number of whom was finally limited to sixty. By degrees the whole of the

business came to be transacted by the Sworn Clerks, who acted in the names of the Six Clerks, sometimes without even knowing one of them by sight.

Such was the state of things when a Commission was appointed to report on the Court of Chancery. The report, which was made in 1826, was without much effect; for it failed, as Mr. Field afterwards, in 1840, pointed out, to show how large a saving there would be in the expense of a Chancery suit, if the Six Clerks' Office and the intervention of the Sworn Clerks were abolished. During the Chancellorship of Lord Brougham, in 1832 and 1833, several Acts were passed with a view to certain improvements; but the larger plans, which his lordship contemplated, were not carried out. Further legislation on the subject took place in 1840, 1841. Still the Clerks in Court remained untouched, as likewise the mode of transacting the business in the Six Clerks' Office.

Early in 1840, Mr. Field published on the subject a pamphlet, which, by its vigorous arguments and excellent suggestions, attracted much attention. This pamphlet, seconded by other writings of his in periodicals, and by conversations with persons of influence, seems to have been a main cause of the passing of the Act of 1842, by which the Six Clerks and Sworn Clerks were abolished, and the solicitors themselves were enabled to do the business which they had previously been compelled to do through others. The effect of these changes was an immense improvement in the practice of the Court, and paved the way for further changes, by which the Court of Chancery has been greatly improved in regard both to efficiency and to economy.

In 1841 the Court of Exchequer, as a Court of Equity, was abolished, and two additional Vice-Chancellors of the Court of Chancery were authorized. These alterations also had been advocated, and their necessity pointed out, in the pamphlet of 1840.

Another law reform, in which Mr. Field took a most prominent part, had for its object to facilitate the winding up of the affairs of joint-stock companies and other partnerships. An Act for this purpose was passed in 1844, but was found to be inadequate. Mr. Field's attention was called to the subject by his own experience of the practical impossibility of winding up the affairs of companies in several instances in which he was employed professionally. A scheme for a winding up Act was submitted to the Board of Trade by Mr. Field and Mr. Rigge (then of the firm of Ambrose Lace and Co., of Liverpool, and formerly in Mr. Field's office). In 1848 an Act was passed, embodying substantially *all the clauses* proposed, and was supplemented by another Act the next year; and though both these Acts were repealed by the Com-

panies' Act of 1862, their provisions had been found to work in so satisfactory a manner that they were adopted in that Act and in the subsequent legislation on the subject.

Though the Six Clerks' Office had been done away with, the Office of Master in Chancery remained, and was productive of great delay and expense to the suitors. Mr. Field expressed a most decided opinion that the only effectual remedy was the total abolition of the office, and the performance of the Master's duties by the judge in chambers, or by clerks under his immediate direction. A report of the Incorporated Law Society, in 1851, strongly recommended this and many other changes; and to the preparation of materials for that report Mr. Field devoted himself with untiring industry and perseverance. The Acts of 1852, by which this great reform was accomplished, are based on the recommendations of a Royal Commission, appointed in 1850. In 1851, Mr. Field gave evidence before a Committee of the House of Commons on the subject of a limitation of the liability of shareholders in joint-stock and other companies and partnerships.

A Commission appointed, in 1853, to inquire into the whole matter, sent to him amongst others a series of thirty-two questions. This led to his publishing a pamphlet of ninety-six pages, dedicated to his old friend, Mr. James Booth, Secretary of the Board of Trade, in which he enters into an elaborate consideration of the subject.

In a paper read by Mr. Field at the Annual Meeting of the Metropolitan and Provincial Law Association, in 1846, he dwells on two matters, on which he himself felt strongly. The first is the exclusion of attorneys from the Bar, in regard to which he contrasts England with the United States, in which every lawyer may plead in court and address the jury, and if successful in his career, may be raised to the Bench. The second is the present system of legal remuneration, which, he maintained, offers a premium for lengthiness and incompetency, and fines brevity and efficiency. This subject was brought forward by him on various occasions. The matter was taken up by the Incorporated Law Society, and a committee appointed, of which Mr. Field was a member, with a view to practical suggestions. Communications extending over several years took place on the subject between the Society, the Master of the Rolls, and the Lord Chancellor. The result was an improvement in the old system, but not what he was anxious for—the radical change of a system on a par with that on which doctors used to be paid in proportion not to the time and skill devoted to the recovery of the patient, but to the quantity of physic inflicted on him.

In connection with the subject of remuneration for legal

services, the anomalies of the present system in regard to taking counsel's opinion did not escape his notice.

In February, 1861, Mr. Field was nominated one of a Royal Commission to inquire into "the Constitution of the Accountant-General's Department of the Court of Chancery, the Forms of Business therein, and the Provisions for the Custody and Management of the Stocks and Funds of the Court." Mr. Field was, as usual, most active in prosecuting these inquiries, the results of which were embodied in an exhaustive report, in 1846.

Such are the chief special subjects which engaged Mr. Field's attention with a view to an improved condition of the legal profession and a more effectual administration of the law. But those who are well acquainted with his writings can hardly have failed to perceive that, even more than any single improvement, however important, he had at heart a work without which all other improvements would be, after all, only a kind of patching up of the legal system of this country. Distinguishing between the principles of law, or jurisprudence, and the application of these principles, or procedure, he directed his attention more particularly to the latter, as that which most needed a thorough reconsideration at the present time; and the vision which floated before his mind was nothing less than that of raising into an *inductive science* what now is a most unsystematic, heterogeneous thing, wanting solidarity, harmony and consistency. As early as 1841 he published some articles in the *Legal Observer*, which were afterwards printed in a separate form under the title of "Judicial Procedure an Inductive Science." In 1843 the subject was pursued in the *Westminster Review*, and again, in a separate pamphlet in 1857. And in 1870, in a pamphlet entitled "Observations on the High Court of Justice Bill," he offers, as he says, what would "most likely be his last contribution to a subject which had long been one of interest to him.

With his mind fully possessed by such ideas, it was a matter of course that Mr. Field should ardently take up the subject of a proposed concentration of all the courts of justice and their offices in a convenient neighbourhood. This subject, it is believed, was first debated in Parliament in 1822, and since that time it has been repeatedly brought before both the Parliament and the public. In 1841 and 1842 evidence was taken before a Select Committee of the House in regard to the removal of the Law Courts to the neighbourhood of the Inns of Court. Before this Committee Mr. Field was examined. In 1859 a Royal Commission was appointed to report upon the subject, and before this Commission also Mr. Field was among those who were ex-

amined in evidence. This Commission reported in favour of the concentration of the courts in a building, or group of buildings, to be erected on what is known as the Carey Street site.

The Acts of Parliament of 1865, authorising this measure, were owing in no small degree to Mr. Field's energetic exertions—exertions begun upwards of thirty years before, while he was still a young man, and continued with all his characteristic vigour and devotion through the intervening years. His evidence given before the House of Commons Committee, appointed in the earliest stage of the agitation, furnished then, and continued to furnish to the last, the chief arguments in favour of concentration. In pursuance of these Acts, a Royal Commission was issued to obtain and approve a plan upon which the new courts should be built. By this Commission Her Majesty appointed her "trusty and well-beloved Edwin Wilkins Field" to be the Secretary to the Commission. It is the usual practice to pay the secretary for his services, but Mr. Field's heart was in the work, and at the first meeting of the Commission he requested that he might be allowed to act as honorary secretary without remuneration. "No other arrangement," he said, "would be satisfactory to him." He zealously discharged all the laborious and responsible duties of secretary, conducting a voluminous correspondence, ascertaining the accommodation required for the judges and officers of the several courts, the most convenient position of rooms for counsel, solicitors, jurors, and witnesses, and the internal approaches to the several courts and offices, and innumerable other details of great importance to the completeness of the work. He was indefatigable also in the preparation of the very elaborate instructions which were issued to the competing architects, and in the subsequent examination of the various plans; and the Report of the Commission, which gave a very accurate account of all the important work done, was drawn by him. In short, for three years, or until the work of the Commissioners was virtually completed, the duties of his secretaryship occupied his incessant attention, and had precedence of everything else.

The firm of which he was the head were appointed, by the Board of Works, solicitors for acquiring the site for the new courts, and under his vigorous superintendence a very short space of time sufficed for clearing the ground on which the public and the legal profession are now anxiously hoping to see the new courts begun without further delay.

In the foregoing account one legislative measure, in which Mr. Field took the most lively interest, has been purposely left out, because his interest in it arose more from his religious feelings and convictions than from any mere legal considera-

tions. He was brought up amongst the English Presbyterians, who, as a body, had by imperceptible degrees become Arians and Unitarians, without at any time allowing differences of opinion to interfere with the fullest adherence to liberty of conscience. To this religious body Mr. Field belonged during the whole of his life. In 1813 the clauses which had excluded Unitarians from the benefit of the Toleration Act were repealed by an Act which "passed through both Houses of Parliament without a division, or even a debate." These clauses, however, were found afterwards to possess a "posthumous vitality," which threatened to render them practically more injurious than they had ever been before their repeal. In the well known Lady Hewley case, it was held by the judges, and ruled by the lords, that no endowment could be regarded as intended in favour of a form of worship which the law did "not tolerate at the time of the endowment, and that this original defect was not cured by any subsequent legalisation of the same form of worship." It resulted from this that the chapels, burial-grounds, and religious property of the anti-Trinitarians, derived from their forefathers, and upheld and added to by themselves, were held by a title which would not be treated as valid in a court of justice. A number of leading men among those whose most cherished possessions were threatened, met together to confer on what should be done. Mr. Field's suggestion, that the only remedy was an Act of Parliament, was at first regarded rather as a dream of his sanguine temperament, than as a practical suggestion which could be carried out. But through the indefatigable labours of a number of earnest men, under Mr. Field's leadership, and through the careful and vigorous attention of the members of the Cabinet under Sir Robert Peel, and the thorough way in which Sir William Follett (then Attorney-General) made himself master of the subject, the Dissenters' Chapels Bill, which was applied for in 1842, and the object of which was "the full liberty of private judgment, unfettered by the accident of ancestral creeds, and protected from all inquisitorial interference," received in 1844 the royal assent, and became a part of the law of the land.

While this matter was going on, an information was filed against the trustees of Dr. Williams's library, on the ground that they did not represent the theological opinions of the founder. In this case, also, Mr. Field's religious zeal and legal ability were alike manifest. He drew up an elaborate historical memorial, to be laid before the Attorney-General, and himself replied to the arguments urged, before the Attorney-General, by two eminent counsel, who argued the case *on the opposite side*. The considerations thus laid before

the Attorney-General led him to stay all further proceedings.

After the passing of the Dissenters' Chapels Bill, a considerable sum of money was raised with the view of presenting to Mr. Field some testimonial in acknowledgment of the great services rendered by him in connection with the Bill. But he was unwilling to accept for his personal use the money which was raised, and at his request it was applied to the rebuilding of the Rosemary Chapel at Kenilworth, at which his aged father was then the minister.

Of the Incorporated Law Society Mr. Field was a member, and his partner, Mr. Sharpe, was on the Council. Of the Law Amendment Society, established in 1844, he was an active and zealous member from, it is believed, its commencement. The Metropolitan and Provincial Law Association, which held its first meeting in 1848, had his warm sympathy and hearty co-operation; its object being "to promote the interests of suitors by the better and more economical administration of the law, and to maintain the rights and increase the usefulness of the profession." He attended most of the annual meetings, and very often read at them papers, several of which were printed by the Association. After his death the Committee, of which he had been a member from the birth of the Association, passed a resolution, expressing their deep regret at the loss of their colleague. The Council of the Incorporated Law Society also bear their testimony to "the energetic assistance at all times rendered by him to uphold the character and interests of the profession, to promote improvements in the law and amendments in its practice;" and add that, "with the concentration of the Courts of Justice, and the selection of the site now fixed upon for their erection, the name and services of Mr. Field will always be inseparably connected." The directors of the Solicitors' Benevolent Association, of which he was a member, and one of the founders, bear a similar testimony to "his zealous and efficient co-operation in many important works interesting to the profession."

Of Mr. Field as a leading partner in one of the most eminent legal firms in London, it is not necessary that much should be said. The position he occupied, and the confidence placed by his clients in his great ability—in his doing the best that could be done, even in the most difficult cases, are too well known to require any lengthened reference here. It is also well known that some years since the firm became two—Sharpe, Jackson, and Co., forming one, and Field and Roscoe (the son of his old master), the other, and that the latter were afterwards joined by Mr. Basil Field and Mr. Francis.

The relation between Mr. Field and his clerks was of an unusually cordial and confidential kind. About 1858 his



"hundred clerks and pupils " presented him with his portrait. The feeling which this tribute excited in him may be shown in fewest words by an extract from a letter to his friend, Crabb Robinson :—

"Congratulate me. A hundred of my old clerks have subscribed to have my portrait painted. Men I have tyrannized over—bullied—taken the praise from which *they* really had earned—who knew every bit of humbug in me, and who have nothing more to get out of me—no sense of favours to come. Regard from such a body is worth having."

Mr. Field's generosity to younger members of his profession was often of the most considerate kind.

Field was a great lover of art, a great friend to artists. How he was able to attain such proficiency is best told in his own words. Addressing his "century of clerks and pupils," he says—

"There is a favourite rule of mine, which I am sure I have preached to every one of you over and over again ; It is, 'Have one horse and one hobby.' I trust I may have helped to teach you all to ride our common great horse ; I am also happy to have induced many of you to mount my especial hobby. A hard-worked lawyer can scarcely find a better solace than the study and pursuit of art. To me these have been inexpressible blessings ; I never knew what sunshine was till art told me."

On the capability of art for religious expression, he speaks in his own strong, poetical, Miltonic way, in connection with some of Flaxman's relievos presented by Mr. Field and Mr. H. C. Robinson to the congregation, of which the former was a member, for erection in Rosslyn Hill Chapel, Hampstead : "These reliefs of Flaxman's are as truly psalms as those of Wesley or George Herbert ; if not as devout, after their speech and language, as those of the old King of Israel himself." And while acknowledging that souls are differently strung, he asks that those who cannot interpret this particular gift of tongues, will not "debar others from singing in harmony with Flaxman's holy songs," unless it can be asserted "that the very angels could not mould out of mere clay divine things fit for the sacred house."

As Mr. Field was a warm lover of art, so he was a warm friend of artists. As his house overflowed with their works, so his heart overflowed with personal kindness towards themselves. To them his house was open with a kindly hospitality. He always seemed to treat them as the living representatives of a source of happiness to which he owed a greater debt of gratitude than he could ever pay.

In 1863 Mr. Field received a portfolio very valuable in its

contents, and very gratifying as an expression of personal feeling towards himself. The portfolio contains thirty drawings from members of the Old Water-Colour Society. On an illuminated card, signed by the thirty members who contributed (or all who were living at the time of the presentation), it is stated that the folio was presented "as a token of their sincere regard for him as a friend, and also as an acknowledgment of his earnest activity in furthering the general interests of the Society as its solicitor." The nature and value of this collection will be readily understood by those who know what the members of the Old Water-Colour Society can do, and would do for such a friend. There is one beautifully finished drawing there, which, while it was in progress, took the fancy of a would-be purchaser, who offered a large sum for it. When Mr. Field heard of this, he said, "You must by all means let it go, and do something else for me; I cannot allow you to be so great a loser as you would be otherwise." But the reply was irresistible—"If this drawing has any special merit in it, it is on account of the friend I had in my mind when I was at work at it." And certainly that drawing has about it a peculiar charm, which, though felt at the first glance, seems to increase rather than become less with familiarity. But there are others which, in their different ways, have as much genius in them, and as much love. And there is hardly one which has not in it some characteristic excellence. This portfolio was followed some years after by one containing fifteen very interesting drawings by members of the Langham Society—a society formed for figure study. A quaint old-style letter says that the drawings are in acknowledgment of "services received." Mr. Field was the solicitor of the Society, and drew up its constitution.

From the amazing quantity of work Mr. Field got through, it might, not without reason, be supposed that he was one of those drudging toilers who despise what the world calls enjoyment, and secretly murmur at losing so much time, from the necessity of rest. This, however, was by no means the case. He was a great advocate for holidays—not only for what they enable a man to do, but also for what they are in themselves. He speaks of himself as looking forward to them "with school-boy expectation;" and not only did he himself contrive to get a good share of them, but he was quite as anxious that others should have plenty of them too. And as he did nothing by halves, he had no sooner got away from the scenes of his busy London life, than he was so engrossed with the joys and pursuits of the country, that there was no room left in his mind for haunting business cares.

The place which is most associated with the happiest moments of his life, as well as with his own actual pursuit of

art, is the Thames. Not Izaak Walton loved his favourite river more than Mr. Field loved the Thames. Year by year he resorted to it for the long vacation, and found in it inexhaustible objects of interest and pleasure. If he were drawn away from it for a season, for the sake of sea-air for his family, or from some other special cause, he returned with fresh zest the next season to the river, which he had come to regard as a friend. Formerly, his habit was to take a house for the autumn months, varying the places, so as to become familiar with all the chief points of interest; but some years since he took a lease of the Mill House, Cleve, near Goring, and made it a country home, to which he could go, not only during the long vacation, but also for a day or two at any time, when he had a little leisure or needed rest. And what a pleasant life that Thames-life was! There was so much doing, so much that was interesting going on, so much enjoyment, so much freedom, and withal, so much quiet. What with bathing and sketching, rowing, sailing, and driving, reading and social intercourse, and now and then a picnic, the days seemed never long enough for all that was to go into them. And what a welcome was there always for friends! With what enthusiasm would he take them from point to point, to show them his favourite spots! And if the friends were artists, all the better. But as for himself, there seemed to be no part of the scenery which he did not enjoy. He used to say that "every place has its tune," and all we need is ears to hear. Still oftener he would say, "We see what we have eyes to see." Not long ago a friend, about to visit the English lakes, said, "Shall I find there the effects of light and colour given in ——'s sketches?" The answer was, "All depends on yourself; they are there, if you have eyes to see them." He was never weary of quoting Coleridge's lines in their widest application:—

"O lady! we receive but what we give,  
And in our life alone does nature live:  
Ours is her wedding garment, ours her shroud."

The commonest flat meadow would often have to him a beauty which made him enthusiastic with delight. On a drawing of Wargrave, by himself, he wrote:—

"Ille terrarum mihi præter omnes  
Angulus ridet." (HORACE, II., B. V., Ode.)

Of Mr. Field's own sketches, which fill many portfolios, not a few of course are from other places, especially two places of which he was very fond, Lulworth Cove and Corfe Castle; but a large proportion of them are connected with the Thames, his sketches of which would form probably a more complete picture gallery than could be found elsewhere of that river,

from Maidenhead to Wallingford. He drew the weirs, the locks, the mills inside and out, the back waters, the quiet nooks, as well as the churches, the bridges, the abbeys, and the picturesque landscapes which would obviously attract the eye of the artist. For an amateur, he had attained very considerable proficiency in water-colours, and there was one class of subjects in which he particularly excelled. It has often been said by eminent judges, that his feeling for and way of expressing old time-marked ruins were not surpassed by those of any professional artist. So devoted was he to this hobby of his (sketching), that artists by profession were quite outdone in the number of hours and eagerness with which he used to work. In the most scorching summer heat, he would often after dinner be in such haste to get back to a pet subject, that he would go off with his bread and cheese in his hand, so as not to lose the light.

Mr. Field was essentially a religious man. But he was infinitely removed from bigotry. His friend Sir John Rolt said, "Mr. Field's toleration is indescribable." And doubtless it would seem inexplicable from the point of view from which most Christians have been in the habit of looking at the subject. He felt that there was "something deeper than creeds." He used to say,—“what I care for most of all is *religiousness*.”

Looking back on the life that has closed for this world, it seems almost incredible that so much can have been done in it, and so much enjoyed. Nor could there have been, excepting by a man of very remarkable abilities and character. His interest in the things going on about him seemed to have no limits, save that it did not extend to frivolity, which was at the farthest remove from his nature. He liked to have a hand in planning a house or laying out a garden.

The impression left on most of those who knew Mr. Field was that they had never met with any other instance of such boundless energy and fulness of life. In nothing in which he took part could his presence be otherwise than felt as a power. The *rapid* working of his mind, and the quickness with which he arrived at decided conclusions on questions presented to him, might appear at first sight to indicate precipitancy; but those who had experience of his judgment, did not find themselves betrayed by the confidence they reposed in him; and they found it a great relief, in their perplexities, to put themselves under the direction of one whose counsel was prompt and unhesitating, as well as reliable.

And doubtless his success in inducing others to take up and work out his projects contributed greatly towards the effect of his own exertions. In the letter to his century of clerks and pupils, he lays it down as the master's rule: "See everything that is done, and how it is done; but do nothing yourself that

another man can do for you." And, accordingly, it was his custom to get his clerks to do things which were generally considered master's work.

One, who was in various ways brought into close relationship with him, says :—

"As an old clerk, I have a vivid recollection of the effect of his energy and power. I remember, on one occasion, when I was in court as his representative, the Judge (V. C. Wigram) and counsel had just arranged the terms of an order, when Mr. Field burst into court, and I heard the Judge, in agonized soliloquy, exclaim—'Oh! here comes Mr. Field to upset everything.' Mr. Field approached me, glanced at the terms of the order, and disappeared. On my looking about for him, I was surprised to see him standing by the side of the Judge, speaking earnestly to him. The solicitor opposed to me exclaimed indignantly, 'Why, there is Field earwigging the Judge.' On leaving the court, I inquired of Mr. Field what he had been saying to the Judge. 'Oh!' he replied, 'I was only giving him an order for a private view of some good pictures.'"

The present sketch requires that something should be said of the personal attachment which Mr. Field himself felt, and inspired in others. He was intimately acquainted with some of the principal literary men and jurists of the United States, Bryant and Emerson, Professors Storey and Greenleaf, his namesake, Cyrus Field (to whom the Atlantic Telegraph is chiefly due), and Dudley Field (to whom is due the Codification of the Laws of New York), and Charles G. Loring, a leading advocate. His English friends were an innumerable host, including in particular more artists, perhaps, than for many a year have been gathered together in a single heart. Two friends only will be mentioned here; his contemporary, the late Sir John Rolt, at whose call Mr. Field held himself always ready to attend with the sincere offices of a deep friendship, during the long illness which terminated in Sir John's death; and his senior, H. Crabb Robinson, towards whom he added to warm personal regard the tenderness and consideration due to old age. In the latter part of life, Mr. Robinson did nothing of importance without consulting Mr. Field, in whose ability and attachment, as well as in those of his other adviser in chief, he placed the most absolute trust. As Mr. Robinson's executor, Mr. Field spared no pains, either in carrying out the wishes or paying honour to the memory of his friend.

Of the social life at Squire's Mount, Hampstead, a lively picture was given many years ago by an American visitor, Mr. Brace, who wrote :—

"Here I am, at the country-house of a lawyer, near London. He is a distinguished member of the profession, an untiring worker

during the business hours, and has already accomplished as much in professional honour and in legal reforms as any living lawyer of his department in England. He works like a Yankee—quick, intensely, with whole mind and feelings for the moment fixed on the point; jumping with incredible rapidity and intensity from one knotty point to another. But the moment the fast little pony has carried him out here, he is another man. Old law-precedents, authorities, principles, problems, questions for Parliament or Chancery, are clean forgotten and put aside. His friends—not of his profession, too, men of literature and art—are gathered here after dinner. The word is a game at bowls!—good old English bowls. The green is cleared, so that the little wooden ball may roll easily over the soft, shorn grass. The gentlemen, hats off, gather in the mild summer evening at one end, and the game begins. No *dilettante* playing—nice, careful, eager bowling; shouts and laughter and jokes. My friend of the law—the adviser of corporations and parliaments, perhaps, in the morning—now a complete boy again, running, shouting, calling to this and that one again—generally by the first name, or bringing out a cup of coffee for some new-comer. Then, as the long twilight comes on, we gather together and sit in the verandah or in the garden, talking with such a genuine relish and heartiness as are rarely seen.”

It now only remains to speak of the close of the life thus briefly and imperfectly described. Few men seemed more likely to reach old age than Mr. Field. That at sixty-seven he had not the elasticity of forty was a matter of course; but there was no apparent giving way of his strong constitution. Getting over a stile which he used to vault over, he said, “There are days for vaulting over, and days for getting over;” but only in such things was there any perceptible change.

In 1861 he wrote to Crabb Robinson: “As to your brother’s death, I need say nothing. Call no man happy till he’s dead, and the doing our work while it is yet day, are your and my philosophy, rightly interpreted.”

Of the accident, which soon followed, the particulars known are too imperfect to afford a clear explanation of the fatal issue. That, on July 30th, 1871, after luncheon, Mr. Field and the two clerks, one of them, Ellwood, the first he ever had, went out for a sail in the *Yankee*—that, about a mile from home, the boat was upset by a gust of wind—that the three at first clung to the boat, and one of them lost his hold and sank—that they were afterwards together, the one who had lost his hold, and who could not swim, supported by Mr. Field and Mr. Ellwood, both of whom could swim—that they were making for the shore—that, on the way, Mr. Ellwood sank, and, almost immediately afterwards, Mr. Field also—that the clerk who could not swim was picked up by a boat when he was at the point of sinking—that, in the chain of

consciousness of the survivor, there had been too many missing links for him to be able to give a connected and complete account of what happened—is all there is to tell.

On the 4th of August, 1871, at the Highgate Cemetery, in the presence of a large number of those who most loved and honoured him, his mortal remains were laid in a vault next to that in which rest those of his friend, Henry Crabb Robinson.

## V.—PROTEST OF THE LORD CHIEF JUSTICE OF ENGLAND.

**W**HEN the Lord Chief Justice of England speaks on a question relating to law, and when the occupant of his high judicial position not merely speaks but protests, his protest ought to challenge the ear, not only of the Government and of the Bar of England, but of the whole Empire. As a judge, for keenness of intellect, for calmness and severe impartiality, for all the faculties and endowments required to make a great and able jurist, it may be safely affirmed that none of the Chief Justices of the Queen's Bench has ever excelled Sir Alexander Cockburn. That so distinguished a judge should record his emphatic and solemn protest against any appointment made at the suggestion of the Government, should certainly, one would hope, induce the Government, and especially the Lord Chancellor, to pause, and to reflect, whether a most unfortunate mistake may not have been made in the appointment of Sir Robert Collier to the "Judicial Committee of the Privy Council." Let it not be supposed that we wish for a moment to raise an outcry against the Ministry, or in any way to embarrass it in the coming Session of Parliament. It is far otherwise. The appointment which has given rise to the protest of the Lord Chief Justice of England involves matters of a grave character, and lying very far remote from the sphere of political partizanship.

Notwithstanding the profound respect we entertain for the character and the high position of the Lord Chancellor of England, we feel bound, from a sense of duty, to place on record the fact that after the Parliament of the United Kingdom had passed a Statute, which enacts clearly enough that experience on the Bench shall be required as a qualification for the discharge of a certain high judicial function, Lord Hatherley has apparently unwittingly lent himself—to use the words of the Lord Chief Justice—to a mere "subterfuge" and

evasion of the 'Statute' in order to raise Sir Robert Collier to a judicial position and dignity, for which he would not otherwise have been qualified. We would yield to no one in our respect for the late Attorney-General, and would gladly express our satisfaction at his professional advancement and success; but public duty obliges us to add, that it would have been well even for Sir Robert Collier himself, it would, we are convinced, have been much for his future reputation, satisfaction, and happiness, if he had hesitated before accepting the position which he now occupies at the cost of so great a shock to the feelings of every lawyer, and to the regret of all the judges of the land. There are many positions that the men who but the other day were struggling and fighting at the Bar by the side of Sir Robert would be glad to occupy; but, thank God, the old sense which has for ages animated the Bar of England, and which has rendered it even independent of the Crown itself, still survives. We inherit the splendid traditions as we are privileged to walk in the very footsteps of our noble professional ancestors; and we would not purchase for money, we would not obtain by an evasion or violation of law, we would not have at the sacrifice of honour, the honourable positions that as lawyers we may aspire to, and that we may or may not hereafter some day obtain. Let it not, however, be supposed that we charge the Lord Chancellor with knowingly and deliberately doing that which we regard as most unfortunate and improper. We fully absolve the Lord Chancellor in conferring and Sir Robert Collier in accepting the appointment to the Judicial Committee from all intentional impropriety. But when we have said thus much, we have said all we can say in extenuation, and we are forced to add, in the language of the Chief Justice, "that a colourable appointment to a judgeship for the purpose of evading the law" has been made; and we feel bound to join with Sir Alexander Cockburn in saying, that all the parties concerned stand charged with a "grievous impropriety."

When the Lord Chancellor resolved to appoint Sir Robert Collier to the Judicial Committee of the Privy Council, "he had before him the 34 & 35 of Vict. c. 91." That Statute enacts that:—"Any persons appointed to act under the provisions of this Act as members of the Judicial Committee must be specially qualified as follows: that is to say, must at the date of their appointment be, and have been, judges of one of Her Majesty's Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature, at Fort William in Bengal, or Madras, or Bombay, or of the late Supreme Court of Judicature in Bengal." No lawyer doubts the meaning and intention of the Legislature. It without doubt intended that the judges of the Judicial Committee should be men of large experience,



having occupied the highest judicial positions in the realm. It is a vain and irrelevant plea to state that Sir Robert Collier might have become, by direct appointment, Lord Chief Justice of England if there had chanced to have been a vacancy. No doubt he might have become such both lawfully and with the utmost propriety, for the law does not require previous judicial experience for the Chief Justice. But the sovereign legislative power in the State had solemnly decreed that judicial experience gained in the highest tribunals in the empire should be an indispensable qualification for the appointment; and it is manifestly absurd to argue that a fitting tenure of office in the Common Pleas—a tenure so short and evanescent that it is amusingly enough alleged that the new-made justice did not even procure his robes of office—sufficed to create the important qualification demanded by the Statute. Two distinct qualifications were required for the appointment, namely, judicial experience and dignity. Many County Court judges are possessed of great judicial experience, but notwithstanding their honourable positions, they are not regarded as possessing the dignity of the judges of the high judicatures mentioned in the Statute. They lack the dignity, though they have much judicial experience. Sir Robert Collier was possessed of neither the experience nor the dignity required, and we maintain that neither of these qualifications could be properly imparted by so brief an advent to the Bench in Westminster Hall.

In interpreting the enactment above cited, it was without doubt the duty of the Government and of the Lord Chancellor to regard carefully the intention of Parliament. Guided by this fundamental principle, no one can be in doubt for a moment, that whilst the finger-post set up by the Legislature pointed in one direction, the Government and the Lord Chancellor have walked in another. That the course taken has been obtained by artifice or "subterfuge" as the Lord Chief Justice expresses it, does not make it a less dangerous path, and one, both on account of the parties concerned, and also as a precedent that some Government may be tempted to follow, to be infinitely deplored. Many, may we not say all the members of the Bar as well as the judges of the land, would be glad if possible, from feelings of respect for the Lord Chancellor, to cast a mantle over the unfortunate transaction. But such a thing cannot be done. So dangerous a precedent must not be established. As the judge dare not soil the ermine which it is his honour to wear, without suffering rebuke, so the most powerful minister, and the most estimable and honoured Lord Chancellor must learn, for the dignity of our tribunals and for the honour of the State, that the forum of justice is not to be hurriedly invaded by the political

partizan, and the Bench of the judge just pounced upon for a few brief hours or days that the aspirant for high legal distinctions may obtain a *quasi* qualification, in order that he may be rewarded for past services to his party, or gratify his personal ambition. Again, we repeat, that we have no other feeling than one of personal respect for Sir Robert Collier, but we join Sir Alexander Cockburn, and in the interest of law and of justice, of England and the empire, we denounce the appointment and protest against it, as a colourable evasion and palpable violation both of the *letter*, and also, we believe, of the spirit of the Statute.

The thanks of the public and of the profession are due to the Lord Chief Justice for the noble protest which he has placed upon record. To his lordship it must have been a duty painful in the extreme. His protest, however, will do much to prevent the present appointment being adduced in the future as a precedent to be followed. It will be always remembered that the appointment did not pass unchallenged. But great as is the value that we attach to the protest of the Chief Justice, it is not all that we desire to see done in the matter. Are not Mr. Gladstone and the Lord Chancellor powerful enough to admit that they have fallen into an error. It would be far more dignified in Lord Hatherley to admit this, than to enter upon a defence that cannot but fail upon reflection to satisfy his own mind, and that we can assure him will not convince the judgment of Her Majesty's judges or of the Bar of England. We should deplore the appointment of Sir Robert being made a party question. It is far too grave a matter to be made a party foot-ball in the arena of St. Stephen's. Let Parliament pass an Act, sanctioning the present appointment, and the future appointment of any Attorney-General. Better give up judicial experience as a qualification demanded in time to come, than labour to conceal a subterfuge, or varnish over a violation of law. How can the rulers of the land look for good faith on the part of the people in their obedience to the law when the Government itself shows how easily a Statute may be violated? We can only regret the occasion that has rendered it necessary to write these lines.

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## VI.—THE NEW LAW COURTS.

**T**HE profession to which our pages are addressed is obviously more interested in the question of the construction of the Law Courts than any other portion of the public. We propose, therefore, in the following remarks to consider this subject mainly from a professional point of view. With this object we shall devote most of our attention to laying before our readers as clear an account as we can of what has been done, and what is intended to be done, towards the construction of the great pile of buildings destined to occupy the space between Carey Street and the Strand.

It will be in the recollection of our readers that for many years the want of increased accommodation, and of concentration of our law courts and offices, has been keenly felt. It has been pointed out scores of times that loss of time and money in the conduct of suits arose from the way in which these various courts and offices were separated. The remedy naturally suggested was, that a block of buildings should be erected in the midst of the legal quarter. After years of discussion this came to be universally admitted as the right thing to be done.

But the difficulties in bringing the public to see that it was their interest mainly that called for a concentration of the law courts and offices were enormous. It had to be pointed out that the loss of time spent in journeying to and fro between Westminster and the Temple, between Bedford Row and the various comparatively distant regions where the scattered courts and offices exist fell upon the suitors and the public. It had to be shown that the requirements of the nineteenth century had altogether outgrown the accommodation of the eighteenth. And when the public came to admit that such a concentration would be in every possible respect advantageous, nay, was absolutely necessary, it devolved upon the representatives of the suitors and of both branches of the profession to demonstrate to an unsympathising and stiff-necked Chancellor of the Exchequer that the money in the suitors' fund could legitimately, and ought to, be applied to the purpose. These were but a few of the preliminary difficulties. At length they, and others equally formidable, were surmounted, and a royal commission was appointed to advise and report as to the buildings proper to be erected, and the plans upon which such buildings should be erected for the new courts. It held its first meeting on July the 5th, 1865. Having decided on what was the amount of accommodation required, in March of the following year it invited architects to compete. Eleven sent in designs. In February,

1867, their several productions were exhibited in Lincoln's Inn. The architects had had before them an instruction from the Commission of an admirable character. "The chief point to be kept constantly in view, and to be treated as superseding, as far as they may conflict, all considerations of architectural effect, are the accommodation to be provided and the arrangements to be adopted, and in carrying out this design, the first object should be to provide ample uninterrupted communication and accommodation for those who have legitimate business in the New Courts."

Four sets of examiners were appointed to report on the plans sent in. First, and most important, was a joint committee of barristers and solicitors. Next, the designs were sent to the several heads of departments to be reported on with reference to each department. Thirdly, two gentlemen, Messrs. Shaw and Pownall, were asked to report; and lastly, another was appointed to estimate the cost of carrying into execution the several designs. With these several reports before them, the judges in the competition gave a joint award in favour of Mr. Street and Mr. Barry; and subsequently, in May, 1868, the former gentleman was appointed architect by a Treasury minute. Under the directions of the Commission he was ordered to revise his plan, having regard mainly, and rightly as every barrister and solicitor will think, to the questions of convenience and capacity for the despatch of business. The revised plan, together with its details, was approved in February, 1869.

So far, everything seemed going well. But within two or three months, Mr. Layard, then First Commissioner of Works, made a proposal to erect the new courts on the Embankment. The proposal received the support of the *Times* and of its able correspondent, Sir Charles Trevelyan. The question was discussed in Parliament and in the press. The Law Amendment Society did its utmost to oppose the change of site. The Incorporated Law Society was in arms. Lincoln's Inn and Gray's Inn favoured the Carey Street site. For a while public opinion hesitated. A Select Committee of the House of Commons was appointed in June, 1869, to consider the question. After sitting for five weeks it reported against the Embankment site. The battle of the sites was at an end and the advocates of Carey Street had triumphed. In truth it was hardly seriously contended that the Embankment site could compare in point of convenience with the one chosen. Its advocates relied mainly on what is, of course, an important consideration, that a pile of buildings such as those proposed to be erected would have a much finer architectural effect with a noble river frontage than with a frontage between the Strand and Carey Street. Those who favoured Carey Street urged

that not only were the advantages of utility greater, but that even architecturally the higher site was the better.

The next step in the history of the courts arose from the parsimony of the present Government. Mr. Street was ordered to reduce the dimensions and cost of his original plans. His original building was estimated to have cost a million and a half. The reduced building is to be given to the public for three-quarters of a million. Instead of twenty-five courts as originally proposed, eighteen only were to be designed. The whole of the Probate Department, the depository of wills, the Land and Middlesex Registries, together with many other offices, were to be banished from the revised plans. Reduced plans, in accordance with these instructions, were finally approved in the early part of last year, and are now worked out in all their detail. All the features of the original plan, which were approved by the Courts of Justice Commission, are carried out in these reduced plans. These features, which commended themselves to the Commission, are quite sure equally to commend themselves to those members of the profession who care to examine them. Before pointing out what they are, let us endeavour to give our readers a general idea of the whole. The buildings form a continuous block, bounded on the south by the Strand, on the north by Carey Street, on the east by Bell Yard, on the west by Clement's Inn Gardens. The west side is that on which the clearest view will be obtained, from the fact that there will be a space of nearly 400 feet of unoccupied ground. This great block is divided by two quadrangles, running north and south, into three groups of buildings. The great quadrangle is about 250 feet long by 100 broad. Between it and Bell Yard are various offices belonging to the taxing masters, the registrars, masters, &c. The smaller quadrangle is roofed in and constitutes the central hall. It is to be 230 feet long, 48 feet broad, and 80 feet high. It will thus be longer and loftier than Westminster Hall but not quite so broad. Mr. Sharpe, surely one of the ablest authorities on such a question, declares that if this is built as Mr. Street proposes, "London will possess the finest hall of the kind without any exception that has ever been constructed in any country or in any age up to the present time. It is designed after the purest forms of the geometrical period; it has excellent proportions; is of noble size; will be admirably lighted with a double range of lofty, two-light windows, . . . and will be covered with that most elegant of all roofs, modern, classical, or mediæval, the simple quadripartite vaulting of the 13th century."\*

\* *Times*, January 15, 1871.

Keeping to our determination, however, of putting the useful before the ornamental, let us ask what is the use of such a hall? Mr. Street replies, and the answer is obvious, that such a building with a vaulted roof will be fireproof, will so cut off one portion of the block from another that, in case of fire, the enemy might be prevented from crossing from one portion to the other. No barrister, however, who has frequented Westminster Hall, and knows the various uses which that building serves, can doubt that a central hall will be a great convenience to the hundreds of persons whose duty calls them to the law courts.

Between the central hall and the quadrangle, six courts are placed, and the same number are situated between it and Clement's Inn, the remainder being north and south of the hall.

The general arrangement of these courts is, in one respect, not unlike that of the courts opening out of Westminster Hall. As in the older building, the judges sit facing the hall. At the back of the courts are a series of offices, occupied on the court floor exclusively by the judges, or those in attendance upon them.

With this general rough plan before us, we may now notice some of the special features of the plan which commended themselves to the Commission, and which will be sure of the approval of the profession. In the first place, we may note that there is ample provision made for light. All round the building the streets are or will be made of a good width. The internal areas are spacious. The dimensions of the great quadrangle we have already given. Whether the windows look into this or into the streets, they have all wide, square-headed windows, put in the best part of the room for light. Most of the office-windows will be at least four feet wide. Instead of being fitted with the wretched diamond panes which are justly the abomination of those whose eyes are wearied with the decorations of architects who would condemn us to the accommodation of an age when the art of glass-making was in its infancy, these windows are to be filled with plate glass, and are to be sash windows. The courts have all side-lights as well as sky-lights, the former looking into court-yards, one of which exists between each pair of courts.

Then, too, the buildings will be quiet. No carriage thoroughfare will be made or allowed through Bell Yard, through the quadrangle, or on the west side of the building, and almost all the offices look into one or other of these streets and places.

The number of rooms and courts would doubtless in so large a group be confusing, but that Mr. Street has provided that the relative position of all the rooms connected with each court shall be similar in every case. Each of these, too, is

easily and directly reached from the court. Those, therefore, who know one of the courts and its adjuncts will know all.

But the feature which in the plans adopted most commends itself to our notice, is the complete way in which the several classes using the courts and offices are separated. The offices, as we have already stated, are divided from the rest of the building by the great quadrangle. The persons using the new courts to be considered apart from those whose business is at these offices, are the judges, the Bar, attorneys, witnesses, jurors, and the general public. For each of these classes of persons a separate mode of access to the courts is provided. The judges will enter on the east, north, and west sides. At the back of the Courts is the judges' corridor. On one side of it are the judges' robing rooms, secretaries' offices, &c.; on the other the entrance to the Bench of each court. This judges' corridor runs entirely round the central hall and the courts surrounding it. No one has access to it but the judges; those who have business to transact with them having secondary approaches by stairs from the attorneys' corridor. The Bar entrances are from the Strand and Carey Street. One Bar room is situated over the archway leading into the great quadrangle from the Strand; another adjoins Carey Street. Robing rooms are in each case placed near. The Bar, too, have a corridor exclusively for their use. If we may call the judges' corridor the outer square, the Bar corridor may be called the inner square. The Bar corridor passes the central hall at each end, and being on the first floor, that is, the floor on which the courts are situated, allows entrance to two noble balconies which are placed at each end of the hall. From this they can look down into the body of the hall which is on the ground floor. The ground slopes from Carey Street to the Strand, making a difference of sixteen feet between the two levels. Hence, while the courts are on the ground floor of Carey Street, they are on the first floor from the Strand. The arrangements for the Bar, which we have carefully examined, are, so far as we can judge from the plans, simply perfect. Barristers will be able to pass from one court to the other without having to come into the central hall, or without liability of being jostled and having their robes torn from their backs by a crowd of idle sightseers. The attorneys, too, have a corridor for their own use. The witnesses and jurors enter through the central hall. Ample space is set aside for their accommodation. The officers of court will not require to cross the floor, but will have an entrance below the judge.

The general public, that is, the mere spectators, will enter through two staircases placed in the octagonal towers standing one on each side of the entrance to the central hall on the Strand side. These staircases will lead them to a corridor

above that set apart for the Bar, and will give them entrance to the gallery of each court; and there are corresponding entrances in Carey Street.

All the floors are to be fireproof. All the fireplaces are to be supplied with fresh air from the exterior. All the water-closets, the number of which is ample, and other conveniences, are to have ventilation of an effective character, as well as direct openings to the outside air.

At the east end of the Strand front is a triple Gothic archway leading to Bell Yard, and over this archway rises a tower, with high pitched roof and projecting clock. The tower to the top of the steep roof will be 165 feet in height. The front of the building, westward of this tower, shows five floors, the upper three, above an ornamental string course, being lighted by pointed windows. We then come to the entrance to the quadrangle, which consists of another triple archway, one arch being large enough for carriages and two for foot passengers; on each side of this archway are gables flanked with turrets. The front of the great central hall and chief entrance to the courts is deeply recessed. A richly decorated pointed archway leads by a groined entrance to the central hall. Over this archway is an open corridor, connecting the two sides of the hall, and marking the central feature of the principal entrance. Above this corridor rises the gable end of the high pitched roof of the hall, pierced by a large pointed window, with a rose window above it, and with large turrets rising on each side. A large *flèche* or turret rises from the centre of the roof of the hall, and on a more distant view forms a natural and striking centre to the very varied sky-line of this part of the building. Beyond this recessed entrance, with its large octagonal staircases, the front wall of the building is pierced as at the other end by pointed windows, some of which are bay windows, and the front ends westward with a small gable and turrets standing over three arches, beneath which runs the street pavement. The building has, of course, three other fronts. Those towards Clement's-inn and Carey Street will, like the Strand front, be of stone, while on the front towards Bell Yard in the great quadrangle, and round to the east end of the Carey Street front, red brick will be used for the walls, with stone windows.

We have thus far endeavoured to give our readers a notice of the general plan of the new courts as proposed by Mr. Street. We honestly confess that when we undertook the task we were prejudiced against it. We had followed closely the attacks made in the *Times*, and were inclined to believe that owing either to want of care on the part of the Commission, or to some other cause, Mr. Street in being compelled to cut down his plans by a parsimonious Government, had produced a block of buildings which would scarcely



be an improvement on those in which our law courts are now lodged. Visions of diamond panes, of pointed windows with heavy mullions, of coloured glass, of a darker Westminster Hall without its historic traditions to make us forget its darkness, of furniture enough to give one, as Mr. Fergusson says, the rheumatism to look at, of monastic buildings whose every aspect and arrangement should be uncomfortable, fitted before our eyes. While we are not unmindful of architectural effect, we thought primarily of the use to which it is intended to put the new buildings, and we feared that another blunder was about to be perpetrated. But a careful, thorough, and systematic study of the arrangements as they are set out in the court plan, and as they have been detailed in the *Building News* and elsewhere, has led us entirely to change our opinion. We cordially join with our legal contemporary, the *Law Journal*, in expressing our admiration of the internal arrangements. We can assure our readers of our conviction that it would be simply impossible for any unprejudiced professional man, barrister or solicitor, to examine these plans and not to be satisfied with them. We believe that no suggestion has been overlooked which would increase the adaptability of the buildings for the purpose for which they are designed; that no appliance has been lost sight of which will render their arrangements more complete, or the use of them more convenient and comfortable. They will as far as the most careful examination will allow us to judge be excellently fitted for their purpose, and thus our first requisite for new law courts and offices is fully and wholly satisfied. We entirely join in the opinion expressed by the late Mr. Edwin Field, who combined with a true feeling for art the fullest determination to give to utility the first place. In his examination before the Select Committee he declared that the admirable "arrangement of the plans was 'perfect.'"

Our impression against Mr. Street's design was certainly not lessened by the illustration which appeared in the *Builder*. Many of our readers must have seen what looked something like a reminiscence of Westminster Hall, with a small tower on each side. Mr. Street, in his recently published "Notes," seems to imply that this was reproduced from an elevation, and an elevation which cannot be understood without comparison with his plan.\* The impression, however, derived from this view is more than counteracted by an examination of the illustration which appears in the *Illustrated London News* of January the 26th. With this illustration before us, we appeal to any one who has not taken sides in the mere architects' controversy, whether Mr. Street's law courts

\* "Notes on Recent Criticisms," p. 16, note 6.

would not constitute the noblest pile of buildings in the metropolis.

The recent attack made on Mr. Street's design by Mr. Fergusson in *Macmillan's Magazine* compels us to say a few words in regard to the style. We hope in the name of common sense, and of every suitor and member of the profession for the next generation, that the battle of the styles is not about to be begun again. What are the facts? Five years ago the Commission invited designs. They specified no preference for any style. Eleven of the first architects in the empire sent in designs, and every one was in Gothic. Does anybody believe for a moment that a plan in any other style would have met with public approval? Mr. Fergusson, in his slashing criticism in *Macmillan*, talks much about a style that should be the natural growth of the 19th century, and creates a good deal of amusement by suggesting that we should go farther back than the 13th century up to the era of the Druids for our architecture. His article, like his letters, is very readable. But if his statements are seriously examined they are found to be wild beyond measure. We who are laymen join heartily in his denunciation of "gloomy vaults," of "narrow windows filled with painted glass," of "corridors whose gloom recalls the monkish seclusion of the middle ages." But Mr. Street answers by saying that the gloomy vault, otherwise the central hall, will have two enormous windows at the north and south ends, besides sixteen very large side windows, each having about 300 feet of glass; that his corridors will not be dark, and that his design contemplates sash windows with plate-glass. To Mr. Fergusson's declaration against Mr. Street's adoption of the Gothic style, we may plead, first that the majority of the English people prefer Gothic; second, that the 19th century style, unless we are to take our railway stations (King's Cross for example) as specimens, exists only in the imagination of Mr. Fergusson, not having been even by him yet committed to paper; and third, that the Gothic is, to say the least, as convenient as any other style, and therefore being English ought *ceteris paribus* to be preferred. It may be that we are incompetent to judge of architectural effect, and this being so, we are ready to call in the testimony of experts. After some inquiry we are bound to reject the evidence of Mr. Fergusson himself. We find that his criticisms are incisive but also inaccurate; his facts turn out to be fictions; and, while he is open to the grave charge of having attacked Mr. Street without having taken the trouble to acquaint himself with his designs, we cannot learn that he has materially added to the architecture of the country, or has done anything to develop that 19th century architecture of which he speaks. But looking round for other witnesses

we find nearly all the artists and architects in favour of Gothic, and we find some of those whose opinions are most entitled to respect, speaking in terms of admiration of Mr. Street's plans. Mr. Sharpe, for example, says in a letter to the *Times* of the 15th January, that he recognizes "in parts of his (Mr. Street's) principal front the existence of features of a certain grandeur, the grouping of which when seen—as they will appear when executed—in perspective, may produce effects totally unexpected by those who have based their criticisms on the elevations alone."

When Mr. Fergusson uses such language as we have quoted he is of course ignoring much of what modern architects have done and of what they assert. Mr. Street affirms that his whole building is fire-proof in its construction, and that in no part has he ignored any modern appliances which present any real advantages. We have seen that he has provided abundance of light and of ventilation; and, still looking to the question from that point of view which all through these remarks we have kept most prominently before us, namely, what are the conveniences these buildings will afford for the transaction of business? we are perfectly ready to accept the statement of so high an authority when he asserts that the Gothic style "is perfectly free and elastic, and lends itself so easily to every useful requirement as to be infinitely more suitable for a building of such varied requirements than any variation of classic or renaissance architecture." We should probably not be far from the truth were we to affirm that the coincidence of every competing architect sending in designs in Gothic arose as much from the fact that each one found it easiest to meet the varied wants of such a building in a style allowing so completely of elasticity of treatment, as from the conviction which must have been present to them all, that Gothic was the only one which would stand the slightest chance of obtaining public approval. We believe that Mr. Street may fairly claim that in the buildings with which he designs to ornament the metropolis, he has taken English architecture at that period of history at which it was in its highest advancement, and having varied it so as to meet modern wants, having not failed to take advantage of developments in architecture in distant parts of this country, and in many other countries, which modern travel has made our architects acquainted with, and having endeavoured to superadd all that modern science can give in heating, in ventilation, in a hundred developments of the mechanical arts, he has adopted the style which experience is leading men to regard as being that 19th century style of which Mr. Fergusson is in search, but of the indications of which he gives his readers no trace; a style which aims at utility, com-

fort, and convenience, and produces elevations as the result of its plans.

We, however, have no intention of entering into the question of style. We may fairly leave rival architects to attack each other, and to make against the design of Mr. Street attacks utterly inconsistent with each other. While Mr. Fergusson\* complains that Mr. Street copies everything from old examples, we may be amused at seeing that Mr. Denison's attack is on the ground that nothing is copied, and we may set off that portion of the criticism in the *Times*, which finds fault with the designs on the ground that they are too English and too ecclesiastical against that portion which objects to them because they are a mere copy of foreign secular work. With such criticism we have nothing to do. If Sir Christopher Wren had been attacked as Mr. Street has been, and if the public had waited until the controversy had been settled, possibly the foundations of St. Paul's might by this time have been laid. Can any one point out a way by which these designs can be improved? If he can he ought to do so. Can any one produce a better general design? If he can we may promise him from his professional brethren an even fiercer attack, from his defeated competitors, and their not over-scrupulous friends. Our main object in writing is, to place before our readers the fact that by everybody who has paid attention to the subject, the internal arrangements are admitted to be admirable, "perfect" as so exacting a critic as the late Mr. Field declared them; and having done so, to protest in the strongest manner possible against the attempt to delay the erection until a few architects have discovered a 19th century style. The century is already far advanced. Lawyers who were juniors when the subject was first discussed are in full practice now and will be grey-headed before the buildings are ready. The question of style has already been fought out in the House of Commons. The eleven architects who thought themselves of sufficient eminence to send in designs for the courts were unanimous that Gothic should be chosen, and nobody doubts that in their decision the public voice was with them. The battle of the sites has been fought and won. There is now no cause whatever for delay, and in the name of the whole profession throughout the country, and of the public, we cordially join with our legal contemporaries in asking that the design shall be carried into execution as speedily as possible.

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\* "It is the accuracy of imitation pervading every detail that makes Mr. Street's design so perfectly intolerable."—*The New Law Courts*: "Macmillan's Magazine, January, p. 254.

## LEGAL GOSSIP.

HENCEFORTH no one is to be called to the Bar without passing an examination. This is the decision arrived at by the joint committee of the four Inns. Every one who has the honour of the profession at heart will rejoice at the change. A law school and every other device, however excellent, is of secondary importance to this. Compel men to pass an examination and they may safely be left to find the means of instruction. We have reason to know that several of the men who have done best at the law examinations in the London University, which in severity far exceed those of the Council of Legal Education, have never attended lectures or classes in law. Henceforth we shall no longer have barristers who have never opened a law book, or dubiously ornamental members who have gone to the Bar merely to give them a social *status*.

The public has been much occupied during the past month with the duties and dangers of trustees. Vice-Chancellor Malins has recalled attention to these by his judgment in the case of *Sculthorpe v. Tipper*. The conclusion of the matter is that trustees must do what they are told and not what they think best. The circumstances in this particular case were no doubt hard, but they constitute no exception to the well-known rule of law. The testator had ordered that his property should be invested in certain securities. The trustees thought well to invest in others. They acted with perfect good faith, but they committed an error in judgment, and unfortunately, they have to suffer. We see no reason in this for either a change in the law, or for general complaint against the perils of trustees.

Civilized nations are looking anxiously to the experiment in international arbitration which is about to be tried at Geneva. The scoffers are already exulting in the possibility of a break-down, and sneering at everybody who indulges in the premature but noble belief that a step has been taken towards getting rid of war. If the American demand were intended to be taken literally there would be some reason for this tone. Mr. Sumners' claims would probably be preferable. But these demands are in the regular "high-falutin" style, which for some unaccountable reason it suits Americans sometimes to adopt.

The Temple Gardens have been much improved by the Thames Embankment. The large space reclaimed from the river and added to them does more to increase their apparent size than the actual area would lead one to expect. It is a great advantage, too, to have the gardens of the two Inns thrown into one as they now are. Within the last few weeks the old library chambers adjoining the Middle Temple Hall have been closed as well as the pathway leading to them. The latter has been thrown into the Middle Temple Garden. The old paling has been set back so as to extend the garden. The paling around the fountain in Garden Court is to be removed. Of course the benchers are not such Goths as to dream of removing the fountain itself. Surrounded as it is by trees, it is a

beautiful object, and since the days when John Westlock courted Tom Pinch's sister has become public property.

The Inner Temple new clock tower and clock are in keeping with the new hall and library, and are real additions to the many objects of interest to visitors to the Temple.

Every lawyer is anxious to know whether we are to have any sweeping changes in law or procedure during the forthcoming session. The High Court of Justice Bill of 1870 was for some reason or other omitted last year. We understand that it is to be reintroduced, and that it is not unlikely that the Commissioners may report in favour of a considerable extension of the jurisdiction of the County Courts, and in favour of an alteration in their *status*. If it is again brought forward some kind of organized action on the part of the profession would be desirable. There is a strong feeling among barristers, at least, that in the recent changes their interests have been altogether overlooked. Of course, where these interests conflict with those of the public it is right that they should go; but that the Bar should come to hold a lower position than it does would be a misfortune every way, and between the rigid exactions of Bar etiquette on one hand, and the extension of County Courts, the contemplated fusion of Common Law and Equity, and new changes on the other, there is a danger lest the Bar should seriously deteriorate. Why should not a committee of each Inn be formed to consider the proposed changes? The Law Amendment and the Juridical Societies too may possibly render useful service in forming themselves a general committee.

At the last moment we regret to hear that the differences of opinion among those who form the Judicature Commission are so great that it is not probable that any general measure, based on any report of theirs, will be introduced during the ensuing session.

The many solicitors and barristers who had the pleasure of knowing the late Edwin Field, will be glad to learn that a life of him is in course of preparation, and will soon be ready. We have, through the kindness of its author, been permitted to place before our readers in this number a sketch of the leading incidents in his life. He was a man of singular energy; not merely one of the very ablest of our solicitors, but a man of great versatility. He usually spent his vacation in sketching in water colours, and if he had not been one of the greatest lawyers in England, might have been one of the greatest painters. The present writer remembers well when he met Mr. Field for the first time. A committee had been sitting for nearly an hour, and with but very little result. Mr. Field entered, and in ten minutes he had shown every one the right thing to do, and the right way of doing it. On expressing afterwards, to one who knew him well, admiration at the clearness of insight and decision which Mr. Field had shown, it was mentioned that he was a descendant of Oliver Cromwell, and his friend added—"I never understood until I knew Field, how it was possible that Cromwell could have made himself Protector."

The site of the new Law Courts is now almost ready for building. The contract taken some months ago for the preparation

of the foundations is nearly completed. The houses and other property in St. Clement's Danes have nearly all been vacated. The Vestry, which received 10,000*l.* for its premises, including almshouses, and the old burial ground, has given up possession. These premises are to be taken down; the bodies in the churchyard to be removed under the faculty granted by the Bishop of London. The object of purchasing these buildings is rather for the sake of better light and air, than for the enlargement of the plans, though the *Daily News* asserts that Mr. Street has a plan by which a block of buildings might be placed on that portion of the ground, and room be left at the east end for the grand clock tower, which the Government have struck out of the plans, in order that accommodation may be provided for the Lunacy Commissioners, but which the architect of course parts with reluctantly. By-the-bye, our readers must have observed a curious instance of parsimony in allowing the wretched barber's shop attached to Temple Bar to remain. By an accident it was omitted from the Bill authorizing the purchase of the site of the Courts, and, though it might be had now for a small sum, there seems some hesitation about its purchase. Possibly Mr. Ayrton intends to keep it as a monument to himself.

Sir Robert Collier's recent appointment to the Judicial Committee of the Privy Council was the subject of an animated discussion on Tuesday evening, the 23rd ultimo, at a meeting of the Union Society of London, which numbers some 150 members, principally of the legal profession, and holds its meetings at the rooms of the Social Science Association every Tuesday evening. The general opinion was very much that since expressed by Lord Hatherley, *Audi alteram partem*.

The Law Amendment Society held a meeting on the 18th ultimo, under the presidency of Mr. Joshua Williams, Q.C., to hear a paper from Mr. Jacob Waley, Q.C., on "Suggestions for Facilitating the Transfer and Disposition of Land." The paper and the discussion which followed were full of practical suggestions, almost every speaker being an authority, and the concluding speech of the Chairman was admirable.

We regret to hear that Mr. Dickenson, Q.C., of the Chancery Bar, continues to be still very seriously ill. Sir William Jenner was called in on the 24th and the report then given was of a very alarming character. Since that day however some improvement has taken place. The absence of Mr. Dickenson is greatly felt in the Court of V. C. Wickens, where his practice is of the most extensive description.

We understand that Mr. De Longueville Giffard, one of the reporters to the Law Reports in the Court of V. C. Wickens, has received leave of absence for two years. His duties are discharged in the meanwhile by Mr. H. R. Young, reporter to the *Law Journal* in the same Court.

It appears that there is no arrear of cases in the Appeal Court in Chancery, but the very reverse is the case in some of the courts below. In the Court of V. C. Malins there is a heavy arrear. The Vice-Chancellor has been sitting *de die in diem* for many days past to hear nothing but motions; and only succeeded at last in closing the

Seal at five o'clock on Wednesday evening, the 24th, the next Seal commencing at ten o'clock the next morning. His Honour has said that whenever the motions shall be finished, he proposes to sit in the same manner *de die in diem* to hear adjourned summonses. As these are numerous, there appears little chance of many causes being heard in this branch of the Court for some time.

The reprieve of Miss Edmunds has led again to the public discussion of the question of how far insanity is an excuse for the commission of a capital offence. A good deal of confusion arises in the public mind from the non-recognition of the fact that legal insanity is one thing, what the mad doctors and the public understand by the term insanity another. The points to be determined by a court are, Did the prisoner know whether he was doing that which would bring him under the sanction of the law, and was the evidence tendered sufficient legal evidence of insanity? In this case, the legal evidence was insufficient. But there seems to have been abundance of moral evidence to raise a presumption in favour of her insanity, and unless we are prepared to adopt Whateley's view, and make no exception in favour of the insane, no one can regret the decision at which Mr Bruce has arrived.

One Mr. Jarvis, residing at Walthamstow, has had to pay 5*l.* and costs under sentence from the Ilford Petty Sessions for having used armorial bearings without a licence. The facts are so curious, that at the risk of wearying our readers with a thrice-told tale, we must repeat them. The defendant is a clerk in the City. Having to write to the Commissioners of Taxes appealing against their assessment he found himself without an envelope. He stepped across the street to the office of a solicitor and borrowed two. These he used without observing, as he alleges, that they had a crest on them. The chairman admitted to the full the hardship of the case, reduced the fine to the lowest in his power to inflict, and wished it to be represented to the Commissioners that the magistrates believed the defendant had no intention to evade the law, with a view to a further mitigation of the penalty. But surely the magistrates were not bound to convict. The use of crests for which duty has to be paid is not of this casual kind. Does any one suppose that it was ever intended, for example, that a visitor in the house of a friend by using his paper should be liable to the duty? And yet this would be a more glaring case than the one punished. As well might a man be fined for taking his friend's dog with him for which his master only had a licence; or for using his carriage for an evening. Or supposing Brown borrows a dozen forks with Jones's crest on them, is Brown liable? It may be said, no doubt, that in these cases the ownership does not pass, but this does not affect the argument, for the question is one of use, not of property. At the last moment we are glad to learn that the Commissioners have remitted the whole of the fine.

We have received a letter from Mr. Charley, M.P., calling attention to what he regards as the existing unsatisfactory state of the legal profession. The rest of the letter speaks for itself:—"Public opinion needs to be enlightened upon the subject, and, with that view, organization is requisite. I shall be happy to receive the



names of any of your readers, who may feel disposed to assist in forming a 'Legal Practitioners Society,' for the following (amongst other) objects:—(1.) To revise the rules of the legal profession, and reduce them to a written code. (2.) To readjust the relations of the existing branches of the legal profession. (3.) To place the government of the legal profession on a sound representative basis. (4.) To secure the legal profession against the depredations of unscrupulous, non-professional persons. I have already received letters from members of both branches of the profession expressing approval of this movement."

If anything were wanting to urge on the construction of the new law courts, it might be found in the complaints which are continually arising as to the accommodation and ventilation of the existing courts of the metropolis. As a rule, the courts in the country are far superior. Manchester, Leeds, and York, are conspicuous examples. Compare these which are used during only a few days in the year with the courts at Westminster, or with such wretched places as those at Kingston, and we see at once how far London is behind. The crowds who are attending at the Tichborne trial may amuse themselves by asking whether they believe it possible that any other country in the world would permit one of its highest courts to be lodged even temporarily in such a place. A few days ago, the Bench, the Bar, and the reporters, at the Court of Queen's Bench, joined in complaining of the ventilation of that Court. Mr. Manisty, having to apologize for the loss of his voice through a severe cold caught in the Court, Mr. Justice Blackburn wished that matters might be arranged so as to give the Bench a little of the air of which the Bar appeared to have too much.

We are informed that an effort will be made in the ensuing session to alter the law, so far as the actual owners of mines are concerned, in two points of special interest to Common Law lawyers. The first relates to the liability of the master when an injury is caused to his servant by the act of a fellow servant. As our readers know, a series of decisions during the last few years have held that the negligence or other tortious act of his fellow servant will exempt the masters from liability, and this, even though the master may himself have contributed to the injury. Thus, for example, if a man is killed through an explosion caused by the carelessness of his fellow servant, the sufferer's family have no redress even though the owner has neglected precautions prescribed by law for keeping the mine well-ventilated. The second point relates to contributory negligence. A man, for example, partly by his own negligence, suffers injury. The injury, however, notwithstanding this negligence, would not have happened but for an illegal omission or act of the master. No compensation can be claimed by him, or in case of his death, by his relations under Campbell's Act. In both these cases it is sought to change the law rather with a view to making masters take proper precautions than out of sympathy with the sufferers. In both cases, where the master has violated the law he ought, as it seems to us, to be liable.

The Royal Commissioners of Victoria, concerning the establish-

ment of a Court of Appeal for the Australian Colonies, have reported in favour of the constitution of such a court. They deal with the objection that it is not competent for a colony to establish a Court of Appeal which may exclude the appeal at Common Law to the Queen in Council. Of course not; but Parliament might doubtless remove this obstacle. The suggestion that England would view any attempt in that direction with great jealousy has more in it. There is a strong feeling here that cases may occasionally happen, when, in the interests of the colonies themselves, it is important that there should be an appeal from local jealousies to a court free from them. We ourselves look also to the establishment of a High Court of Appeal for the whole empire as the means of keeping or of obtaining a uniformity of law throughout the empire, and therefore as forming one of the links which is to bind the empire together. Just as our highest court would probably hold that no local legislature has power to deny a man his right to a Habeas Corpus, so they and the country with them will refuse to prevent appeal unto Cæsar's court from the caste prejudices, the narrownesses and provincialisms invariably found in communities so small as our colonies. We may hold all this and still not fail to recognize that the cost and delay occasioned by appeals to the Privy Council are a great evil, and that some form of Court of Appeal for the Australian colonies is necessary and desirable—desirable because judges conversant with colonial life, manners, and laws, will be at hand to preside over it, and necessary, in order to prevent the decisions of the courts of separate colonies being at variance. A Court of Appeal for Australia is good for the latter object; a supreme Court of Appeal for the empire, for the same reason, is good for the empire.

The doors of the Bankruptcy Court at Birmingham were lately closed for the last time against the transaction of further business under the provisions of the Act of 1869. Since the 1st of January, 1870, when the Act came into operation, after which time no new business could be entered, the officials have been busily engaged winding up the estates, about a thousand having remained open at the time of closing, of which a remnant of about seventy cases has been transferred by order of the Lord Chancellor to the County Court of the district. Another monument of our late bankruptcy system is hereby demolished.

Custom has a great deal to do with Common Law rights. So think the judges of the Royal Court of Jersey, who have recently been called upon to adjudicate in a suit brought by an hotel-keeper for the payment of the cost, in the last six years, of their own dinners had on the occasion of the opening of the Assizes. It had been the custom for a couple of centuries at least to feast the judges on this auspicious occasion, and it was maintained as a right that the Crown owed to the judges for their services, while on the other hand the Lords of Her Majesty's Treasury, with equal force, urged that the Crown was not legally liable for the dinners, and that simply as an act of courtesy the practice had been permitted for a long period, and could therefore be withdrawn at pleasure. Of course the judges were not of this opinion, and finally decreed against the Crown, an appeal to her Majesty in Council being entered by the Attorney-General.

The Right Hon. Sir Robert P. Collier, the newly-appointed member of the Judicial Committee, has been entertained by his former colleagues at the Common Law Bar at a dinner given at Willis's Rooms, Sir John D.

Coleridge, M.P., Attorney-General, took the chair, supported by a large number of Queen's Counsel and other leading gentlemen belonging to the profession.—A similar honour has been paid by the United North and South Wales Circuit to Mr. Justice Grove, to congratulate him on his appointment as one of the judges of the Court of Common Pleas. Mr. Giffard, Q.C., was in the chair, and there were also present Lord Romilly, Mr. Osborne Morgan, and nearly all the members of the United Circuits.

Mr. Francis Ellis M'Taggart, who for eleven years has been the judge of the County Court of Northamptonshire and district, took a farewell of his local professional friends at a dinner given by the solicitors practising on his circuit, at the George Hotel, Northampton. Sir J. Eardley Wilmot, Bart., has taken his leave of the Bench of the Marylebone County Court, and made his farewell address to the Court, in which he suggested several amendments in the law connected with County Courts generally. Of Sir Eardley Wilmot's character as judge and the cause of his retirement, we could not do better than repeat the words of our contemporary, the *Law Journal*:—

"No judge was ever more respected, or ever better deserved the respect of the profession and the public. His ability and learning were conspicuous, and he was distinguished for the zealous discharge of his onerous duties. He retires because he is unable to attend to the business of Circuit 43, and the work that overtakes the strength of Sir Eardley must surely try the powers and endurance of his learned successor. The Marylebone district comprises a population of upwards of a quarter of a million. Sir Eardley, supported by memorials from the inhabitants, petitioned for a division of the Court, but the petition was disregarded; we suppose on the score of economy. Then he obtained the assistance of Mr. Abbott as deputy judge for one day in the week, but that course was not approved of, and as Sir Eardley would not do injustice to the suitors by attempting to do more than his strength permitted, he resigned. We protest against the costly economy of the Government, but there is consolation in the case of Sir Eardley Wilmot. He is lost to the country as a County Court judge, but we apprehend that he will be of greater service as a law reformer, for which his talent, his learning, and his ripe judicial experience peculiarly fit him."

The judges have arranged the Spring Circuits as follows:—Home—the Lord Chief Justice Cockburn, and Lord Chief Justice Bovill; Western—Mr. Baron Martin and Mr. Baron Bramwell; Norfolk—Lord Chief Baron Kelly and Mr. Justice Blackburn; Oxford—Mr. Justice Byles and Mr. Baron Cleasby; Midland—Mr. Justice Keating and Mr. Justice Quain; Northern—Mr. Justice Mellor and Mr. Justice Lush; North Wales—Mr. Baron Channell. South Wales—Mr. Justice Grove. Mr. Justice Willes remains in town.

#### SCOTLAND.

In Scotland just now the judicial and other legal arrangements are engrossing a great deal of the thoughts of all grades of lawyers. There seems to be wonderful unanimity on the subject, at least to the effect that something must be done. But various and diverse opinions prevail as to what ought to be attempted.

The present judicial staff of Scotland consists of: (1) Thirteen supreme civil judges or Lords of Session as they are called, of whom seven are also supreme criminal judges, or Lords of Justiciary: (2) Twenty sheriffs who are practically Judges of Appeal, reviewing the judgments of fifty-eight Sheriff-Substitutes, on all civil causes, not dealing with real property or status arising within their respective jurisdictions. These sheriffs and Sheriff-Substitutes decide criminal causes and revise the registers of voters. Their civil juris-

diction is, within its range, quite unlimited, but there is an appeal to the Court of Session from the decision of the sheriff, who in civil cases is not a judge of the first instance, but merely reviews his substitute. The result is, that there is an appellate court interposed between the court of first instance and the Supreme Court. This complicated kind of jurisdiction carries with it necessarily many other complications. As a general rule the members of the Bar do not practise in the Sheriff's Court, and each Sheriff-Substitute's Court has its own little group of solicitors who have the privilege of excluding all other solicitors from practising before it. It happens in this way that a sheriff is divided among the exclusive privileges of many such bodies of solicitors. In the Supreme Court, again, we have two distinct bodies of solicitors, but both are on an equal footing, but they have the exclusive right to practise.

The provincial solicitors are agitating for the abolition of the exclusive privilege enjoyed by the solicitors who practise in the Supreme Court, and it rather appears that the local advocate is to gratify them by bringing in a Bill next Session with the view of attaining that object. The wonder is that, in a country so narrow as Scotland, these absurd little corporations have stood, growled against certainly, but unchallenged to this time of day. Their time is over, and their usefulness is gone. But the Supreme Court solicitors say that while they have no objection to allow their provincial brethren equality of rights, that equality must be given all round. They hold that the Sheriff-Substitute's jurisdiction ought to be limited to something like that of the County Court judge in England, and the sheriff entirely abolished, so as to give the decision of all important commercial causes to the Supreme Court. We rather incline to the opinion that this view is the correct one. The sheriff, though an excellent fellow, intrinsically is not really required. Practically he is rather in the way of a man who wishes his cause decided well and speedily. He is an unnecessary step in the procedure, for if his judgment is acquiesced in it is because he concurs with his substitute, or because the litigants' patience and money are both exhausted, and if it is not it is no advantage to the Court of Review to have the benefit of his lucubrations. He does not live in his county, but only visits it at rare intervals, and thus he is the cause of much heart-breaking delay, since litigants who want time can always manage to appeal so as to hang up the case until the sheriff comes down, probably once in the quarter, if the county be remote from Edinburgh. The sheriff used to be rather a favourite in Scotland, but, we fear, he cannot stem the tide now setting in against his existence. The point as to limiting the jurisdiction of the provincial courts is attended with more difficulty. The judges are certainly greatly inferior to the judges of the Supreme Court, but the public among whom they live have a certain liking for them, and then their law is cheap. Well, we hold bad law to be dear at any price, and would prefer to see that kind of article unsaleable; but, unfortunately, it is occasionally sold by some very high class quacks.

An able and interesting address was a few nights ago delivered to the Scottish Law Amendment Society, by Mr. W. A. Brown,

advocate. The abolition of the office of sheriff was strongly urged.

The session in Scotland begins in the middle of October, and a movement has been made with a view of postponing the commencement till the 1st of November. But this cannot be done without the intervention of an Act of Parliament. Whether such a change would be beneficial is a question, seeing that on this side the Tweed propositions are in vogue for doing away entirely with the long vacation. The Scotch Law Commissioners have reported, and it only remains to be shown what will be the result of their deliberations in this respect. The physical condition of two or three members of the Bench is also a matter of observation. Some rule of superannuation is suggested as a cure for the shortcomings which old age and consequent debility brings in its train.

The question as to the *status* of the Lord-Lieutenant is also one exciting some interest at the present moment. The "Regulation of the Forces Act, 1871," seems to have lessened the importance of the office. He is not, as in England, at the head of the magistracy. In fact, he need not, by virtue of his office, be a magistrate at all. He is at the head of the militia, as representative of his magistracy.

A series of lectures have been arranged for delivery in Glasgow on special subjects connected with Scotch law. Mr. Gordon, the Dean of Faculty of Advocates, delivered the introductory address about three weeks since.

The University Court have approved of a resolution of the General Council's recommending a graduation in law. The Court are persuaded of the importance of raising the standard of legal education throughout the country, and although the Court decline to dispense with the right to confer the degree of LL.D. as a badge of honorary distinction on persons not necessarily connected with the law, yet they think such degrees should be kept distinct from those obtained by legal acquirement. The Court are desirous of dealing with the whole question of graduation, and to include that of law in any new system that may be adopted.

Mr. E. G. Gordon, late Lord Advocate, read a paper lately at a meeting of the Faculty of Procurators at Glasgow, on the new Legal Education Scheme. He pointed out what appeared to be the defects of the present system complained of by the supporters of Sir Roundell Palmer's scheme, and approved generally of its details. In reference to the objection taken by some members of the Bar, that it was not advantageous that students for the two branches of the profession—the Bar and legal practitioners—should receive instruction at the same institution, he said, they in Scotland could speak of the attendance of students of both branches of the legal profession at the same course of lectures, as not being productive of the injurious consequences apprehended. Speaking for himself, and he was sure he spoke in accordance with the opinions of most members of the Bar, he had never felt that there was a lowering tendency in the association of the members of the two branches of the profession in the same legal studies. There was this advantage resulting from the custom, that an aspirant for success at the Bar, who had no other professional influence to support him, thus frequently obtained early employment in his profession from his fellow students, who thought he had the ability which would make him a good

lawyer, and a successful pleader for their clients. It was somewhat difficult in Scotland to appreciate the objections urged by those who opposed the proposal, that a satisfactory examination in certain legal studies should be essential to admission to the Bar. Such an examination was required in all other professions in the United Kingdom—existed in other countries in the case of lawyers—and even in England existed as a test of the qualifications of an attorney. The admission of a member of the Bar to practise not only conferred upon him that privilege, but also a title to hold certain judicial appointments and public employments, and, therefore, it appeared the more necessary that he should possess the real qualifications.

#### IRELAND.

THE Right Hon. W. Justice Lawson, LL.D., well known in recent years as M.P. for Portarlington, and Attorney-General for Ireland, read a paper at the January meeting of the Dublin Statistical Society (which fulfils for Ireland the duty of a Law Amendment and Juridical Society), "On the Practicability of Codifying English Law." At the same time he presented a specimen Code of the Law of Evidence. Mr. Justice Lawson agrees with Mr. Justice Willes, one of the Digest Commissioners, on the undesirability of proceeding further with a digest as a whole. He says, that the great excuse for doing nothing, because it would only be a part of a large scheme, does not apply to codification. The great advantage, he says, of codification is, that we can proceed by steps, first codifying one branch of the law and then another. Accordingly, Judge Lawson has prepared a Code of the Law of Evidence, in forty clauses, as a specimen, with the aim of giving a practical proof that the codification of the English law is not an impracticable or hopeless task. Into the special merits of the proposed Code we shall not enter fully, but will briefly point out the most important changes which the judge would make in the present law of evidence. Enunciating the principle, that "a code of the law of evidence should reject all unmeaning and trivial exceptions, and lay down the broad rule that no witness should be incompetent by reason of being a party or having any interest in the suit, or for any other reason," he extends the same rule to criminal proceedings. He discusses the reasons for and against this extension of the rule, and comes to the conclusion, as we are disposed to think rightly, that the discovery of truth, which should be the great object of all judicial investigations, would be promoted by it. He says, "I disapprove of the French system of interrogating the prisoner, but the true medium lies between that system and ours, namely, to allow the prisoner to explain on oath, if he desires, the circumstances of the case, and in that case *only* to subject him to interrogation." Accordingly, the Code provides—"VIII. Any person who in any criminal proceeding is charged with the commission of an indictable offence, or any offence punishable by summary conviction, shall be competent, but not compellable, to give evidence for himself, and if examined, shall be subject to cross-examination as any other witness." Mr. D. C. Heron, Q.C., M.P., who took part in the discussion which followed the reading of Mr. Justice Lawson's paper, observed, that the distinction between making the prisoner competent and compellable to give evidence is

in a great degree visionary. We are disposed to agree with this, on the ground that the refusal of a prisoner to give evidence, when he had the power to do so, would be taken by almost any jury as the almost conclusive strongest evidence of his guilt. Clause XIII., altering the rule excluding hearsay evidence so far as to admit conversations, if in the opinion of the judge material and relevant to the issue, meets with our entire approbation. A clause, borrowed from the Indian Code of Civil Procedure, remedies a great evil in our law. "XVIII. The improper admission or rejection of evidence shall not be ground of itself for a new trial, or for the reversal of any decision in any case, if it shall appear to the court before whom such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision." Mr. Justice Lawson would abrogate (Clause XXXVII.) the rule which excludes from the jury evidence of previous convictions of the prisoner. He objects to this as an instance in our criminal law of the desire to withhold full knowledge from the jury, and of a rule too favourable to the accused. It may be objected that the reception of such evidence would press unfairly upon a prisoner, as it could not fail to produce in the minds of the jury a strong, and often an unfair, prejudice against him. The law of evidence is perhaps the branch of our law which affords the greatest facilities for codification, but Mr. Justice Lawson adds it is the one in which a code would be of immediate practical benefit, and he believes the law of contracts, of bills of exchange, and some other branches of the law, are capable of being similarly dealt with. The law of real property, however, in its present state scarcely admits of being codified, and stands in need, Mr. Justice Lawson thinks, of a radical reform. On what can be done in that direction he has promised the Society to read a paper on another occasion.

We have to record the death of the Right Hon. John George, one of the Justices of the Queen's Bench in Ireland, of whom a biographical notice will appear in the next number. To the vacant seat on the Queen's Bench has been appointed the Right Hon. C. R. Barry, Attorney-General for Ireland, formerly M.P. for Dungarven. Mr. Serjeant Dowse, M.P., Solicitor-General, succeeds to the post of Attorney-General; and the office of Solicitor-General has been filled up by the appointment of Mr. Pallas, Q.C.

One of the oldest members of the Bar, Mr. J. W. J. Lendrick, Q.C., died on the 19th ult., in the 81st year of his age. Mr. Lendrick was called to the Bar of Lincoln's Inn, and subsequently at Dublin, in 1817, and was appointed Queen's Counsel in 1859. As advocate at the Bar he was not less accomplished than he was as chairman of County Sessions, an office he held for thirty-four years. The death is also announced of Mr. Loftus Bland, Q.C., chairman of the county of Tyrone.

## BOOK NOTICES.

[\* \* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

The Leaders of Public Opinion in Ireland—Swift, Flood, Grattan, O'Connell. By W. E. H. Lecky. London: Longmans, Green & Co. 1871.

THIS new edition of Mr. Lecky's book has been revised and enlarged. We have read the book and can say that it possesses all the marks of careful research and of that hard labour which make Mr. Lecky's books so readable. We are unable to point to any other source which gives so good an epitome of the history of Ireland during the last century and a half. The struggles of Ireland, her hardships, her impolitic and unjust treatment by England, have never been more ably or more temperately set forth. Grattan's life, on the whole, strikes us as being the best, though this may probably be due to the period of Irish history which Grattan filled. But the most interesting portion of the book is, we frankly own, the introduction. In this Mr. Lecky points out that while in England an even disproportionate amount of the natural talent takes the direction of politics, while the debates in Parliament are everywhere followed, in Ireland public opinion is diseased, Parliament is powerless upon it, allays no discontent, and attracts no affection. Political talent, he thinks, is declining. Sectarian considerations are superseding natural ones. A blind, persistent hatred of England is the predominant feeling. This melancholy state of things might be accounted for if the people were either ignorant or wretched. But the people of Ireland are neither. Mr. Lecky thinks that no country in Europe has advanced so rapidly as Ireland during the last ten years. He believes "that no reasonable man who considers the relative positions of the two countries can believe that England would ever voluntarily relinquish the government of Ireland, or that Ireland could ever establish her independence in opposition to England." He points out that no one would suffer so much by separation from England as the class by which revolutions are made. What then is the remedy? The three great requisites of good government for Ireland are, that it should be strong, that it should be just, and that it should be national. Without advocating home rule, he believes that we should do all we can to call into active political life the upper class of Irishmen, and to enlarge the sphere of their political power—to give, in a word, to Ireland the greatest amount of self-government that is compatible with the unity and the safety of the empire. An even greater danger than springs from the division of sects is that arising from the division of classes. But Mr. Lecky believes that the land Bill of Mr. Gladstone will do much to cure it. If it be possible to create a yeoman class between landlords and tenants, the facilities now given



to tenants to purchase their tenancies will create it. At any rate the interests of the tenant class have been more than ever united with those of their landlords. On the whole Mr. Lecky is hopeful.

**A Plea for the Home Government of Ireland.** By John George Maccarthy, author of "Irish Land Questions plainly Stated and Answered," &c. London: Longmans, Green & Co. 1871.

THIS book deals with the same subject as the introduction to Mr. Lecky's book, but, as its name suggests, it arrives at a different conclusion. The case on behalf of Ireland is remarkably well stated, and is a case which is not to be got rid of by such stupid sneers as some of our contemporaries have met it with. The arguments against home rule seem to us to be irresistible, but it is ridiculous to suppose that a local parliament, such as existed between 1782 and 1800, reformed as our own parliament has been reformed, would necessarily imply disruption of the empire or the alienation of Ireland. The objections which are usually made to the proposal are fairly stated and ably answered. We commend the book to all who wish to come to political conclusions by reason rather than by feeling.

**Disabilities of American Women Married Abroad.** Foreign Treaties of the United States in conflict with State Laws relative to the Transmission of Real Estate to Aliens, with Appendix. By William Beach Lawrence, LL.D. New York: Baker, Voorhis & Company. 1871.

THIS book deals with the disabilities of American women married abroad, and calls attention to the fact that, by the laws of New York, a woman belonging to the United States, in contracting a foreign marriage, is subjected to the disinherison of her offspring, while no such consequences to his descendants, arises from the marriage abroad of a man belonging to the same States. It contains also an appendix, giving a summary of the United States laws of naturalization and expatriation; the naturalization treaties with various German States, with Mexico, with Belgium, and our English Naturalization Act of 1870. Then follows a synopsis of the laws of different States respecting the holding of real estate by aliens, and a summary of the various treaties relative to the transmission of real estate to aliens. The work concludes with a very able paper from our own pages, contributed by Mr. Lawrence, on "The Marriage Laws of various Countries as affecting the Property of Married Women." It is sufficient to say that the author is the well known editor of *Wheaton* to let our readers know that the work is singularly painstaking and accurate.

**An Annual Digest of Criminal Law,** containing Cases decided and Statutes passed relating to Criminal Law, from Hilary, 1870, to Michaelmas, 1871, including the Prevention of Crimes Act, 1871, and the Act to Amend the Law relating to Trades Unions, 1871. By W. A. Warner Sleigh, of the Middle Temple, Barrister-at-Law. Vol. I. London: Shaw & Sons. 1871.

MR. WARNER SLEIGH's idea of a pocket annual digest of criminal law is a good one. The work is really what it professes to be, and

has the decided cases well posted up. We can recommend it heartily to our readers.

**The Session of 1871: an Epitome of its Labours and Results.** By Homersham Cox, M.A., a County Court Judge, Author of the "Institutions of the English Government," "Ancient Parliamentary Elections," "A History of the Reform Bills of 1866 and 1871," &c. London: Longmans, Green & Co. 1871.

THE object of the eighty-four pages which Mr. Cox has devoted to the session of 1871 seems to be mainly to show that that session was much more faithfully at work than most people imagine. He points to the fact, for example, that out of the nine subjects mentioned in the Queen's speech, Parliament legislated upon seven. Altogether 117 enactments were made, many of them of an extremely elaborate and intricate character. As a defence it is very good. It is an excellent summary, but we would suggest to Mr. Cox that with a little alteration, and with an index in which this volume is wanting, an annual summary of the kind would meet a want. We are not forgetting Mr. Ross's useful work, but any one who will take the trouble to compare the two will see that the aim of one is altogether different from that of the other.

**The Hindu Law, being a Treatise on the Law administered exclusively to Hindus by the British Courts in India.** By Herbert Cowell, Barrister-at-Law and Tagore Law Professor. London: Thacker & Co. 1871.

THE work under notice is a reprint of the Law Lectures delivered, during the year 1871, by the Tagore Law Professor to the students at the Calcutta University, and republished in accordance with the will of the founder of the professorship in view of furnishing a series of text-books useful to the legal profession. This second of the series is quite equal in value to the first; it is in fact in continuation thereof. The first volume treated of chiefly the Hindu Law of Adoption, and that relating to the Hindu family system. The second volume treats of the power of alienation of property possessed by Hindus. To discuss this it becomes necessary to discuss the law of succession according to the various schools of Hindu law, as it is out of the rights of succession by the heirs that spring the restraints on alienation by the ancestor. The right of alienation is treated of from both points of view, *i.e.* the right of alienation *inter vivos*, and the right of alienation by will. The exact nature and extent of the testamentary power possessed by the Hindus has always been, and even at the present time is, a matter of uncertainty. Sir William Jones and Mr. Colesbrooke, the great authorities on Hindu law, once expressed as their opinion (although the latter afterwards recanted) that the Hindu law knows no such instrument as a will. Such is not the doctrine now-a-days. The right of a Hindu to make a will is recognised; but the difficulty is to decide what property he is competent to dispose of by such will. This question is discussed in the eleventh and twelfth chapters of the work under notice, and the chief decisions of the Indian courts are therein collected, so that to that

source we must refer our readers. We must, however, note this—a Hindu will need not be made with any formalities, nor need it be in writing, except in cases governed by the Hindu Wills Act, 1870, which makes the provisions of the Indian Succession Act, 1865, as to the execution of a will (these provisions are founded on, and almost identical with, those of the English Wills Act), applicable to wills made by Hindus after the 31st of August, 1870, in Lower Bengal, and in the towns of Madras and Bombay. It will be observed that this Act has only a partial operation, and that in all other cases the old rules remain firm. Finally, there is in the work under notice a chapter on contracts, which subject is, however, treated of very briefly, the reason alleged being the imminence of a Contract Code, which is to supersede all existing law. As this code has been imminent for some years, and may be so for some years to come, we wish that Mr. Cowell had made the discussion of this branch of Hindu law as complete as he has made that of the other branches to which he has hitherto addressed himself.

**A Concise Manual of the Law relating to Vendors and Purchasers of Real Property.** By Henry Seaborne. London: Butterworths. 1871.

THE writer of this manual aims at producing a work which shall hold to Sugden and Dart's elaborate treatises a position resembling that which Mr. Smith's well-known Manual of Equity holds to Spence and Story's completer treatises. This aim was a most laudable one, and the profession would (if we judge of others by ourselves) gladly welcome any manual which should accomplish it with average perfection. Mr. Seaborne's manual, we regret to say, has not accomplished it, in the way, at least, that the practising portion of the profession would desire; we mean, in particular, that the amount of the information which it contains is utterly inadequate to serve the purposes of practice. It is a congeries of miscellaneous matters somewhat loosely strung together in respect of their connection, and incomplete in respect of their amount. The one utility which may possibly give value to the manual is, its verbatim repetition of all the modern Acts of Parliament bearing upon that portion of the law which is the subject of it; for example, chapter xiv. is a literal transcription of all these sections in the Stamp Act, 1870, which are relevant to that subject, but a transcription, let us add, which is unaccompanied by either comment or illustration.

**A Manual of the Laws affecting Medical Men.** By Robert George Glenn, LL.B., late Scholar of Magdalene College, Cambridge. London: J. A. Churchill and Stevens & Sons. 1871.

"THE history of surgery," says the author, "is almost synonymous with that of humanity," but we expect it was a history very different from the conservative science of these days. Rough must have been the implements, and rougher still their application, in those days of Druidism to which we are here referred, and according to Mr. Glenn, we are only returning to early historical practice, in recognizing woman as pre-eminently a physician if not a surgeon.

And, therefore, the Americans are "almost conservative in their efforts to revindicate woman's place among doctors."

\* We shall quite agree with the author in the honourable estimation in which he holds the science and art of physic, and the honourable place he assigns to its practitioners. The preface tells us the book is mainly intended to be useful as a guide to the medical profession, and we believe it will accomplish this object, while we quite agree with the writer that "it will not on every occasion obviate the necessity for consultation with a lawyer." For the axiom may with equal appositiveness be applied to either profession that, whether doctor or lawyer, he has, when he undertakes the management of his own case, some one not in the category of wise men for his client. The book must be of great use to medical men as collecting together the rules and regulations which on the part of various universities and colleges govern the admission of candidates to the medical profession, giving further the Statute for registering medical men, and even somewhat further than the medical profession in treating of the laws relating to the Pharmaceutical Society, and the registration of pharmaceutical chemists. Indeed, if we may venture to divine the feelings of our medical men, we may imagine some little disapprobation at the want of any dividing line being laid out in the book between chemists, dentists, and practitioners of medicine and surgery.

The army and navy medical services, the Privy Council medical officer, the appointments of surgeons to the prisons and to unions, public vaccinators, officers of health, are all cleverly treated of, and the position, rights, and duties of the several offices and officers succinctly explained and illustrated. A large and not the least interesting and valuable portion of the work is devoted to the subject of the rights, and privileges, and duties, and obligations of medical men generally, whether in ordinary practice, or in their relation to the State in various capacities—such as witnesses in courts of justice, as certifying to the condition of alleged lunatics, or a keeper of lunatic asylums, &c., &c. In the appendix is an excellent paper, or what is called "medical etiquette," a misnomer in our opinion in not fairly expressing the importance of the subject of medical ethics. The public are apt to imagine from this name that this is some absurd code of rules established by medical men for their own grandeur, or in protection of their own special and individual interests, whereas in truth it is the public who are the most interested in the matter, and who should be the staunchest upholders of medical etiquette, so called for their own sakes. We candidly agree, therefore, with Dr. Carpenter's able exposition of the subject, and should be glad to see his rules for the conduct of medical practice, whether in relation to the public or to the practitioner, universally prevail.

#### SMALLER BOOKS AND PAMPHLETS.

*The Law relating to Trades Unions*, by E. W. Brabrook Assistant Registrar of Friendly Societies in England (Shaw & Sons, Fetter Lane; price 1s. 6d.), is a cheap hand-book, which will be of use to both professional and non-professional readers. Its usefulness

will be increased by its good index. *The Parish in History and in Church and State*, by an Hereditary High Churchman (the Church Printing Company, 13, Burley Street; 6d.), is an interesting little pamphlet. The writer's great effort is to show that the parish organization is what its name would imply, an organization for all local purposes, and not for church purposes only. He points out that church rates were intended, and were used at one time, for all parish purposes, that, in fact, they ought to have been called parish rates; that they provided funds for all parish purposes, for the repair of the church, of the roads, the destruction of moles and owls, and other general purposes. There is considerable curious learning in the pamphlet, and although we should dissent from some of the writer's conclusions, his industry and ability are entitled to respect. *A Handy Book of Privy Council Law* (B. M. Pickering, 196, Piccadilly). I. Ecclesiastical Cases; II. Patent Cases, is an entire misnomer. As to the division here indicated seventy-four pages are taken up by Part I., and two pages by Part II. The book is really an attack on the jurisdiction of the Privy Council in ecclesiastical cases. It is written from an extreme high church view and is well done. The writer really shows that the judgments of the Court have not been anything like uniform, but have wavered with the times.

We have also before us an excellent paper by Mr. David Pitcairn *On the Winding-up of Life Insurance Companies*, read before the Juridical Society (Wildy & Sons, Lincoln's Inn Archway). In *Proposals for the Application and Extension of Admiralty Jurisdiction to the Mayor's Court of London, in Default of a Royal Commission appointing the Court of Hustings in London, for the Administration of Admiralty and Maritime Jurisdiction in and for the City and Port of London*, we have a paper by Mr. J. H. Torr, the purport of which is surely sufficiently indicated by its title. He thinks that the proposed removal of the Court of Hustings has been provoked by "the ungracious way" in which the presiding judge in the City of London Court has declined to perform without remuneration the additional duties imposed upon him in the administration of Admiralty jurisdiction which was conferred on this City Court by reason of its being declared to be "a County Court." The pamphlet, however, does not even attempt to show that the course suggested is necessary for the furtherance of public business. The *Ancient Land Settlement of England* is a lecture delivered at University College, London, by Mr. Willis Bund, Professor of Constitutional Law and History. It is an honest attempt to work in the same mine in which Nasse and Von Maurer have already worked with such success, and is well worthy of careful attention by all who take an interest in the ancient land settlement of the country. Mr. Archibald Dobbs has contributed a paper on *General Representation on a Complete Readjustment and Modification of Mr. Hare's Plan*. (Longmans, Green & Co., 1871: price 1s. 6d.) It appears to us that the best course to adopt in regard to all proposals for this kind is to have them thoroughly discussed before some such society as the Social Science Association. Nothing so completely enables a man to prove the strength of his case, as well as its weak points, as this kind of

discussion. Mr. Hare's plan has, we believe, been thus discussed over and over again. Bentham's old pupil, and one into whom he has infused much of the same largeness of view, and grasp of big propositions, recently remarked that Bentham would have been the first to avail himself of the means now at hand of having his proposals submitted to this test, and of deriving such suggestions from the discussions as invariably turn up. Of the *Law of Husband and Wife*, by Philo-Familias (Hatton & Son, 22, Chancery Lane), with reference to the Married Women's Property Act of 1870, the less said the better. It is full of unmitigated nonsense, of which the following is a specimen:—"Neither Writers, Orators, nor Legists seem to be fully alive to the importance of the fact that a *Gift to a wife for her separate use* [neither the capitals nor the italics are ours] is enough of itself to bring ruin upon herself, husband, and family." Mr. Vernon Harcourt's *Plan for the Amendment of the Law*, that is, his address at Leeds before the Social Science Association, is far too elaborate a production, and has had far too much careful thought bestowed upon its suggestions, to be dealt with in summary fashion. For the present, while we do not pretend to agree with everything, we have no hesitation in saying that the country owes a debt of gratitude to the writer for a bold, comprehensive, scientific plan of law reform. It is the plan of a statesman, as well as of a lawyer. We hope, before long, to see Mr. Harcourt in a position where he will be able to carry into effect the amendment of our legal system on the broad lines which he has indicated. At the same gathering Mr. W. A. Jevons contributed an excellent paper on the subject of *Legal Education*. His views are far from identical with those expressed by Mr. Edgar, but they are ably expounded, and have much to be said in their favour.

## CALLS TO THE BAR.

*Michaelmas Term, 1871.*

SINCE the last issue of the *Magazine* the following calls have been made :—

INNER TEMPLE.—Theodore Ribton, Esq., B.A., Cambridge, holder of the studentship awarded in Trinity Term last; Hugh Francis McDermott, Esq., B.A., Dublin, holder of an exhibition awarded in July, 1870, and of an exhibition awarded at the general examination in Trinity Term last; Seward William Brice, Esq., M.A., LL.B., London, holder of an exhibition awarded in Michaelmas Term, 1870; Thomas Tomlinson, Esq., jun., M.A., Oxford; Charles Edmund Maurice, Esq., B.A., Oxford; Andies Ferdinand Stockenström Maasdorp, Esq., B.A., London; James Mowatt, Esq., M.A., Cambridge; Clement Higgins, Esq., B.A., Cambridge; Charles Comyns Tucker, Esq., M.A., Oxford; Forster M'Geachy Alleyne, Esq., B.A., S.C.L., Oxford; Frederic Philip Tomlinson, Esq., M.A., Cambridge; Charles Mellor, Esq., B.A., Cambridge; George Disney Jelf, Esq., M.A., Oxford; Hercules Tennant, Esq.; Robert Bruce Russell, Esq., B.A., S.C.L., Oxford; John Alexander Scott, Esq., B.A., Oxford; Samuel Thomas Fitzherbert, Esq., B.A., Cambridge; Edgecumbe Ferguson Edwards, Esq., B.A., Cambridge; Henry Warlters Horne, Esq., B.A., Oxford; Charles George Oates, Esq., B.A., Cambridge; Hon. Henry Robert Orde Powlett, B.A., Cambridge; Charles Conyers Massy Baker, Esq., B.A., Oxford;

Charles Erskine Vertue, Esq., B.A., Oxford; Charles Edward Cuthell, Esq., Cambridge; John Dickinson, Esq., LL.B., Cambridge; John Harvey Torrens Roupell, Esq., B.A., Cambridge; William Edward Nicolson Browne, Esq., Oxford; Louis Bingham Gaches, Esq., B.A., LL.B., Cambridge; Charles Doyle, Esq.; John Lucas Walker, Esq., LL.B., Cambridge; Charles Henri Louis Webster Wilmot, Esq.

**MIDDLE TEMPLE.**—Allan William O'Neill, Esq., B.A., Trinity College, Dublin; William Litton Woodroffe, Esq., B.A., Trinity College, Dublin; Maurice Denis Kavanagh, Esq., LL.D.; Samuel Lewis, Esq., of the University of London; Alfred Cook, Esq., of University College; John Stapleton Martin, Esq., B.A., Christ's College, Cambridge; Herbert Appold Grueber, Esq.; George Woodford Sherlock, Esq., B.A., Trinity College, Dublin; George Edward Aubert Ross, Esq.; Henry Watts Rooke, Esq.; Ellis James Davis, Esq.; Harry Whiteside Cook, Esq.; Walter Charles Henry Sutherland, Esq.; John Edwin Howard, Esq.; Reginald Charles Edward Plumptre, Esq.; Lewis Edmund Glyn, Esq., of Magdalen Hall, Oxford; Henry Perrean de Tourville, Esq.; Felix Henry Gottlieb, Esq.

**LINCOLN'S INN.**—John Watt Smyth, Esq. (certificate of honour, first class, C.L.E.), of the Queen's University in Ireland; George Somes, Esq., M.A., Oxford; David Fitzgerald, Esq., University of London; George Edward Sherston Baker, Esq.; Alfred John Pound, Esq., B.A., Oxford; George Farwell, Esq., B.A., Oxford; Alfred Andrew Andrew, Esq., B.A., Cambridge; Edward Bond, Esq., M.A., Fellow of Queen's College, Oxford; Henry Edward Sweeting, Esq., B.A., Oxford; Lord Edmond George Fitzmaurice, B.A., Cambridge; Malcolm Gasper, Esq., Calcutta University; Edward Stanley Roscoe, Esq.; Ernest Edwin Witt, Esq., M.A., Fellow of St. Peter's College, Cambridge; Edmund Robertson, Esq., Fellow of Corpus Christi College, Oxford, and Vinerian Scholar, M.A., University of St. Andrews; Ernest Mathews, Esq., B.A., Oxford; Thomas Francis Alexander Day, Esq.; Marcus William Mott, Esq.; Hugh Eden Eardley Wilmot, Esq.; Samuel James Rice, Esq., of Queen's College, Cambridge; Malcolm Peter Gasper, Esq.

**GRAY'S INN.**—Edward Osborne Hilliard, Esq., of the Irish Bar; John Proctor, Esq. (Lee prizeman, 1870).

### *Hilary Term, 1872.*

**LINCOLN'S INN.**—Mr. Alfred Barratt, B.A., Oxford (Eldon scholar); Mr. Charles George Danford, B.A., Cambridge; Mr. Bertram Savile Ogle, B.A., Oxford; Mr. Samuel Winter Cooke, B.A., Cambridge; Mr. Frank Challice Constable, B.A., Cambridge; Mr. George Holmes Blakesley, M.A., Fellow of King's College, Cambridge; Mr. Jacob Edward Harvey, B.A., Cambridge; Mr. Henry Staffurth, LL.B., Cambridge; Mr. Thomas Allen Hulme, B.A., Dublin; Mr. Herbert Edward Hull, B.A., Oxford; Mr. Charles Lane Sayer, Trinity Hall, Cambridge; Mr. John Silvester, jun., B.A., Oxford; Mr. Frank Lockwood, B.A., Cambridge; Mr. Somers Reginald Lewis; Mr. Ferdinand Mauger Whiteford; Mr. Philip Henry Lawrence; Mr. Andrew Laidlay, M.A., and B.C.L., Oxford; Mr. Samuel Lee, M.A., Cambridge; Mr. Charles Edward Heley Chadwyck Healey; Mr. Edmund Richard Gayer, B.A., Dublin; Mr. Walter Bishop Kingsford, M.A., Oxford; Mr. William Henry Bullock, B.A., Oxford; Mr. Arrakiel Peter Gasper; and Mr. Thomas Watt Smyth, M.A., of the Queen's University, in Ireland (Bengal Civil Service).

**MIDDLE TEMPLE.**—Mr. Hiram Shaw Wilkinson, B.A., Queen's University, Ireland, holder of the Studentship awarded by the Council of Legal Education, Michaelmas Term, 1871; Mr. James Dyer Trémlett, M.A., Sidney Sussex College, Cambridge, holder of a Certificate of Honour awarded by the Council of Legal Education, Trinity Term, 1871; Mr. James Simpson Carson, of Worcester College, Oxford; Mr. Allan Camp-

bell, B.A., Exeter College, Oxford; Mr. Arthur Greville Dowler; Mr. Arthur Entwisle, M.A., Balliol College, Oxford; Mr. Richard Fletcher Wilme; Mr. Bernard Charles Molloy; Mr. Frank Safford; Mr. John Henry Boome; Mr. George Peter Martin; Mr. George Henry Wavell; Mr. Thomas Wm. Carmalt Jones, B.A., Emmanuel College, Cambridge; and M. Pierre Ludovic François Clement Langlois.

**INNER TEMPLE.**—Mr. Philip Colley, B.A., London; Mr. Herbert Alexander Wix, LL.B., Cantab; Mr. Thomas Holme Cardwell, B.A., Oxford; Mr. Charles John Howe, B.A., Cambridge; Mr. Reginald Godfrey Marsden, B.A., Oxford; Mr. Bowen May, jun., M.A., S.C.L., Oxford; Mr. Charles Frederic Davison, B.A., Cambridge; Mr. John Edmund Linklater, B.A., S.C.L., Oxford; Mr. Arthur Frederick Jeffreys, B.A., Oxford; Mr. William Charles Gayner, M.A., Oxford; Mr. William Henry Thompson, M.A., Cambridge; Mr. Charles Norman Bazalgette, B.A., Oxford; Mr. George Rodie Thompson, B.A., Cambridge; Mr. Walter Bradford Woodgate, M.A., Oxford; Mr. Francis Adams Ilyett, B.A., Cambridge; Mr. Hungerford Tudor Boddma; Mr. Clement Ireby Fisher; Mr. Robert Morris, M.A., Cambridge; Mr. John Winterbotham Batten; Mr. Tindal Arthur Pearson, B.A., Cambridge; Mr. Henry John Pattison; and Mr. Thomas Robert Stokoe.

**GRAY'S INN.**—Mr. Edward Henry Hunt.

## INNS OF COURT EXAMINATION.

At the general examination of students of the Inns of Court, held at Lincoln's Inn Hall, on October 30 and 31, and November 1, the Council of Legal Education awarded to Mr. Hiram Shaw Wilkinson, student of the Middle Temple, a studentship of fifty guineas per annum, to continue for a period of three years; to Mr. James Owens Wylie, student of the Middle Temple, an exhibition of twenty-five guineas per annum, to continue for a period of three years; to Mr. Edward James Ackroyd, student of the Middle Temple; to Mr. Robert Forster McSwinney, student of the Inner Temple; and to Mr. Gustavus Adolphus Smith, student of Gray's Inn, certificates of honour of the first class; to Mr. Charles C. M. Baker, student of the Inner Temple; to Mr. Charles Norman Bazalgette, student of the Inner Temple; to Mr. Samuel William Casserley, student of the Middle Temple; to Mr. Samuel Winter Cooke, student of Lincoln's Inn; to Mr. Charles Doyle, student of the Inner Temple; to Mr. David Fitzgerald, student of Lincoln's Inn; to Mr. Samuel Thomas Fitzherbert, student of the Inner Temple; to Mr. Robert James Forrest, student of Lincoln's Inn; to Mr. Malcolm Peter Gasper, student of Lincoln's Inn; to Mr. Thomas Joseph Greenfield, student of Gray's Inn; to Mr. Henry Appold Grueber, student of the Middle Temple; to Mr. William Frederick Hunter, student of Lincoln's Inn; to Mr. Walter Bishop Kingsford, student of Lincoln's Inn; to Mr. Charles Edward Lanauze, student of the Middle Temple; to Mr. Samuel Lewis, student of the Middle Temple; to Mr. Somers Reginald Lewis, student of Lincoln's Inn; to Mr. Reginald Godfrey Marsden, student of the Inner Temple; to Mr. Richard Owen Stewart Morgan, student of the Inner Temple; to Mr. Raj Narain Mitra, student of the Middle Temple; to Mr. Maurice O'Connor Morris, student of the Middle Temple; to Mr. Bedford Clapper-ton, Trevelyan Pim, student of the Inner Temple; to Mr. Anderson Souttar, student of Lincoln's Inn; to Mr. Thomas Robert Stokoe, student of the Inner Temple; to Mr. George Henry Wavell, student of the Middle Temple; to Mr. Hugh Eden Eardley Wilmot, student of Lincoln's Inn; and to Mr. Charles Palmer Bluett Wiltshire, student of the Middle Temple, certificates that they have satisfactorily passed a public examination.



## THE FINAL EXAMINATION.

*Michaelmas Term, 1871.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Edward Worsfield Mowll, Henry Kemp Avory, John Edward Jones, Arthur John Binney, William Wood, Charles Edward Stevens, Frederick Walker.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books:—To Mr. Mowll, the Prize of the Honourable Society of Clifford's Inn; to Mr. Avory, the Prize of the Honourable Society of Clement's Inn; to Mr. Jones, Mr. Binney, Mr. Wood, Mr. Stevens, and Mr. Walker, Prizes of the Incorporated Law Society.

The Examiners also certified that the following candidates, under the age of 26, passed examinations which entitle them to commendation:—Onesimus Smart Bartlett, Stephen Nelson Braithwaite, Arthur Edward Peile, George Herbert Steinberg, Edward Francis Turner. The Council have accordingly awarded them certificates of merit.

The Examiners also reported that among the candidates from Liverpool, in the year 1871, Mr. William James Winstanley passed the best examination, and was, in the opinion of the Examiners, entitled to honorary distinction. The Council have therefore awarded to Mr. Winstanley the Prize, consisting of a Gold Medal, founded by Mr. Timpron Martin, of Liverpool.

The Gold Medal founded by Mr. John Atkinson for candidates from Liverpool or Preston who have shown themselves best acquainted with the law of real property and the practice of conveyancing has also been awarded to Mr. Winstanley.

The Examiners also reported that there was no candidate from Birmingham in the year 1871 who was, in their opinion, entitled to honorary distinction. The Council have communicated this report to the Birmingham Law Society.

Mr. Stephen Nelson Braithwaite having, among the candidates in the year 1871, shown himself best acquainted with the law of real property and the practice of conveyancing, the Council have awarded to him the Prize, consisting of a Gold Medal, founded by Mr. Francis Broderip, of Lincoln's Inn.

The number of candidates examined in this Term was 152; of these 130 passed, and 22 were postponed.

## APPOINTMENTS.

SINCE the last issue the following appointments have taken place:—

Sir Robert P. Collier, as Justice of the Common Pleas; the Right Hon. Mr. Justice Smith, the Right Hon. Sir James W. Colville, Mr. Justice Collier, and the Right Hon. Montague Bernard, D.C.L., as members of the Judicial Committee of the Privy Council; Mr. Justice Montague Smith, Baron Pigott, and Mr. Justice Hannen, selected to try election petitions for the current year; Mr. W. R. Grove, Q.C., Judge of the Court of Common Pleas; Mr. Quain, Q.C., Judge of the Court of Common Pleas; Mr. T. J. Bradshaw, Judge of the County Court of Newcastle-upon-Tyne; Mr. F. C. McTaggart, Judge of the Marylebone County Court; Mr. James Stephen, LL.D., Judge of the Lincolnshire County Court; Mr. Richard Harington, Magistrate of the Hammersmith Police Court, and afterwards Judge of the County Court; Mr. J. B. Aspinall, Q.C., Attorney-General for the County Palatine of Lancaster. The following Barristers have been raised to the dignity of Queen's Counsel:—Mr. T. C. Renshaw, Mr.

Leofric Temple, Mr. Charles W. Wood, Mr. Æneas McIntyre, Mr. William J. Bovill, Mr. S. B. Bristowe, M.P., Mr. John Day, Mr. J. B. Torr, Mr. Nathaniel Lindley, Mr. J. Napier Higgins, Mr. Thomas H. Fischer, Mr. James Kemplay, Mr. Theodore Aston, Mr. A. E. Miller, Mr. Charles Russell, Mr. Farrer Herschell. Mr. Serjeant Sargood has a patent of precedence next after Mr. Samuel Pope. Mr. J. W. Mellor, Recorder of Grantham; Sir Henry S. Maine, K.C.S.I., Member of the Council of the Secretary of State for India; Dr. A. R. Adams, Q.C., Assessor to the Chancellor's Court of the University of Oxford; Mr. John Bridge, Stipendiary Magistrate of Wandsworth and Hammersmith; Mr. Joseph Henry Warner, Counsel to the Chairman of Committees of the House of Lords; Mr. Edward Bromley, Clerk of Assize on the Northern Circuit; Mr. C. J. Middleton, Principal Registrar of the Court of Probate; Mr. J. O. Griffiths, Junior Counsel to the Admiralty; Mr. J. J. Johnson, Taxing Master of the Court of Chancery. The Benchers of the Inner Temple have appointed the following gentlemen "tutors" for 1872:—Jurisprudence and Civil Law, Mr. Sheldon Amos; Real Property, Mr. C. S. Medd; Common Law, Mr. Arthur Wilson; Constitutional Law, Mr. J. J. Hooper; Equity, Mr. George Wells. Mr. G. P. Bidder, Barrister-at-Law, Secretary to the Royal Commission to inquire into the loss of the *Megara*; Mr. H. Leigh Pemberton, Solicitor to the Suitors' Fund of the Court of Chancery; Mr. William Charles Ward, Solicitor, Deputy Prothonotary of the Court of Pleas of Durham; Mr. Henry De Jersey, Solicitor, Secondary of the City of London; Mr. C. Grey Spittal, Sheriff-Substitute of Ross-shire, at Stornoway; Mr. R. Craig, Sheriff of Dumbartonshire; Mr. Thomas Rice, Solicitor, Crown Prosecutor for the East Riding of the county of Cork; Mr. Ridgway Harrison, Receiver-General of the Isle of Man; Mr. James Armstrong, Chief Justice of the Isle of St. Lucia; Mr. J. Pitt Kennedy, Puisne Judge of the High Court of Bengal; Mr. Francis Snowdon, Senior Magistrate of the Straits Settlements; Mr. Charles Jeffrey, District Magistrate in Jamaica. Mr. Richard Copley Christie, Barrister-at-Law, Chancellor of the Diocese of Manchester.

## NECROLOGY.

*October.*

- 3rd. MOODIE, Asleck, Esq., Barrister-at-Law, aged 33.
- 21st. SMITH, R. Bryan, Esq., Solicitor, aged 78.
- 22nd. CHILD, C. Morgan, Esq., Solicitor, aged 23.
- 26th. COLLING, Thomas, Esq., Barrister-at-Law, aged 69.
- 28th. TEED, J. Godfrey, Esq., Q.C., County Court Judge, aged 77.

*November.*

- 1st. GREENWOOD, Thomas, Esq., Barrister-at-Law, aged 80.
- 2nd. MYERS, J. Postlethwaite, Esq., Solicitor.
- 3rd. ASTON, William, Esq., Solicitor, aged 54.
- 4th. TRIPP, R. Stevens, Esq., Barrister-at-Law.
- 5th. FOSTER, William, Esq., Barrister-at-Law, aged 52.
- 10th. BIRD, John, Esq., Solicitor, aged 55.
- 12th. GODLEE, Rickman, Esq., Barrister-at-Law, aged 67.
- 15th. WALKER, Edward, Esq., Solicitor, aged 37.
- 15th. MADDOCK, Charles, Esq., Solicitor.
- 18th. SMITH, A. Lockhart, Esq., Barrister-at-Law, aged 29.
- 18th. ALDERSON, F. Bennet, Esq., Solicitor.
- 21st. PARK, Alexander A., Esq., Senior Master of the Court of Common Pleas, aged 69.

- 24th. HAYWARD, Philip, Esq., Barrister-at-Law.
- 24th. CHAPMAN, William, Esq., Solicitor, aged 77.
- 26th. LLOYD, W. Hodson, Esq., Barrister-at-Law, aged 29.
- 27th. CARGILL, Hon. Jaspar F., a Judge of the Supreme Court of Jamaica aged 65.
- 27th. POWELL, James, Esq., Solicitor, aged 77.
- 28th. HARVY, Moses W., Esq., Solicitor, aged 72.
- 29th. KIRKBANK, John, Esq., Solicitor, aged 39.
- 29th. REEVES, J. Frederick, Esq., Solicitor, aged 60.
- 29th. KIPLING, J. Philip, Esq., Solicitor, aged 63.
- 30th. TINNEY, William H., Esq., formerly Master in Chancery, aged 77
- 30th. PAYNE, G. A., Esq., Barrister-at-Law, aged 60.

*December.*

- 1st. BRETT, Wilford G., Esq., Barrister-at-Law, aged 56.
- 7th. HEATON, C. H., Esq., Barrister-at-Law, aged 80.
- 7th. HUMPHRYS, William, Esq., Solicitor, aged 74.
- 10th. TEPPER, Jabez, Esq., Solicitor, aged 54.
- 12th. WILLIAMS, G. Henry, Esq., Solicitor, aged 52.
- 13th. BLAINE, D. Robertson, Esq., County Court Judge, aged 64.
- 17th. WAGSTAFFE, W. Godwin, Esq., Solicitor.
- 21st. COOKE, J. Malsbury, Esq., Solicitor.
- 21st. DAVIDSON, Harry, Esq., a District Judge of Jamaica.
- 22nd. WILLIAMS, Lewis W., Esq., Solicitor, aged 61.
- 23rd. BAYLEY, Sir John E. G., Bart., Barrister-at-Law, aged 78.
- 23rd. GRIFFITH, E. Clavey, Esq., Solicitor.
- 24th. MAYER, Samuel, Esq., Solicitor, aged 61.
- 24th. MIDDLETON, Joseph, Esq., Barrister-at-Law, aged 52.
- 25th. WINTERBOTHAM, Lindsey, Esq., Solicitor, aged 72.
- 26th. THORNE, William, Esq., Solicitor, aged 67.
- 27th. SEEVAN, J. Watton, Esq., Barrister-at-Law, aged 32.
- 29th. MASON, Joseph, Esq., Solicitor.
- 29th. EDEN, John, Esq., Solicitor, aged 66.
- 29th. BEADY, Sir Francis, late Chief Justice of Newfoundland, aged 62.

*January.*

- 8th. CUFFE, William L., Esq., Barrister-at-Law.
- 10th. CLOWES, J. Ellis, Esq., Barrister-at-Law, aged 82.
- 10th. MORGAN, John, Esq., Barrister-at-Law.
- 15th. VERNON, Hon. Gowran, C.B., Barrister-at-Law, aged 47.
- 24th. FORSHAW, Henry, Esq., Solicitor, aged 62.

THE  
LAW MAGAZINE AND REVIEW.

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No. II.—MARCH 1, 1872.

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I.—ADDRESS OF M. ROUSSE, BATONNIER OF  
THE FRENCH BAR.

THE following is a translation of part of the “Discours” delivered by M. Rousse, Batonnier of the Order of Advocates at Paris, at the opening of the Courts after the Long Vacation on the 2nd of December in the last year.

It is not universally known that in France the Order of Advocates is governed by an elected council of discipline, at the head of which is the batonnier, elected annually. The appointment is highly esteemed and respected, and the choice invariably falls on some gentleman distinguished for learning, character, and position. It is his duty on the opening of the Courts to pronounce to the assembled Bar a “discours” of a nature analogous to that annually pronounced by our eminent surgeons and physicians at our hospitals. The translator has confined himself to rendering so much only of the lecture as is of general interest, and as touches certain plague spots from the infection of which our own Bar is not free. The remainder refers to the part which the Bar took in the late war, and to the numbers who had died in the course of the year either naturally or on the field of battle. We trust that the echo of the lecturer’s noble, and generous, and wise sentiments will not be heard on this side of the water without profit and pleasure to many of our readers.

MY DEAR COMRADES,—When for the second time you elected me batonnier of your order, I came under an engagement to you which I am here to-day to discharge.

I told you that I would narrate the history of the Paris

Bar during the war, and under the reign of the Commune. It is a sad record, but we may derive from it instruction to which we ought to lend an ear, and lessons which we must learn to turn to account.

Struck down by such calamities as we have undergone, it is childish to blame fortune, or to accuse one single individual of such accumulated disasters. People reduced to hopeless slavery have alone the right to throw all the reproach on their master, and a nation which could be prostrated by the crimes of a single man deserves that the prostration should be eternal.

The fault is all our own; let us have the manly courage to own it. Every one of us, with a common eagerness, has had a hand in our ruin, and the foolishness of nearly every one of us has rendered that possible, of which the folly of one man has laid the foundation.

The Bar must take its place amongst the crowd of criminals, and by an effort of self-sacrifice must leave to no one else the right to point a finger at its delinquencies.

Whilst running over the legends of this disastrous year, I have fallen on some instances of glorious devotion, of generous sacrifices, of heroic virtues, and of acts which will live in the memory, and of which you may justly be proud. But, on the other hand, from the walls of this palace, from the ruins which surround us, in the making of which time has had no hand, accusing voices have, within my hearing, been raised against you; bitter reproaches have been launched against you, as if you were in truth the embodied country. Did I not recall them to you, the story I am about to rehearse would be neither honest nor useful, and this is no time for frivolous talk. We have had enough of self praise. The time has arrived for knowing and judging ourselves. To the young men that surround me, it is my duty to point out the dangers that beset them on their line of march, and it is for them, on their part, looking at their own interests, to think less of the merits they may justly claim, than of the duties they have sometimes forgotten.

Why should I not speak out? At this moment the Bar is in ill odour. Flattery without limit is followed by accusations without justice. The public is ready to lay on its back the crimes of the whole country, and many are they who, having with a blind infatuation incited the Bar to mix itself up with the political world, are now asking what business they have there, and what can be done to bring about their perpetual exclusion? In this we may observe the caprice which is habitual to democracies—shafts of childish spite, by which, when troubles fall on them, they love to distract their minds from the strokes of ill fortune. But think of the

matter as we will, amongst a people free or desirous of freedom, that is to say, wherever the litigation of citizens and the affairs of State are matters of open and public discussion, advocates must have, in the council of the nation, a position at once legitimate and inevitable. Were they to retire altogether from politics, compulsion, doing violence to their modesty, must force them to a participation in public affairs. For the last sixty years, however, there has been no occasion in France to resort to this extremity.

Under the government of the Bourbons, our manners and institutions presented many temptations to the Bar, but the advocates were not readily seduced by them, and yielded only with a timidity which to us of the present day is surprising. It was in the Courts rather than in Parliament that they sought at that time consideration and celebrity.

The military conspiracies of the first years of the Restoration, and the prosecutions of the Press which succeeded, gave to the Bar illustrious clients and favourable opportunities for gaining popularity. But, under those circumstances, the Bar gave proofs of a praiseworthy discretion—it was represented in those brilliant conflicts only by the ablest and the most celebrated. If some juniors succeeded in fortunate openings, their talent sufficiently justified their boldness, and in their youthful enthusiasm, and the rush of their undisciplined eloquence, one might easily detect qualities which in due time would confer on them a legitimate title to celebrity.

The Revolution of 1830 exposed the Bar to a formidable temptation. Under a liberal government, which set so great a store on oratory, the Bar played an important part in politics, but it would be a departure from my present functions to trace their history. Equal success was not their lot, but nearly all proved worthy of their positions, and one of them, engaged in combats the most hotly contested and opposed to adversaries the most illustrious, remained by common consent the greatest orator of our age.\*

But before long, what with the noise of parliamentary strife, and the agitation of popular movements, the spirit and discipline of the Bar showed symptoms of decay. At the courts, politics by degrees took precedence of business—they were everywhere; they invaded the lobbies and the halls of justice, but rarely indeed were their utterances heard from the lips of the most experienced or the wisest.

Then might be seen emerging from the lowest ranks, from the most obscure and the youngest of the Bar, an intrusive activity, a crowd of impatient aspirants, who looked to their profession for nothing but the means and

\* M. Berryer.

opportunity of notoriety. Then might be seen intruding here, in the very midst of our youthful members, the worst practices of popular governments—the earnestness for distinctions and appointments—canvassing and intrigues. The dignity of the Bar was besieged by presumptuous men of mature age and beardless politicians as a sure road to fortune, and before long, the evil increasing from bad to worse, instead of leaving to our seniors the government of our little republic, these were called to account for their political and religious opinions. Instead of listening to their mode of conducting their clients' causes, their views on the affairs of Europe were demanded. That was a great calamity for us and was the seed of many others. It grew without ceasing, and towards the end of the reign of the House of Orleans the evil had become absolutely intolerable.

Twenty years have elapsed, but as is always the case with us as we grow old, it seems but as yesterday. It was just there, in that narrow and dark chamber, that all day long the affairs of France and the world were debated with noise and hubbub. Nothing could be more singular than that swarm of black gowns, crowding round the orators, presenting at a distance the appearance of the excitement of a parliamentary debate. There were discussed to exhaustion plans of campaigns and projects of constitutions. There the news of the day, and the events of the period, were freely agitated. And there, as elsewhere, was seen that wonderful mixture of folly and wisdom, which is at once the eternal despair and the eternal hope of this country. Nowhere in France I do believe was more nonsense uttered with gravity, but most certainly nowhere was there a more useless expenditure of talent.

Sometimes, in that chattering corner, unexpected capacities came to light—advocates until then unknown obtained brilliant success. They displayed in that sombre corner vigour, just discrimination, talent, and sometimes even eloquence. They lavished in their babbling all the resources of their conversational powers. It was in truth conversation vulgarized—the decay, and as it were the gloomy shadow, of a charming and an especially French art. The very familiar name of this place of meeting was a raillery against idle talk. It stands erect after all our disasters, and as a finishing irony the flames, which paid no respect to our Council Chamber, have left standing the *Parlotte*.

As to our elders and masters, when they quitted the courts after a day of toil, if they stopped for a moment to hear what was going on, some raised their arms to heaven like the good Desboudets—others listened an instant and said nothing; Dupin, with his satirical and impressive sneer

Paillet, with his deceptive look of good-nature ; Marie, with the sardonic smile of a Republican uneasy about the Republic. All went off together shaking their heads, mentally exchanging looks of paternal compassion, and words the purport of which I never could exactly seize.

In 1848 the Bar found itself still more involved in politics, and then appeared to an extent previously unknown, but which was at a subsequent period exceeded, a lamentable abuse calculated above all others to compromise us in public esteem—I mean to refer to the intrusion of advocates into public offices of distinction and profit.

In France, during the last sixty years, so many governments have risen and fallen, that revolutions have acquired a jurisprudence of their own. On the arrival of a new power to the head of affairs, it is but reasonable that it should call for the support of its friends, and that the adversaries it has conquered should not be for too long a period backward in the tender of their services. In 1848, as indeed at all times, we met with men who, sacrificing their interest to their principles, have, to serve the latter, thrown up the legitimate advantages they had acquired by their profession—nothing can more truly merit our respect, and the Bar has afforded noble examples of this self-sacrifice.

But the public conscience has a distrust of sudden attachments, and is not easily made their dupe. It will not endure, that on the eve of a revolution, politics should all at once become the resource of those who have no other—that they should be made the refuge of youthful imbecility, or the desperate expedient of a crisis of impecuniosity, and that men should pretend to govern the country who are incapable of governing their own lives. Nevertheless, we have met in the courts with far more examples of this than we ought to have done, and there, as elsewhere, the patriots of the day have become the office-holders of the morrow.

These sudden transformations excite the sneers of public malignity, and afflict honest people. The world is amazed that, by merely being an advocate, one should come to know so many things, and all with such convenient promptness, that one should be prepared in so short a time for such various conditions of life, and that the mere study of the law should teach so many different means of rising in the world.

At the period of which I am speaking, public offices were not the only attraction against which the Bar had to guard itself. There was then, as there is now, an aspiration still higher, a temptation still more dangerous—that of figuring amongst the representatives of the country, of sitting in



Parliament, and speaking from the floor of the House. For several it was a legitimate ambition, for others an audacious presumption; and the means made use of to gratify it rarely accorded with the duties of the profession.

The most ordinary mode of setting to work, and that which most often succeeds, is to canvass for the retainer of some candidate for popularity who is the object of a political prosecution.

When I speak of political prosecutions, I do not refer to those famous cases in which the convictions of the citizens support, animate, and inflame the genius of the advocate; such cases present to eloquence its noblest employ. Nor do I refer to those tragic occasions, in which violence having donned the mask of justice, the advocate comes forward and demands to be placed in the dock with the victims. Cases like this appeal to the most sacred of our duties, and I am not aware that the Bar has ever been found wanting.

I speak of those self-interested defences, which are coveted as the means of carrying fortune by storm and of acquiring that rapid celebrity which party spirit dispenses at its pleasure. By the aid of flashy bursts it is not difficult to become a person of importance, and that which men of talent have not been able to acquire by ten years of labour and experience, is carried by assault in ten minutes, not by reasonable speech, but by the force of vehement spouting.

The speaker is at once raised to the dignity of a grand orator, not because he has well pleaded his cause, but because he has pleaded it—not because he is eloquent, wise, or honest, but because he is republican, royalist, or free thinker; and thus the defence of the client becomes the least part of the defender's anxiety, while it serves sometimes as a pretext for the most unbecoming liberties. Be the client, however, acquitted or condemned, the advocate has gained his cause. To the accused he owes half his success, and party spirit provides the rest.

The revolution of 1848 introduced a new power to the courts of justice, which put the finishing stroke to our traditions and manners—I speak of the Press.

Up to that time the current literature of our confraternity was limited to the trustworthy leaves of *Sirey*, and to those journals which, edited by skilful hands, while they imparted to public curiosity all that it was needful for the public to know, discussed with us every morning, with seriousness, matters which related to our business or our duties.

But this modest publicity did not suffice to the importance which many amongst us coveted, and to that frivolous passion for knowing and repeating every sort of gossip, which is the curse of our country and our epoch.

To the gossips the courts became, like everything else, a sort of theatre, and it became a great acquisition to know, not merely the play and the characters, but above all things what was doing behind the scenes. We were converted into artists, and our vanity gained in the process all that was lost to our proper sense of dignity.

They discussed our first appearances, our re-appearances, our successes and failures; and in the evening journals the courts had their columns between the racecourse and the theatres, a little below the stock exchange, and somewhat above the advertisements.

At the same time appeared notices, biographies, judicial portraits, amongst which, associated with distinguished advocates, appeared sketches of those who aspire to become such, with the merits and defects of each, the details of his domestic life, and of all his movements, his familiar *bons mots*, and down even to the lineaments of his physiognomy. The portico of the courts had its chronicle, as under Louis XIV. the palace had its Dangeau.

Gentlemen, the Press is a power which well knows its rights, and will not bear to be informed of its duties, but it cannot by itself confer celebrity, or glory, nor even a well-founded reputation. It can manufacture something which from a distance resembles them, a superficial glitter with which vulgar minds are satisfied. Not to be thus imposed on requires a refinement of the mind and of the sentiments which does not belong to every one. Many of us have been seduced by these vulgar compliments, and these welcome criticisms, which bring our names daily before the public, but which are in truth no more than the small change of true reputation. They have come at last to seek with anxiety for such a frivolous gratification, which, rather than lose, they have resorted to unwonted zeal and even interested inducements to procure. We know indeed of more than one advocate who has forgotten in a newspaper office that proud independence, which it was his boast would never bend before any power on earth.

Thus it has happened that, step by step, the Bar has lost, along with the simplicity of its ancient manners, the consciousness of its high position and the duties it owes to the country. Diverted from its true functions by political frenzy, and by the illusions of vanity, the interests of justice and respect for the laws have ceased to be the undivided objects of its concern.

I may, I believe, keeping within proper limits and without compromising any one, say that the Bar accepted the Empire with no very favourable impression. Between them and it there was from the very first a mutual distrust, and

a sort of family antipathy. The Empire always considered us as adversaries, and sometimes treated us as open enemies. But whilst we opposed the Empire without intermission, sometimes with more energy than wisdom, the advocates like the rest of the country were affected by its influence and stamped by its impression.

In stimulating recklessly and without limit the thirst for wealth, the appetite for luxury, the passion for rapidly earned fortunes, in accumulating in Paris those famous public works the sterile grandeur of which may be measured by the ruins around us, the Empire created rights and interests of a kind which were previously almost unknown in the courts. You know well what compensation cases have gained to the Bar, and at what sacrifices it has been earned. Those abuses which are passing in your minds as well as my own are so recent, that I need not recall them at length. But they are too grave, they have been too fatal to us, that I should ever seem to forget them or to overlook them; not one of our traditions has escaped the taint—equivocal dealings, suspicious toutings—a sour and exacting advocacy, to which we were previously strangers, have too often in this common-place kind of business been substituted for that antique candour—that proud contempt of lucre—that excessive self-respect, all those noble chimeras which elevate and dignify life, which are not indeed the duty but the luxury of high born souls, and which are combined in the word—*honour*.

The faults and disorders I have thus indicated with some severity are not those of the Bar alone—they belong to the country and the period. That passion for public employment and for wealth—that political intemperance—that love of popularity—that intoxication of vanity—have we not seen them for years past pervading all classes? Are not these the real causes of our downfall? And whilst we allow that some amongst us have paid more regard to the rapid accumulation of fortune than to the preservation of dignity, is it not attributable to their having been caught up by that irresistible torrent of bad principles and corrupt manners which has borne away the whole country to its ruin.

One day, however, we had reason to believe that the dangers which threatened us were dispersed; great changes took place in the council of the sovereign, and why, should I not confess it? many a heart beat high with hope for the future. Round a youthful minister\* there gathered even from our own ranks a crowd of young politicians; who up to that moment had refused to engage in the service of the

\* M. Emile Ollivier.

prince their names, their talents, or their prospects. Forth also came from their retreats as genial witnesses, and as it were sponsors of this tardy restoration, those venerable forgotten sages whose names are the only consolation to our wounded pride, and to whose wisdom we shall perhaps be compelled to appeal as our last resource when reduced to the extremity of misery.

But these illusions were rapidly dissipated. They were soon followed, from all quarters, by unpardonable faults, nameless follies, and misfortunes without parallel.

Gentlemen, this Consulate of mine has been but a sad one. It will be marked only by the remembrance of our defeats, our shame, and our misery. It commenced at the same time as that fatal war; on the day when you called me to this function, all our youth started for the frontier, and my first words (I stand self-accused of it) were like a rash defiance of fortune. To those who quitted us we tendered our sanguine adieus, and not without anxiety we gave way to presumptuous anticipations, to which the will of the Almighty in a brief space of time gave the lie.

Since that time we have undergone every form of suffering, although none has equalled the anguish of the first days. Do you remember those surprises—those sinister rumours which ran through the city, ever heralded by lying reports of victory, those bursts of joy followed by melancholy silence, those defeats pressing, crowding one on the other? then all at once those bulletins of despair, in which a predestined hand seemed to re-demand of chance all that it had blindly confided to her? sedition muddling the ranks of a routed army, like a drunken mob, and at last a revolution, breaking at one single stroke the only tie which held back a whole nation from an abyss? These are the events you have witnessed. These are events, young men, you should never forget.

It is not for me here to pass judgment on those whom events have raised to power. Amidst the dust and roar of these great downfalls, cotemporaries see things imperfectly. They judge at random at the dictation of their passions or their sufferings. This is no place for pronouncing praise or blame.

But those whom we looked after, those whom we followed in this hurricane, were the youths who were on the eve of departure, and who without illusions, I may almost say without hope, sallied forth to throw themselves into the thick of the danger and to fight for their country.

[Here follow short biographical notices of and eulogies on many members of the French Bar who had died in the current year, and especially such as had gone forth to fight for their country and had fallen on the field of battle.]

## II.—ON THE “SCOTCH COURTS OF LAW” REPORT.

**T**HE Royal Commission appointed to enquire into the Courts of Law in Scotland, was issued on November 24, 1868. The selection of Commissioners was most judicious. It included, from the English Bench, the Lord Chancellor and Justice Willes, and from its Bar, Sir Roundell Palmer, and George Selater Booth. The Scotch judicial establishment was well represented by the heads of the Supreme Courts, with one distinguished Judge Ordinary, since deceased. There were sheriffs of counties and their substitutes. The Procurator-Fiscals and practitioners before the supreme and local courts had their place. The manufacturing, commercial, and agricultural interests had also their qualified representatives. The Chairman was the veteran Lord Colonsay, who, in addition to a lengthy experience of the machinery of legal proceedings in all the Courts of Scotland, possessed an amount of sound judgment united with thorough good sense, which rendered him eminently the person to combine in harmony the varied elements and interests which formed the Commission, and still more the diversified mass of evidence. The eminent Professor of Scottish Law, in the University of Edinburgh, was judiciously named Secretary to the Commissioners.

The Commissioners proceeded to receive evidence, and from time-to-time held upwards of seventy sederunts in London and Edinburgh. They submitted five Reports, which, after nominally passing the table of Parliament, form an equal number of that delectable literature known as “blue books,” which, to most readers, are equivalent to certain medical prescriptions, known under the same cerulean colour.

The first three Reports in the series were confined to records of the evidence, received from ninety-two witnesses. It clearly appears that the Commission was open to receive evidence of facts and suggestions for improvements, from every quarter, non-professional, as well as professional. Appended to the third report, there is an admirably compiled index of the evidence, which enables any one in search of information at once to find any particular fact or any witness. We cannot help thinking that the Commissioners, in their desire to hear suggestions from all sides, have taken evidence, occasionally in *plethora*, on some

points, and sometimes record suggestions, often ill-considered, and wholly impracticable and discordant with other more reliable testimony. It is well, however, that thus their "failings lean to virtue's side."

In the fourth Report the Commissioners state their views and suggestions on the supreme and inferior civil courts of Scotland, accompanied with an appendix of numerous and valuable official returns from the various courts of justice in Scotland. The fifth and final Report embraced, first, the Justiciary or Criminal Courts, second, the Civil Procedure in the Courts of the Sheriff, and lastly, the official, not judicial, staff.

The concluding Report is not dated, but it was printed and published upwards of a year ago. It might therefore have been expected, that some action would have been taken by the Government to incorporate all, or several, of the suggestions of their Commission, into a Bill for an Act of Parliament. Indeed, two at least of the recommendations of the Commissioners have been already taken up by individual members of Parliament and have become law. As it is likely, and to be hoped, that Parliament next Session may have its attention early directed to this important matter, so deeply affecting the northern section of the kingdom as well as ourselves, we deem it right and profitable to direct the attention of our English readers to the Reports of the Commission, confining however our remarks to general points, which, more or less, affect the interests of both sections of the Empire, and which, too, may have a material bearing on reforms in our own Courts of Law.

There never existed in Scotland, as with us, the separation of Law and Equity. Certain questions of real rights and *status* were reserved to the Court of Session, as the Supreme Court. The ancient Chancery having been merged in that court, the judges, under what is termed their *nobile officium*, still exercise certain jurisdictions, which in England are peculiar to the Courts of Equity. The more general rules and principles of Equity have, in practice, been equally recognized by their local, or inferior courts. The recent tendency of legislation with us is to effect a similar fusion of these two elements of justice in all our courts, even those of the counties.

At one time there existed a variety of courts of peculiar jurisdiction in Scotland. Since the Union in 1711, it had its Exchequer, regulated by English formula, and presided over by five Barons. As it was strictly confined to revenue cases, and had only one attorney for the Crown and one for the public, in time it became a solemn and

expensive mockery. There was also a separate Court of Admiralty. A Supreme Commissary, or Consistorial Court, with four judges, sat at Edinburgh, where the cases of highest import were in the first instance adjudicated, whilst a numerous array of local Consistorial or Commissary Courts, coming in place of the Courts of the Bishops, exercised a lesser jurisdiction over the ancient dioceses. An appeal from all these tribunals lay to the Court of Session, and thence to the House of Lords. All these Courts are now happily merged in the Court of Session. The Court of Session at one time had certain civil causes made exclusive to its jurisdiction. From time-to-time the Courts of the Sheriff have had their jurisdiction extended, so as to embrace most of these causes. All these causes are subject to appeal to the Supreme Court. But other civil causes, under a certain limit (25*l.*) are subject to no appeal from the Sheriff Courts, and ordinary cases of debt or claims below the same amount, are excluded from the jurisdiction of the Court of Session.

The Commissioners, in their Fourth Report, deal, in the first instance, with the Supreme Courts, and next with that of the Sheriff. We will reverse the order, and first notice their suggestions on the Sheriff and other Local Courts, these being in every sense the primary, or Courts of the first instance, and then ascend to the Court of Appeal—the Court of Session.

The *magistrates* (*Bailies*, answering to our aldermen) of the *royal burghs* of Scotland at one time exercised both a criminal and civil jurisdiction, equal, even greater, than sheriffs. They had power to enforce their decrees by imprisonment, which, until recently, was denied to sheriffs, unless through the expensive, tedious, and ridiculous intervention of the Supreme Courts by "Horning and caption." With the extension of the jurisdiction of sheriffs, and the higher qualifications of the judges appointed to these Courts, the business of the Burgh Courts gradually decreased, and has, of late years, almost, if not altogether, become obsolete. The Law Commissioners of 1834 reported for the transfer of all their remaining jurisdiction to the sheriffs. In this the recent Commissioners coincide, leaving only some small matters connected with burgh prisons, the warning and removal of tenants, and the police jurisdiction, which last is now generally regulated by Statutes. They judiciously recommend a written notice to tenants to quit, instead of the ancient barbarism of chalking the door with the cabalistic initials of the reigning monarch, "V. R."

*Barony and Regality Courts.*—These ancient relics of feudalism are recommended to share the same fate, to which,

indeed, modern opinion and practice have long since consigned them.

In *Royal Burghs* there exists a very peculiar Court, known as the *Guild Court*, the presiding judge in which is called "*Dean*." His jurisdiction is somewhat similar to the *Ædile* in ancient Rome. He exercises an extensive jurisdiction as to the erection of new buildings, and the regulation of old erections. A majority of the Commission are of opinion that all these courts should cease to exist, and that certain regulations should be introduced in their stead, under the jurisdiction of the sheriffs. A minority of the Commission are of opinion that separate Guild Courts should continue in Edinburgh, Glasgow, and Greenock, but under the same rules suggested by the majority for the regulation of erections within burghs.

The Courts of the *Justices of the Peace* in Scotland are of very different constitution, and exercise a very different jurisdiction than with us. Their civil jurisdiction is limited to debts not exceeding 5*l.*, and their criminal jurisdiction is chiefly under revenue and police Statutes. Their Quarter Sessions are merely nominal and ornamental, with no criminal jurisdiction whatever. Quarter Sessions, with us, possess so great a jurisdiction that it is not uncommon for persons, not versed in the nomenclature of Scotch judicial establishments, to confound the Court of Session in Scotland with its Quarter Sessions. The Commissioners express a hesitating opinion that justices should be so far relieved from judging in poaching cases. This has been often made the subject of popular complaint, seeing that any one country gentleman, with the handle of J. P. to his name, may diversify his enjoyment by lagging a partridge in the morning and a poacher in the evening. The Commissioners also incline to the opinion that, instead of granting licenses being open to the whole array of justices, they should be confided to a select committee of their number, thus preventing the common practice of canvassing and packing the bench. Besides the exercise of mere formal matters, the Commissioners propose to leave the small debt jurisdiction to the "*great unpaid*," for the special benefit of the "*great unwashed*." The preference however given by the public to permanent professional judges, learned in the law, over the ever-shifting bench of country gentlemen, is established by a table showing the number of small debt cases in five large counties in one year. In the Sheriff Courts of these counties there were 35,693 cases entered, whilst in the Courts of the Justices the number was only 23,439.

*The Courts of the Sheriff*, as by far the most important



Courts in Scotland, deservedly occupy, both in the evidence and the reports, the most bulky part of the Commissioners' labours. Their courts are very ancient, and, without doubt, have formed the model of our County Courts. The Sheriff Courts are part of the ancient constitution of Scotland, whilst in England they are of modern growth, the recent creation of the Legislature, and with vastly limited jurisdiction to their prototypes in Scotland.

The sheriffs were anciently hereditary in North Britain, and were somewhat identified with clanship, and its consequent feuds and frays. Their jurisdiction, both in criminal and civil cases, was supreme. "*Pit and gallows*" were their prerogatives. For the sake of uniformity, two vassals were put in the stocks or gibbeted, and affectionate wives patted their husbands resignedly to mount the scaffold, "to please the laird." The rebellions of 1715 and 1745, paved the way for the abolition of this hereditary tyranny. By the Jurisdiction Act of 1746 (20 Geo. II. c. 43) Sheriff of counties were henceforth to be nominated by the Crown. We have not space to sketch the interesting history and growth of these local Courts. At first their civil jurisdiction was limited, and their business equally so. The sheriffs were resident in Edinburgh, and only required to reside within their counties four months in each year. They had the power to appoint substitutes to do duty in their absence, with an appeal to themselves. There was no provision for remunerating these local dignitaries.\* They were either paid by the sheriff himself, or rewarded by obtaining some Government office, such as collector of taxes, bank agencies, or factorage for some landowner. These supplementary offices were often incongruous and inconsistent with the proper and pure administration of justice. Not unfrequently the resident Judge was a retired military officer—*arma cederit togæ*—and therefore, it might be said, he was more conversant with *cannon* law than with *civil*. It is still remembered when a resident Sheriff was the county apothecary as well as Judge, dispensing physic and justice with equal balance, and doubtless both in *scruples*. Many alterations of the nature and functions of the office have since occurred. These appointments, when once made by the head sheriff, now become permanent, subject only to their removal *on delict*. The jurisdiction of the sheriffs has been vastly increased, and in several cases

\* It was not until 1787 that a small salary was granted by the Treasury to the resident or substitute sheriff, averaging 50*l.* in the year. This has been periodically augmented until the *minimum* now stands at 500*l.*, but even the highest salaries are considerably lower than those of our county judges, a more limited jurisdiction, and much less labour.

the judgment of the resident sheriff, or sheriff substitute, is final, but in other instances subject to the review of the Supreme Courts. Some of the principal sheriffs are appointed to more than one county, and are now nearly altogether relieved from visiting their counties. The resident sheriffs are usually taken from the same class as their chiefs, and their salaries are augmented, so as in some cases to equal, and even to exceed, some of the principal sheriffs. A feeling for some time has arisen to dispense with the intermediate sheriff, and in all cases (as is already in some) to make the appeal direct from the resident sheriff to the Supreme Courts. At present a great anomaly exists in that where the chief sheriff alters the judgment of the local sheriff; there is no review in cases not exceeding 25*l*. Thus the judge who has heard the case, and taken the evidence, may have, and sometimes has, his decision upset by a judge who tries the case at second hand. The Reports of the Supreme Court not unfrequently show instances where, in appealable cases, the Supreme Court returns to the judgment of the resident sheriff.\*

The Commissioners consider several suggestions implying a radical change in the constitution of all Sheriff Courts. First, it was suggested that only one permanently resident sheriff should be appointed in the county, with an appeal direct to the Court of Session; or, secondly, that there should be an intermediate appeal to a court formed of several sheriffs, holding periodical sittings in certain districts of combined counties. A third suggestion was for upsetting the ancient constitution and jurisdiction of these courts and reducing them to the same limited jurisdiction of the County Courts of England. A large majority of the Commissioners refuse all these suggestions, and are in favour of continuing the double sheriffship as it presently exists, but are for limiting the number of stages at which appeals may be taken, and thus diminishing the length of litigation. The majority of the Commissioners go at great length into their reasons for refusing to recommend the re-construction of the courts on any new basis. Against the recommendation to maintain the existing system of double sheriff three Commissioners enter their dissent, supported by lengthy reasons.

The Commissioners unite in recommending a union of certain counties, under the jurisdiction of one principal

\* The Commissioners recommend an extension of the exclusion of review by the Supreme Courts from 25*l*. to 50*l*., which would greatly increase the objection.

sheriff as well as the districts of resident or substitute sheriffs. This has become imperative by the recent rise and increase of large centres of population, and the facilities of communication by ramifications of railways. At present local sheriffs make periodical circuits to the principal towns in their counties, but merely for the summary decision of cases under 12*l*. By the adoption of the union of jurisdictions, the Commissioners show that the salaries of the judges may be considerably increased, without any further demand on the exchequer.

The Commissioners recommend a considerable addition to the jurisdiction of sheriffs in questions of real or heritable rights, and also in other matters from which these courts are at present excluded. A minority of the Commissioners were of opinion that the jurisdiction might be extended even beyond the recommendations given. They are unanimous against jury trials being extended to Sheriff Courts, as that mode of trial, presently limited to the Superior Court, has never been popular in Scotland.\*

The *Consistorial* or *Probate* jurisdiction of the sheriff is only distinct in so far as hitherto, in most counties, there are separate clerks to the division of the courts. These are paid by fees and not by salaries, and retained only for the exercise of patronage. The separation of offices impose on the public and the profession much unnecessary trouble. With the exception of Edinburgh, where the amount of that description of business is unusually great, the Commissioners recommend that the clerkships be held henceforth by the same person. The Government have already, on the occasion of two vacancies, adopted the suggestion of the Commission for the combination of the offices of Sheriff Clerk and Commissary Clerk.

The Commissioners unanimously recommend an increase of salaries both to sheriffs and sheriff-substitutes, the minimum of the former being 800*l*., and of the latter 700*l*. a year. These are still much below the salaries of the English County

\* Jury trial in civil cases was introduced into Scotland in 1815. It was managed by a separate court of three judges. An English lawyer was chief, with two judges of the Court of Session. The chief was *Mr. Adam*. This gave occasion to the conundrum—why was the Jury Court like Eden? Because it was made for Adam. The clerk was John Osborne Brown, and all papers had his initials in large text indorsed, which unfortunately produced the term "*Job*." The first case tried in the Old Jury Court was a lengthy trial of a smoke nuisance which led a celebrated advocate, much opposed to jury trial, to say that having begun in smoke it would so end. Cases were thus sent from the one court to the other like a game of shuttlecock. This unfortunate mode of trial by jury in Scotland did much to intensify the natural dislike to the novelty. It was at length made part of the ordinary procedure of the Court of Session in special cases.

Court Judges. The Commissioners further recommend retiring allowances to both classes, and that after a certain period of service combined with age. No such allowance is made at present to sheriffs principal, whilst the substitutes have a graduated scale on the length of service. But no length of service entitles them to retire without the accompaniment of disability. There are some still in active duty who have completed their forty years service. The Commissioners, in their fourth Report, recommend some other improvements in the constitution of these important Courts. The fourth Report concludes with an important recommendation as to the regulation of agency. At present there are exclusive privileges applicable to the Supreme Court, and also to some local courts, where the practitioners are incorporated by Royal Charters and Statutes. The Commissioners, with some restrictions, recommend the abolition of all exclusive privileges, and that one examination should qualify for practice as attorneys and solicitors before all the courts, both supreme and inferior.

In their fifth and final Report, the Commissioners report on the form of procedure in civil causes in the Sheriff Courts. These forms of late years have undergone several and great alterations. They are still diversified according to the various divisions of causes, and thus produce confusion. The Commissioners suggest one uniform writ for bringing parties into court, and recommend certain improvements in all subsequent steps of procedure. With these details, which are of a technical character, we need not trouble our English readers. We may, however, notice two modes of citation of a very ancient and very ridiculous character. Where access was not obtained to a dwelling-house, the service of any writ was held complete, if the officer gave the ominous six raps or knocks at the door, and left the paper in the keyhole, though it was immediately, by himself or others, removed. In this way many a debtor, of necessity from home at his daily avocations, has first come to the knowledge of a claim and a decree thereon, by finding himself the inmate of a prison. The other citation was called *Edictal*. One species was the fiction of proclaiming the writ at the market cross, after the officer of the law had cried three several "O'yesse,"\* and then affixing a copy of the writ to the market cross, where such antique had existence, or where (as was the common case), such had long ceased to exist, by throwing the paper on the spot, where tradition reputed the crucial pillar once stood, until its interruption to modern transit compelled its removal.

\* This term "O'yes," or "Hark ye," is borrowed from the French, as many other law and common phrases in Scotland, showing the close intercourse in ancient times between that country and France.

The remedy suggested by the Commission for the "*key-hole*" deposit, is the medium of a registered letter to the debtor's usual address. This sensible substitute has been already made law, at the instigation of private Members of Parliament. But, strange to say, it is confined to small-debt courts, where the claim cannot exceed 12*l.*, and where imprisonment can follow, if the sum is above 8*l.* 6*s.* 8*d.*, (the equivalent of 100*l.* in ancient Scots money). It surely is of more importance, to prevent injustice in matters of great, than in those of small value. It would have been better had all the recommendations of the Commissioners been embodied in one Government Bill, rather than being thus doled out by instalments. Our northern neighbours sometimes twit us with our fictions of law, and strange legal phraseology. Perhaps there is room for recrimination.\* Take, for example, their ancient "*Horning and caption*," for recovery of civil debts. The debtor was, after being "*put to the horn*" by three blasts of a trumpet at the Market Cross of Edinburgh, imprisoned, not as a debtor, but as a rebel to the Crown, which in ancient times carried most serious consequences.† The most astonishing fiction was the citation of a person resident in foreign countries, which England was, and still is, held to be. Such a person, it mattered not in what quarter of the globe he resided, was held duly cited by proclaiming the writ at the "*Pier and shore of Leith*," with the usual accompaniment of the three "*O'Yesses*," sent across the broad ocean. In the knowledge that sound travelled through space slower than light, the person, thus edictally called, had sixty days within which he must appear in the courts of Scotland. There was the highest poetry in this mode of communicating the summons to "*the wild waves*." In short, there was an ancient recognition of modern spiritualism, through this inarticulate *medium*. Several years ago this oceanic mode was surrendered, and in its place an office, in the Register House, substituted for receiving edictal citations. We venture to suggest that, since the Post Office has been substituted for home citations, where access cannot

\* The Scotch *Multiplepoinding* may find a place with any English term of legal phraseology. We have, however, borrowed this useful conglomerate of suits, but under the more euphonic name of "*interpleader*."

† Lord Gillies, one of the most distinguished judges of that day, in giving his judgment on this ancient formula, observed—"The law on this subject cannot be better expressed than it is by Monkbarrow in a work of fiction, with which we are all well acquainted." Accordingly the reporter, adopting his lordship's opinion, appends to the decision a long extract from Sir Walter Scott's "*Antiquary*." 10th Dec., 1828. *Thom v. Black*, 7 Shaw, 158.

be had to the homestead, the Post Office, or submarine telegraph, should be called on to do the same duty to foreigners. This would assuredly give instantaneous notice, whereas the official deposit, now existing is not much better than the ancient citation at "pier and shore," and withal is without its Ossianic sublimity.

We now shortly take up the Court of Session. This Supreme Court is of very ancient origin. It was a fusion of several courts, and the proper title of the judges is "Lords of Council and Session." It was, at length, moulded in its present form, by King James V., so far back as the year 1537, after the model of the parliament of Paris. All the law body, including the clerks, advocates, and other practitioners, form what is termed the *College of Justice*, of which the judges are called its *Senators*. At one time it consisted of *fifteen* judges, whilst England was satisfied with *twelve*.\*

This Court now consists of only *thirteen* judges. The Court always had two divisions known as the Outer and Inner House. The former is held in the ancient hall of the Scotch Parliament or Estates, which greatly excels, in every respect, our Westminster Hall, whilst the Inner Courts cast our miserable dens of justice into the shade.

All the judges were in use to sit in rotation in the Outer House, and prepare and decide, in the first instance, all cases, either originally brought into the Supreme Court, or carried up by appeal, then called advocacy, answering to our *certiorari*. The single judges, in the Outer House, were and are called *Lords Ordinary*. An appeal lay to the Inner House where the fifteen judges sat in conclave. It was found, contrary to the opinion of Solomon, that in the multitude of counsellors there was *not* wisdom. It was seldom that a judgment was unanimous, and, not unfrequently, the Bench assumed the attitude of the Bar, or even descended to the platform of a debating society. In 1806, the Inner House was divided into two sections, called the "*First and Second divisions*." The Lord President is chief of the first, and the Lord Justice Clerk presides over the second division. The judges in the Outer House are now permanent, and consist of the five younger in office. Each division of the Inner House consists of four judges, and, on a vacancy, the senior in the Outer House takes the vacant chair in the Inner Chamber.

There is a separate department known as the "*Bill Cham-*

\* It was a curious coincidence that in England the number of the jury was always twelve, whilst in Scotland it was fifteen, which is still the rule in criminal practice. It would appear that our ancestors determined to have, in the administration of justice, a fair balance of the lay and the law element.

*ber*," which has an equitable jurisdiction in cases of interdict (injunction). This department is open all the year round, and in time of session, the youngest appointed judge is the genius of the place. During vacation, the judges who are not on the justiciary list, and do not go circuit, take periodical charge of this chamber. The judge here acts somewhat as a Janitor or Cerberus to the courts, holding the keys of admission, but, whether the gate be opened or closed by the Bill being passed or refused, there is an appeal to the Inner House, and even to the House of Lords.

A proposal was made, and received the support of a few of the Commissioners, to re-model the courts, so as to have three divisions or courts, of four judges each. In such an arrangement, all causes were at once to be brought and decided by one of these courts, without any previous judgment by a single judge. Only one Lord Ordinary was to sit in the Outer House, to perform certain minor duties. The judgment by the court was to be final, unless an intermediate Court of Appeal was formed of judges from the other courts. A great majority of the Commission are hostile to any such organic change, in the constitution of the court, and assign their reasons at great length.\*

The Commission were unanimously against any reduction in the number of the judges of session, but with equal unanimity, and with much modesty, they suggest that "the time has arrived when the Treasury may fairly be asked to reconsider the scale of the remuneration of the judges of the Courts of Sessions, seeing that it is not only less than that of the judges in the Superior Courts at Westminster, but also less than that of the judges in Ireland." We are certain that, the Bench and Bar, of both these countries, will gladly support such an act of justice to Scotland.†

\* There is at present power given to the judges, in case of an emergency, to create a third division by four Lord Ordinaries. Some years ago this expedient was had recourse to, in order to overtake the great increase of appeals from sheriffs, but this tribunal did not give satisfaction. The pursuer has the choice of the Lord Ordinary; and division before which he may enrol his case. This privilege, extended to one party, has formed the subject of complaint. From its exercise the favourite judge and court is often overloaded with business. To rectify this inequality, the Lord President exercises the power of equalizing the rolls, both of the Outer and Inner Houses, which so far counteracts the seeming favour given to one party to select his judges.

† There is a very strange and ridiculous order, through which a novice judge must pass, before he can take his seat on the Bench. The Crown appointment is unavailing of itself—on its presentation, the presentee is ordered to go to school in the Outer House, and hear a debate on a case before a Lord Ordinary, and next hear one before the Inner House. He then repeats his lesson and his opinion, under the

The Commission proceed to suggest certain arrangements and classifications of business, which appear judicious for the disposal thereof, not sacrificing substantial justice, which requires full and mature deliberation in every class of cases, and in every case of any class, whether the value of the subject at issue be great or small. The details of these suggestions, it is unnecessary to place before our southern readers. One subject is of frequent occurrence in the evidence, on which the Commissioners give no deliverance. There is no division of the Bar attached to the courts. Leading advocates are thus often engaged for several cases, at different bars, at the same hours. As the Inner House has the preference over the Outer, this frequently disturbs the progress of a case. It is of no uncommon occurrence that the names of eminent counsel, being printed on the rolls, is all that an unfortunate litigant obtains in return for large fees.

A large body of evidence was given as to jury trials in civil cases. The great majority of the witnesses fully warrant the statement of the Commission, "that in 1815 the experiment was tried of transplanting into Scotland jury trial, very much as it then stood flourishing in England. It cannot be said that the experiment has been successful. The plant has not taken root and grown as was anticipated, and those who expected great results from the experiment have been disappointed." The jury was at first twelve in number, and required to be unanimous. Afterwards a verdict of nine, after six hours, was held sufficient, which is now reduced to a verdict by a majority of seven, after three hours. In 1866, proofs were authorized to be taken by one of the judges without a jury, and in 1868 the determination of the mode of trial was left to the Court. The evidence and statistics already show the preference of the public for the learned judge, rather than the promiscuous jury. Our readers are aware that a similar result has been reached, in the practice of our County Courts. Some of the Commissioners were of opinion, that jury trial was the best tribunal, for the investigation and decision, of questions of pure fact, as well as for the assessment of damages. On the other hand, a considerable majority of the Commissioners were of opinion that jury trial should be altogether abolished, except where both parties consented to that mode

funny name of "the *Lord Probationer*," and thereon his trials, whatever his opinion may be, (often in the sequel found erroneous) are sustained, and he, by this perfunctory performance, is held duly qualified for judgeship. This exhibition is at once impertinent to the Crown, and degrading, alike to its nominee, and to the Bench. We are surprised that the Commissioners, amongst their manifold minute recommendations, do not suggest its immediate abrogation.



of trial. A majority of the Commissioners, whilst expressing their favour for trial by judges instead of by jury, recommend that both systems be allowed, in the meantime, to exist, but that the Act of 1868 be so far modified as to allow the parties to fix the mode of trial, and, in case of disagreement, that the Court should do so.

At present the judges at circuit dispose only of criminal business, with the rare occurrence of appeals, under certain Statutes. These appeals are far from being popular, and are generally dealt with in a very hasty and unsatisfactory manner. At circuits newly fledged counsel first essay the strength of their pinions, and very seldom any seniors go circuits. There is a provision for jury trials at circuit, which, at one time, was had recourse to in some few cases. But it was found much more economical to carry the witnesses to Edinburgh, than to bring counsel to the provinces, and so civil jury trials at circuit have been almost abandoned. The Commissioners suggest, that the judges at circuit should take proofs, when a jury is dispensed with. Perhaps the same objection, on the score of expense, which prevented jury trials at circuit, may be found equally potent, to prevent such arrangement being adopted to any great extent.

Some important recommendations are made by the Commissioners as to appeals to the House of Lords, which at present are open to much and grievous abuse. (1st.) Formerly an appeal might be taken at any time within five years. This term was reduced to two years. They recommend that the term should now be limited to six months, if the party appellant is resident within Europe, and twelve months if beyond. (2nd.) That the appeal be presentable, though the House of Lords is not in sederunt, as the present contrary practice has occasioned, not only delay, but gross injustice. (3rd.) They recommend to the Appeal Court, the propriety of reform in the regulations as to the conduct of the cases before them, which at present occasion much unnecessary expense. (4th.) They do not recommend finality in the judgments of the Court of Sessions, on matters of fact. Where the case has been decided, without the intervention of a jury, such finality exists in verdicts, or, where the judgment is given by the Court of Session on appeals from sheriffs, the Courts below are bound to find, separately, matters of fact and of law, and the former are final, but the latter are open to appeal. English lawyers, perhaps, may not perceive why the same rule should not exist, when the facts are decided by the judges, seeing that their decision appears to be otherwise so much preferred to those of juries. A suggestion was made that, where parties consented,

an appeal might be taken to the House of Lords from the single judge, the Lord Ordinary, in the Outer House, without the intermediate appeal to the Inner House. A majority of the Commission rejected this suggestion, as inexpedient.

The fifth Report embraces the important matter of criminal law. The Commissioners briefly state the mode of procedure. The investigation of all crimes and offences originates with the procurator-fiscals, (another graft from French law), who are appointed by and act under the sheriffs, but they are under the control of the Crown counsel, who consist of the Lord Advocate, Solicitor-General, and four Depute Advocates. An accused party is apprehended, and after a caution given by the magistrate, somewhat similar to that in England, he is interrogated, and what he says in answer, with free will, is recorded in what is termed a "declaration." The difference in our practice and that of Scotland is, that in the latter, following the still severer practice of France, the accused is subject to interrogations, and though he may decline to answer, his refusal is recorded and is sure to tell on the jury, as indicative of guilt. He may be remanded for a period, not fixed by Statute, but which, in practice, does not exceed eight days. A precognition is, in the meantime, taken of the evidence by the fiscal, but not on oath, unless where reluctance is shown. The accused is then liberated, or committed for trial. In crimes which are still *nominally* capital, no bail can be taken. But in all other minor offences bail must be taken, on a graduated scale, not exceeding 1200*l.* for a nobleman, 600*l.* for a landed gentleman, and 60*l.* for any other inferior person. This, and other privileges of the accused, are regulated by the Act 1701, c. 6. (the *Habeas Corpus* Act for Scotland.) By giving notice to the prosecutor (technically called *running letters*) a prisoner may force on his trial, so as to have it completed within 100 days, which, by a mode of procedure peculiar to our northern neighbours, may be extended to 140 days, and then, if not tried, he is for ever liberated from the charge. The precognition and declarations being forwarded to Crown counsel, they direct the charge to be withdrawn, or order the trial to take place summarily before the sheriff, or by him with a jury, or before the High Court of Justiciary at Edinburgh, or at the next district circuit. The fiscal, in minor offences, at once charges the offender summarily before the sheriff, the punishment, in that form, not exceeding a fine of 10*l.* or imprisonment for sixty days. There is a limited appeal to the justiciary circuit, but this is of very rare occurrence.

The High Court of Justiciary consists of seven judges of the civil court. The Lord President is chief, and is

there known as Lord Justice General, an ancient office, until recently held by a nobleman, the last holder being the Duke of Montrose. The second is the Lord Justice Clerk, a degrading title in southern ears, but of some historical interest. The Court is completed by five of the ordinary judges of the Court of Session. The High Court sits in Edinburgh, without stated sessions. Formerly three formed a quorum, but by recent Statute one judge may officiate, the same as on circuit. There are half-yearly circuits, performed by two of the judges to each circuit, being three in number, with ten seats of the circuit, some of them of small importance, from the change in population, now centred in large towns. A third yearly circuit is held in Glasgow, that great emporium of commerce and crime. One judge may officiate at each circuit, and, in more distant places, this is now almost the rule. The judge at circuit may certify a question of relevancy, or as to the measure of punishment, to the High Court, but not on a point of evidence, and there is no mode of appeal or review. The proceedings commence in the logical form of an indictment, served on the accused, at least fifteen days before the day of trial, and, with a copy of this writ, he receives a list of the names and designations of the witnesses, which may be adduced against him, with all articles and writings to be put in evidence, and which must be lodged with the clerk of court, for inspection, at least one clear day before the day of trial. There is, at the same time, served on him the extended list of jury, from which fifteen are to be balloted for the trial. On the other hand the accused, if he has any special defence, (such as insanity or *alibi*) must lodge a written statement in like time, accompanied by a list of witnesses in exculpation, for whose citation he is entitled to a writ. Where the accused is so poor as to be unable to employ advocacy and agency, these are assigned to him by the Court. One-third on the jury list, made up by the sheriffs, and in circuits some from each county, are special, and two-thirds are general or common jurors. The age is from twenty-one to sixty.\* The qualification is one of property or income, often not of easy ascertainment, and of which the Sheriff Clerk is the sole judge.

From the larger list fifteen are balloted for one or more trials, in the same proportion, five special to ten general.

\* As the jury lists are made up periodically, after the lapse of several years, on the one hand many qualified persons are not called for several years, and, on the other, several every year pass the rubicon of age. It has been suggested that the age might be increased to sixty-five, if not seventy. Judges occupy the bench with ability, beyond that term of years, and gentlemen of ripe experience and retired from business might be found the best qualified for the jury box.

Both prosecutor and the accused can object specially, on cause shown, to any juror whose name is drawn, and each have a certain number of peremptory challenges without reasons being stated.\* The jury are sworn by the clerk, and the witnesses by the judge, which has some advantages over the plan adopted in our English courts.† Questions of relevancy, or objections to witnesses, must be stated and decided by the court, before the jury are sworn, or the points may be certified to the High Court, and the trial postponed. The prosecutor, before the jury are sworn, may abandon the indictment, but retain the accusation. This is termed deserting the diet *pro loco et tempore*. Where the charge is abandoned the diet is said to be deserted *simpliciter*. After the jury is sworn there is no opening address—a copy of the indictment, in print, is put into the hands of each jurymen, whereby they are made aware of the precise issue. If a defence has been lodged for the accused, it is read to the jury at this stage. The evidence is then proceeded with, the judge taking notes, which is also often done by the jury. In lengthy cases (which are of rare occurrence in the criminal courts) the trial may be adjourned from day to day. The jury are kept secluded, and all intercourse from without is most scrupulously prevented. After the evidence is closed the depute-advocate addresses the jury, and is followed by the counsel for the accused. The judge then sums up the evidence, and charges the jury, who either give their verdict verbally from their box, or retire for deliberation. The verdict need not, as with us, be unanimous. A bare majority is sufficient, as eight to seven. But in Scotland, a third form of verdict is recognised, and of frequent occurrence. The verdict need not be Guilty or Not Guilty, but Not Proven, which is equivalent to acquittal. This mid-term is of very doubtful expediency. It becomes a cloak to cover timidity, or induce want of due deliberation on the part of the jury, and is usually understood to imply a strong moral suspicion of guilt. Sentence is immediately given, or if any doubt exists as to the proper measure of punishment, the case may be removed to the High Court—which is of rare occurrence.

\* This is the privilege of the prosecutor as well as the accused, and is not confined to the latter, as indicated in the Commissioners' Report [p. 5].

† The form of the juror's oath in Scotland is absurd, and is applicable to witness bearing, and not to a judge of fact. It owes its parentage to the ancient oath of the *Copurgator*, where the vicinage on oath cleared their suspected neighbour from guilt.

With this brief outline of criminal procedure in Scotland, we as briefly mention the Commissioners suggestions for improvements.

(1st.) They approve of the suggestion that all the judges of the civil court should, as with us, be also judges in the criminal court, instead of being, as at present, confined to seven of their number.

(2nd.) They by a large majority, recommend the existing practice of the examination of accused parties, the secret pre-cognitions and commitment for trial, and refusal to admit the accused as a witness, but a minority (embracing the Lord Advocate himself) dissent, and recommend the introduction of the English practice, in all the preliminaries before trial. They recommend some slight improvement, but, at some length, state weighty reasons for refusing to surrender the existing and long established practice, and adopt that of England. There is this obvious distinction between the administration of criminal law, in the two sections of the United Kingdom. With few exceptions, all prosecutions are with us at the instance of private individuals, who may, and sometimes do, gratify vindictive feelings. In Scotland, all such proceedings are at the instance of a sworn and salaried public officer, whose sole interest is to vindicate public justice, and protect the innocent.\* All that the local authorities do, is again subject to the immediate and strict supervision and control of the Crown officers, in the metropolis. Thus the necessity of the guardianship by the public and the press (often so abused,) is not so called for in Scotland. For this reason coroners' inquests and the grand jury have never existed, or been desired by our neighbours. Every year is bringing us nearer to the abolition of such mere stop-gaps, in the course of justice, and the adoption of the office of public prosecutor, which has so long and efficiently worked in Scotland, alike for the ends of justice as the protection of the innocent.

They suggest a new Statute to supersede the Act 1701, and recommend several very judicious improvements, in criminal trials. The Commissioners suggest some improvements in the form of the indictment, and the service of the lists of witnesses and jurors. They are adverse to the power of judges on circuit, to reserve points of evidence for the High Court.

\* The Commissioners recommend increased salaries, and retiring allowances to the fiscals. All the reasons which operate to prevent the resident sheriff from engaging in any other business or profession, in a much greater degree extend to public prosecutors.

One important distinction exists, between the English and Scotch practice, as to stating previous convictions for a similar crime. In Scotland the previous convictions, however remote in date, and though (as often happens) under a different name, are set forth in the indictment. An extract (office copy) of the conviction is produced, and, by one witness, sworn to apply to the accused party at the bar. The jury are the judges, both of the special cause, and the fact of previous convictions. This aggravation often has the effect of raising the punishment, from a brief term of imprisonment, to one of penal servitude. It is the practice of the judge to tell the jury, that they are to consider the proof of the special charge, independently of the previous convictions. Indeed, if previous punishment has, either a deterring, or reforming element, the presumption should rather be as to the unlikelihood of a person again committing the crime, the penal consequences of which he has already experienced. The Commissioners, however, recommend the Scotch practice of allowing such convictions to go to the jury, even without the existing caution; but "as an element in coming to their verdict on the evidence submitted to them." One of the Commissioners alone dissents from this innovation of practice, and recommends the adoption of the English practice as embodied in the Act 13 & 14 Vict. c. 19, s. 9. Under this Statute convictions are not put before the jury, but only before the judge, after the verdict. The only exception is, where the accused sets up good character in evidence, which then may be rebutted by production of previous convictions.

There exists in Scotland a subtle distinction between theft and robbery. The former, though of large amount, is punished usually by a term of imprisonment, the latter is one of the pleas of the Crown, and is, therefore, nominally capital. It can only be tried before the justiciary, and not by the sheriff. The least degree of violence changes the name of the crime. A lady's purse stealthily taken from her pocket, with a large sum of money, is simply theft. When wrung from her hand, however small the value of its contents, but with any approach of violence, it becomes robbery. At one time the conviction of one kind of crime was not permitted to ground any aggravation of another. But this anomaly has been already abandoned. The Commissioners now recommend that the distinction, so far as regards the court of trial, be given up, and that cases of robbery, the same as of theft, be tried before the sheriff. A majority of the Commissioners are adverse to sheriffs having the power of inflicting penal servitude for any crime. This power is given to Quarter Sessions in England, though with many less judicial qualities. Sheriffs in Scotland even yet nominally, have the power of inflicting capital punish-

ment, but, in practice, cannot pronounce a severer sentence than two years' imprisonment.\*

The Commissioners suggest that the number of jurors, in criminal trials before the sheriff, should be reduced from fifteen to nine, still allowing, as at present, a verdict of the majority. They have made no recommendation as to a like decrease of the number of jurors, in the Justiciary Courts. Hence, there will be three diversified numbers of juries—fifteen, as at present, in the Justiciary, twelve in the Court of Session, and nine in the Sheriff Courts.

They recommend that, in summary criminal trials before the sheriff, there should be a power to state a case to the Supreme Court, if required by either party. This has worked well in the English Summary Procedure Acts. The clause was unfortunately left out of the similar Act for Scotland. In consequence we have in England, points decided by the Courts of Westminster, arising under the administration of Statutes, whilst in Scotland every county rejoices in its own interpretations of Statute Law, and even in the same county, important points are differently ruled with every shifting bench of justices.

The Commissioners conclude their fifth Report, with a most searching examination of the duties of the officials, connected with the administration of law and justice, and with many recommendations for their better regulation.

This outline, of these five Reports, may be useful to those who are desirous to learn the progress of law reform in Scotland, especially as bearing on similar measures in our own country. It might be well that any legislative action, for both countries, should be simultaneous, and that, as much as possible, there may be introduced less discordance and more agreement between the administration of justice, alike civil and criminal, in both, whose interests are one, and between which intercourse is daily increasing.

### III.—THE LATE CHIEF JUSTICE LEFROY.†

**T**HE late Chief Justice of the Queen's Bench in Ireland was in some respects a remarkable man. Perhaps there is not an instance of a judge in modern times who has been so often made the subject of parliamentary attack or complaint.

\* The last instance of a capital sentence being executed under the sentence of a sheriff was at Glasgow, on December 3, 1788.

† Memoir of the late Chief Justice Lefroy, by his son, Thomas Lefroy, A.M., Q.C. Dublin: Hodges & Foster. 1871.

With the circumstances of the last occasion most people are pretty familiar, and indeed it is probably in connection with it that his name is best known to the men of the present generation. We allude to the occasion, in 1866, when the Marquis of Clanricarde, in the House of Lords, and Mr. Bryan, M.P. for Kilkenny, in the Lower House, called the attention of Parliament to the "injury caused to the administration of the law in Ireland," and "to the insult inflicted on the country," by permitting this venerable judge (then in his ninety-first year) to continue on the Bench. But this was not the only occasion on which the late Chief Justice had been the object of animadversion in that place. A precisely similar effort had been made, and on the same grounds, to enforce his resignation ten years before, when the late Sir John Shelley moved a resolution in the House of Commons, in a speech in which he impugned the competence of the Chief Justice, Mr. Justice Torrens, and Baron Pennefather, on the score of age and infirmity. Indeed, Lefroy had no sooner taken his seat on the Bench, as a Baron of the Exchequer, than his appointment was made the subject of parliamentary observation and an attack on Ministers by the Right Hon. Richard Lalor Shiel, on this occasion, it is true, on different grounds.

The recently published memoir—a monument of filial piety—interesting though it be, will scarcely attain a high rank in biographical literature, nor is it altogether such a sketch as a lawyer could desire. Few lessons are to be gathered from this portraiture, which is one rather of an amiable and religious man than of an original thinker or a public-spirited legislator. We know no book to which it can be more aptly compared than the "Memorial of Captain Hedley Vicars," and amongst the lives of eminent lawyers, it may hold such rank as is held by that work amongst military biographies. We shall give our readers a summary of what we can extract from it, of either professional or popular interest, concerning the life and times of this veteran lawyer.

Thomas Langlois Lefroy was born on January 8, 1776, the year of the declaration of American Independence. He was descended from a Huguenot family, which had fled from Cambray, in the time of the Duke of Alva's persecution, and taken refuge in England. His father, having attained the rank of Lieutenant-Colonel (of the 9th Light Dragoons), retired from the army, and settled in the county of Limerick, where he had purchased some landed property. After a private education, Thomas L. Lefroy entered Trinity College, Dublin, on November 2, 1790, at the early age of fourteen. The Rev. Dr. Burrowes (afterwards Dean of Cork) was his college tutor, and received his pupil into his family circle. His grand-uncle, Mr. Benjamin Langlois—Secretary to the



Embassy, when his friend, Lord Stormont, was Ambassador at the Court of Vienna, and afterwards M.P. for eleven years for the borough of St. Germain—took great interest in the young Lefroy, and aided his father with his advice and counsel. It was the idea of this gentleman—who seems, judging from his letters which appear in the present volume, to have been an eminently well-informed, sensible, and judicious man—that his nephew should go to the English Bar. On his entering the Irish University, however, this intention was abandoned, and it was then Mr. Langlois's desire that he should read for a Fellowship in Dublin. However, young Lefroy's attention seems from the first to have been directed to the Irish Bar, and with Dr. Burrowes's advice, the plan of his reading for Fellowship was after some time abandoned. It was then that Mr. Langlois wrote a letter (to Colonel Lefroy), the soundness and practical good sense of the views expressed in which, regarding the scope and function of a university education, will justify our quoting nearly *in extenso*. The feature of this book is the letters with which it is filled, and this is one of the most valuable that it contains.

“ . . I am much perplexed how to answer you, there is something so specious in his (*i.e.*, Dr. Burrowes') arguments that they have a good deal shaken me in regard to the Fellowship, which was always my favourite object for Thomas. . . If he has any talent for oratory, I would certainly not discourage it, but first let him lay in sound knowledge, and a good stock of ideas—*‘Rem verba sequuntur.’* Where there is a natural good elocution, if the judgment is clear and strong, the words will never be wanting. The matter is the great *desideratum* in a public speaker, and though perhaps it is not the direct object of an academical education to acquire such matter, yet from the habit that education gives of examining, weighing, scrutinizing various subjects, and distinguishing true and false ideas, it will so strengthen the understanding that it will be enabled to seize the right side of a question, though the object were entirely new. Therefore, whether he means to stand for a Fellowship or not, let him by all means go on with his academical studies. Let him form his taste upon the great Greek and Roman models. Whether as a statesman a man is to draw his knowledge from Aristotle and Thucydides I cannot say; but I have been often told that the old Lord Granville, besides all his modern literature, studied much those two books, and knew Thucydides almost by heart. If to a thorough and critical acquaintance with the best authors in the Greek and Latin languages Thomas adds such an acquirement in the sciences as is the purpose of academical education, he will lay in such a store of knowledge as with his natural abilities will ensure his making a figure afterwards.

“A learned education (comprehending what we call in England perfect classical scholarship) ought to be his present object; and trifling as it may appear, I would rather he employed his time in making

bad Latin verses, if he cannot make good ones, than in reading 'Smith's Wealth of Nations' at the present moment. It will never be forgotten of that able and eloquent speaker, Mr. Burke, that in one of his best harangues he mistook the quantity of *vectigal* and called it *vectigal*.\* This little instance of prosodical ignorance would in this country have damned a *young* speaker for ever, or at least he must have distinguished himself exceedingly afterwards before he could have convinced his hearers that he had common sense. In a word, what I mean to say is this, that while Thomas is at the University he should follow his university studies and apply as closely to them as his health will admit; and that if any idea is entertained of substituting another course, and of making him either a lawyer, a statesman, or an orator, while at the University, he would lose all the advantages of a learned academical education, and come forth an ignorant, empty, presumptuous prater, contemning and contemned by everybody. They might almost as well at the University pretend to teach a man the Graces (in Lord Chesterfield's phrase), and fit him to shine in the *beau monde*, as to qualify him to make a figure at the Bar or in Parliament. A University education gives strength and vigour to the mind, and opens those sources from which knowledge is derived; but the application of that knowledge to our several walks in the world is quite a different branch of study, and to be acquired in active life only, and by the assistance of an intercourse with those who are engaged in the same career with us."

His college course was a distinguished one, terminating with moderatorship and the gold medal of his class. However, the most interesting feature of his University career was his connection with the College Historical Society, in which he played a prominent part at a most critical period of its history. He joined the Society in 1792, and in the following years obtained several of its medals and distinctions. In it he was associated with Plunket, Pennefather, Jebb, Burrows, and other afterwards distinguished Irishmen. This Society had been founded in 1770, for the cultivation of history, oratory, and composition, and for more than twenty years held its meetings weekly within the walls of Trinity College. But in consequence of the introduction of debates on political subjects leading to breaches of college discipline, the board conceived

\* Mr. Burke, in the course of some very severe animadversions which he made on Lord North for want of due economy in his management of the public purse, introduced the well-known aphorism:—*Magnum vectigal est parsimonia*; but was guilty of a false quantity by saying "*vectigal*." Lord North, while this philippic went on, had been half asleep, and sat heaving backwards and forwards like a great turtle; but the sound of a false quantity instantly aroused him, and opening his eyes, he exclaimed in a very marked and decided manner, "*vectigal*." "I thank the noble Lord," said Burke, with happy adroitness, "for the correction, the more particularly as it affords one an opportunity of repeating a maxim which he greatly needs to have reiterated upon him," and he then thundered out, "*Magnum vectigal est parsimonia*."—*Harford's Recollections of Wilberforce*.

themselves obliged, in the year 1794, to forbid its meetings being any longer held within the college bounds. The Society then met for some time in the city; many were admitted to membership who were not students of the University, and it gradually degenerated into a political debating club. Many of the members, feeling strongly the evils arising from this departure from the objects for which it had originally been instituted, and the advantage of restoring the connection between the Society and the University, a series of resolutions, proposed by Mr. Lefroy, and seconded by Mr. Torrens (afterwards Justice of the Common Pleas), were, on December 19, 1794, unanimously agreed to—remodelling the Society in accordance with the ideas of the board, restricting membership to students, or (under certain circumstances) graduates of the University, and excluding debates on questions of modern politics. The Society, thus newly constituted, was readmitted within the sacred precincts of “Old Trinity.” In the following year Mr. Lefroy was elected “auditor” of the Society, and at the opening meeting of the 2nd session of the revived Society, on October 28, 1795, he delivered an able and interesting address. In it, after noticing the advantages to be derived from the institution in the cultivation of composition, history, and oratory, and dwelling on the inappropriateness of topics of modern politics for their discussions, he proceeded to congratulate the Society upon their reunion with the University, eloquently expatiating on the evils they had thereby escaped and the advantages gained.

“Never was there a folly,” he said, “more glaring, more mischievous, than separating the interests of this Society from the interests of this University, and representing them as distinct and even contrasted. Thus, instead of regarding this as an elementary institution for the first growth of youthful talent, thriving under the shelter and by the protection of the University, it was put forward as a sort of chartered independent corporation, of extensive rights and immunities, not to be questioned, however abused, to the subversion of academic discipline and order.”

In 1797, Lefroy was called to the Irish Bar; and in the same year was engaged to be married to a Miss Paul, of the county of Wexford. The marriage was celebrated in 1799, in Wales, whither the Paul family had gone to reside, owing to the outbreak of what is known as the Great Irish Rebellion of '98. His father-in-law, Mr. Paul, served in the yeomanry against the rebels, and the following extracts from his letters to his family show the state of the country at that time—

“WATERFORD, *Friday, June 15, 1798.*—My dearest Jane,—A horrid conspiracy has been discovered here, within two days, by the interposition of God Himself—many are concerned, but amongst

those that are in custody, are Brown, Tom's tailor, Sargent, who kept 'The Hole-in-the-Wall,' and a number of butchers and publicans. They had stripped all the jails and new buildings of lead, and had made an importation of gunpowder. Sargent was to forward a scheme for a great dinner to be given at his house for the yeomen. Wednesday last was the day. At a particular hour a number were to rush in and murder all the Protestants, at the same time a false drum was to beat through the town, and on the yeomen opening their doors to inquire for the cause, they were to be stabbed by men stationed at every house. The assassins were then to rush in and put to death men, women and children; in short, there never was a more horrid or better concerted plan for a general massacre of Protestants. In Kilkenny the same was to have taken place. It was discovered by the death of Flynn, the high constable, and among his papers were some that led to the discovery."

"WATERFORD, *June 26, 1798.*—My dearest Jane,—. . . We marched by Vinegar Hill and through Enniscorthy, the morning after the engagement there, and such a sight I hope I shall never again behold; the town and three miles of the road almost filled with mangled corpses, promiscuously lying with dead horses, mules, pigs, etc., and the most precious furniture of elegant houses. That town is almost entirely demolished, but Wexford is not; there we found the church and buildings safe. The rebels had 500 prisoners at Wexford, all to be sacrificed. When they determined to evacuate, they ordered immediate execution, and had only time to finish seventy, when they got information that the army was near. I saw the bridge, like a slaughter house, thick with the blood of those seventy Protestants—Sir Wm. Hore, Edward Turner, and Capt. Allen Cox, amongst the number; those three men they took uncommon pains to torture, by piking them before they despatched them, and then stripping them and throwing them over the bridge into the river. . . Now for Silverspring, I could not go there, though so near it, as that part of the country was not regained by us, and if it had I could not have left my duty. Though I was asked to a good bed at Wilson's, in Wexford, we were obliged to lie outside the town in a barn, on a little dirty straw. The house at Silverspring, I am told, is standing, but every article of furniture, beds, wine, &c., taken away and destroyed, mostly by women of that neighbourhood."

The rebels, however, had not a monopoly of the atrocities and barbarities then perpetrated.

"WATERFORD, *June 29, 1798.*—My dearest Jane,—I can now give you joy, and I hope you will all kneel down to the Almighty God, who has deigned to hear our cries. Our enemies have fallen into the deep and cruel pit which they dug for us. If the battle of Ross had ended against us, all in this town were to be massacred; but on the Court-house, at Wexford, are now placed the heads of Bagl, Harvey, Cornelius Grogan, John Colclough, Genl. Keugh, and Roche. I mention those as the great leaders in that county, but at Wexford they are still hanging numbers continually."

In 1800, Lefroy returned to Ireland, and commenced daily attendance at the courts. The "inevitable period of enforced inaction and hope deferred" seems in his case to have been unusually short. Already, in 1801, he argued an important case before the Exchequer Chamber, upon his argument in which, we find by a letter from a friend to his father, Lord Clare complimented him, and the Chief Baron pronounced it to be "the ablest argument which had been made at the Irish Bar." Early in the following year he published a pamphlet upon the mode of proceeding upon writs of *elegit*—a matter then of some interest and importance, in consequence of the recent decision in the case of *Da Costa v. Wharton* (8 Term R.), which gave a fatal blow to the old method of proceeding by ejectment on the title, at least in cases where there were tenants in possession, under demises made previous to the accruing of the title of the judgment-debtor. This able and well-written pamphlet was the means as well of raising his reputation in the profession and among the public, as of introducing him, through some friends of eminence at the English Bar, to the favourable notice of Lord Redesdale, who in that year came over as Lord Chancellor to Ireland. This was a post which his lordship seems by no means to have highly relished. The following extract from one of his letters shows his appreciation of life in the Irish metropolis—

"August 30, 1802. . . You, my dear sir, are so good as not merely to give me the chit-chat of the day, or intelligence of yourself, but to endeavour to persuade me that I ought to be contented with my situation, whatever regret I may feel at quitting my old friends. But it is much easier to talk of submission to evil for public good, than to be content with a situation of mortification through mere consciousness of being usefully employed.

"I have been unable either to purchase or rent a place tolerably pleasant or commodious, and have been compelled to purchase a little farm of about sixty English acres, with a small house, very quiet, though only four English miles from this town. The house is so small that I must add to it, and there is nothing more dangerous than adding to or altering a small house to make it larger. It has annoyed me to think of the outcry which our amiable brother senator, Mr. Robson, made at my salary. As far as I can judge from experience, I must be a good economist, if after six years it should replace me in my former fortune, that is, if it should give me back the sum I have expended and lost in the change of country. I doubt whether six years will be sufficient.

"Expenses here are very great, especially to a stranger. A few articles are cheaper than in England, but an Englishman cannot live like an Englishman at nearly so cheap a rate in Dublin as in London. If he can adopt the habits of the country and be content without a thousand comforts which he has been used to in England, and live in the true Irish style, he may perhaps make something of external

show rather cheaper than he would do in London, but every real luxury and almost every convenience is cheaper in London, and every article is infinitely better. The pen I write with, and the paper I write upon, remind me how execrably bad almost every article of manufacture is, and how abominably dear it is at the same time. For tho' I do not pay for these articles, yet signing an order for accustomed quantities, I perceive the price is far beyond the value of the commodity. I am endeavouring to reconcile myself to all this, and repeat every moment the old saying, 'What cannot be cured must be endured,' and so I chide myself for grumbling. I must endeavour to make my farm a comfortable residence, for I cannot submit to live all the year in the stew and dust of Dublin. I hope I am not blameable in this, though it may be called extravagance, but to be obliged to spend a great deal for show, which only produces discomfort, and to be allowed to spend nothing to obtain real comfort, would be hard indeed."

*Quære*—Are things altered in Dublin since the days of Lord Redesdale?

At this time, and indeed until a much later period, it was the habit often to send over an English lawyer to fill the post of Lord Chancellor of Ireland. Indeed, the bitterest disappointment of Lefroy's life was the being passed over in the appointment to that high office by Sir Robert Peel's government in 1841, when the seals were given to one of the greatest lawyers of the present century, Sir Edward Sugden (Lord St. Leonards). Lefroy and his friends considered that this was a post to which he had entitled himself by his long political services, and they ascribed the unjust oversight of his claims to the influence of O'Connell—an influence which seems to have been equally strong with every government, Whig or Tory, in the conduct of Irish affairs at this period. Whatever may be thought of the appointment of Sir E. Sugden—the foremost lawyer of the age, and unconnected with the bitter party feelings, and religious animosities of that time, so intense and aggravated in Ireland—over the head of Lefroy, who in the service of his party had sacrificed a large professional income, had rescued the representation of Dublin University from the Whigs, and secured the two seats in Longford, who had fought no less than thirteen electioneering battles for them, prosecuted three Parliamentary petitions, who had been the earnest opponent of Catholic Emancipation, and indeed on every question a Tory of the Tories, and staunch to his political principles—there can certainly be no second opinion as to the job that had been perpetrated shortly before, when Lord Plunket was coerced to resign, in order to make way for Sir John (afterwards Lord) Campbell, as the Melbourne Administration was on the point of expiring in June, 1841. Sir John sat for three days in his court, to hear motions, and then with-

drew with his pension of 4000*l.* a year. Writing on this subject to Lefroy, Lord Clare (son to the Chancellor) asked, "Did a Tory government ever offer us such an insult? In 1789, Lord Thurlow objected to the appointment of an Irishman, my father, to succeed Lord Lifford, upon which Lord Buckinghamshire and the remaining members of the Irish government sent in their resignations, saying if Mr. Fitzgibbon were passed over, they could not with credit remain in office. Mr. Pitt then sent Major Hobart (the late Lord Buckinghamshire) to Lord Thurlow. He stormed and roared, but when he found the Ministers firm, he gave way, saying—'If Mr. Pitt will appoint an Irishman Chancellor, Mr. Fitzgibbon is the best man he could select.' This the late Lord Buckinghamshire told me in 1815, and contrast the conduct of a Tory government on that occasion to Ireland with the conduct of a so-called Liberal Government in 1841, in the appointment of Sir John Campbell." In a few weeks Mr. Lefroy and his friends found that even a Tory government could pass over the claims of an Irish political adherent in favour of an English lawyer in appointing to the Irish Lord Chancellorship.

But in noticing this episode in Lefroy's life we have anticipated matters a little. While Lord Redesdale presided in the Court of Chancery, Mr. Lefroy undertook the task of reporting that eminent lawyer's judgments, and to him and Mr. Schoales we are indebted for the valuable reports which bear their names. He went the Munster Circuit; and in 1809 had already attained to such practice and eminence in his profession that we find him called to the Wexford Spring Assizes in that year, with a "special" fee of one hundred guineas. He only continued to go circuit for a few years, devoting himself chiefly to Equity practice. In 1816 he was called to the Inner Bar, and in 1818 appointed King's Serjeant. Between the years 1820 and 1823, he was on three several occasions offered a seat on the Bench, but on each he declined the offer, preferring his position as a leader at the Equity Bar to the duties of circuit, and looking forward no doubt to the offer of something higher than a puisne judgeship.

As First Serjeant, however, he was frequently called on to take the place of an absent judge at the assizes, and his biographer notices with admiration several charges of his to the Grand Juries of the Munster Circuit, in the troublous years of 1822 and 1824, when the spirit of outrage and rebellion was so rife as to occasion grave anxiety and such measures of repression as the Insurrection Act and Special Commissions. In these charges he strongly urged the absolute necessity of a sound and enlightened system of education for the lower order of the Irish as the true and only remedy for the disorganized state of the country, and the discontent and hostility to British

rule so widely prevalent. This question of education was one in which he was deeply interested. He was a prominent member of the "Society for Promoting the Education of the Poor in Ireland," known as the Kildare-Place Society, established in 1811. Indeed, Lefroy was a patron and supporter, if not of all existing religious and charitable societies, at least of such of them as were impressed with a highly Protestant and Evangelical character. He was, moreover, a diligent attender and frequent speaker at their anniversary meetings, held at the Rotundo, in Dublin, and known as the "April Meetings." He was to be counted among the founders of several of them, as of the "Hibernian Missionary," and (notably) the "Scripture Readers' Society." In politics Lefroy was a narrow Conservative of the old school. He was a member of the "Brunswick Constitutional Club," instituted in 1828 for the purpose of opposing the proposed measure of Roman Catholic Emancipation. On these principles he contested the University of Dublin on the vacancy which occurred in its representation by the promotion of the Right Hon. Wm. Conyngham Plunket to the Chief Justiceship of the Common Pleas in Ireland. On this occasion Lefroy was defeated by the Right Hon. John Wilson Croker. It may readily be imagined that, in the then excited state of feeling in the country, it was a delicate matter for the Government to appoint to judicial functions a person who was actually playing so prominent a part in these exciting conflicts, and who by the vehemence and earnestness of his opposition, loudly and unequivocally expressed, had rendered himself so obnoxious to the O'Connell and Catholic party—that is, in fact, to the whole popular party and the entire south of Ireland. Accordingly Baron M'Clelland, being obliged by illness to relinquish his post on the Munster Circuit, in 1830, an attempt was made by the Government to induce the learned Serjeant to request an exemption from circuit duty in order to attend to the causes still unheard in the Chancellor's list. To this he did not accede, and a correspondence then ensued, in which his Excellency the Lord-Lieutenant plainly told him, through the Under Secretary, that he considered his "nomination to the provisional exercise of the judicial function as inexpedient in the existing circumstances of the country." Lefroy thereupon resigned his serjeantcy, intimating that he had received the office unimpaired in its privileges, had held it unsullied, and in that state wished to lay it down, when it could no longer be enjoyed without mistrust and curtailment. At the general election after the death of George IV., in 1830, Lefroy was first returned for the University of Dublin, his eldest son (Anthony Lefroy) commencing a parliamentary career at the same time as member for the county of Longford.



For the next eleven years Lefroy continued to represent that constituency, having no less than six contests for his seat, beside six other battles fought for his son in Longford during the same period. He prosecuted, moreover, no less than four election petitions for his son, and the glorious uncertainty of the law, as administered by election committees, could not, perhaps, be better exemplified than by the result of these petitions: on two, the committees amended the sheriff's return, striking off as fictitious certain votes that had been entered on the poll; on two, they refused to open the register or amend the return, though the same fictitious votes had been again received by the sheriff. Mr. Lefroy was one of their party who voted against ministers, in 1830, in the division on the Civil List, in revenge for the manner in which the party had been sold by their leaders on the Catholic Emancipation question. And, of course, he was a vehement opponent of the Reform Bills of '31 and '32, as well as of the education scheme of Mr. Stanley (the late Earl of Derby), that of the "National Board." The accession of Sir R. Peel to power, in 1841, brought Lefroy's parliamentary career to a conclusion. We have already noticed how he was passed over in nominating to the chancellorship. Shortly after a vacancy occurred in the Court of Exchequer, by the transfer of Baron Foster to the Common Pleas, which was offered to Mr. Lefroy, and now accepted. This gave occasion to a bitter attack on ministers by the Right Hon. Richard Lalor Sheil. In moving for the correspondence relating to the restoration of Mr. St. George to the magistracy, in a speech in which he impugned the general policy of the Irish Government, he said—

"If to the peerage, to which his fortune was so adequate—if to the House of Lords, where on Irish appeals, totally unconnected with party, he could, by his knowledge and his talents, have been eminently serviceable, in reward for his political services, which I do not mean to dispute, you had raised Mr. Lefroy, I should not have complained; his abilities, his acquirements, his capacity to do good in a proper place, I freely admit; but that with your professions still fresh upon your lips, the ink in which Lord de Grey's answers were indited being scarcely dry, you should, from the entire mass of the Irish Bar, have made choice of a gentleman so conspicuous for the part he had acted on every question, by which Ireland has been agitated for the last twenty years, to fill the seat vacated by Judge Johnson's resignation, was a most extraordinary proceeding."

Sir R. Peel's reply was in effect that he had only repeated an offer for the fourth time, which had been made by Lord Wellesley for the third; and, that they had had a narrow escape of having the objectionable individual for Lord Chancellor (to which Sir Robert seemed almost to acknowledge

that his political services had entitled him), in which position he would have had the control of the whole magistracy of Ireland! While Baron of the Exchequer it fell to the lot of Lefroy to be the first of the judges to administer the Treason Felony Act. He was the presiding judge at the great trial of John Mitchell, at the City Commission Court, in May, 1848. His charge to the Grand Jury was a lucid exposition of the New Act and the general law on the subject. It is quoted nearly *in extenso* in the memoir, as also the speech (which was of an unusual length and of an impressive character) in which he passed sentence on the prisoner. On Lord Derby's accession to office in 1852, and the transfer of the Irish seals to Chief Justice Blackburne, Baron Lefroy was promoted to the Chief Justiceship. This post he held—despite the efforts to dislodge him we have alluded to—until Lord Derby's return to office in July, 1866, when he placed his resignation in the hands of the new premier, making way for the eminent orator (The Rt. Hon. James Whiteside), who now fills the post of Head of the Common Law in Ireland. Lord Derby offered the retired Chief Justice a Baronetcy, an offer which was renewed by Mr. D'Israeli on succeeding Lord Derby, but on both occasions the proffered honour was declined. Rumour hinted at the time that the veteran chief expected elevation to the peerage, to which there were obstacles, it was said, of a private nature. How this may have been we do not pretend to know. The subject is naturally not alluded to in the volume before us. Chief Justice Lefroy's conduct on the Bench was impartial, calm, dignified and firm; his judgments were lucid, forcible, precise and clear; in criminal cases he held the balance fairly between the Crown and the prisoner; and throughout his long judicial life he manifested a rare mastery of Crown and Constitutional Law. A favourable specimen of his power of grappling with legal principles, and courageously and logically applying them—as of his luminous exposition—is to be found in the judgment he delivered in the case of *Ward v. Freeman* (reported 2 Ir. C. L. Rep., 460) in the Exchequer Chamber, in which he differed from the majority of the Court. If not one of the most brilliant or remarkable, he was at least one of the most unexceptionable, judges on the English or Irish Bench in the present generation. The knowledge, skill, and acumen with which he discharged his judicial functions may be best judged of by the fact that during the quarter of a century during which he sat upon the Bench not a single decision of his was ever reversed in the Court of Ultimate Appeal—his vigour and industry, by the fact that he did not ever miss a single circuit, or town on any circuit.

The late Chief Justice's political opinions we have already

indicated, as also his rather demonstrative, though deep and sincere, religiousness. He was courteous, amiable, charitable; very domestic, simple in his tastes and habits; fond of the country and of gardening. Even to his Dublin residence, which he built for himself in Lower Leeson Street, he had a good garden attached; and in the county of Longford he delighted to spend his vacations, both long and short, at a much loved retreat, called Carrig-glas, the manor house of which he rebuilt. His letter to his wife is quite touching, in which he speaks of the "*anguish*" he felt at the mischief that had been done to this place—especially in the uprooting of a grove of magnificent Cedars of Lebanon—by the great hurricane of January 6, 1839.

The Chief Justice survived his retirement from his judicial labours nearly three years. On May 4, 1869, at Newcourt, a villa he had rented near Bray, in the ninety-fourth year of his age, surrounded by his family, and with a text of Scripture on his lips, the old man tranquilly passed away.

#### IV.—TRIBUNALS OF COMMERCE.

NOT long since a legal journal, in reviewing the legal events of the past year, remarked on the increased trade of the country, and the growing confidence in commercial speculation, but observed at the same time that the legal trade had not increased in the same proportion. Although merchants were filling their pockets, barristers' fee-books showed a depressed trade in Lincoln's Inn and Westminster Hall; and though speculation was rife again in the City, solicitors' costs showed no revival of life. To the lawyers, 1871 had been as dull as previous years, and they alone seem to have been left out in the cold, while others were beginning to rejoice in the growing warmth of commercial activity. How is this? Usually life in the City gives work to the lawyers. When business is brisk, it has been generally considered that employment is being provided for the courts. When contracts are numerous, breaches of contract will be numerous also. When money is plentiful the costs of litigation do not appear so formidable as when money is tight; when transactions are multiplied, unforeseen combinations of circumstances arise, the effects of which require legal explanation and solution, and thus in a busy world the lawyers are generally busy also. How comes it, then, that 1871 is an exception to this general rule? Perhaps the

answer may be found in the evidence given before the Select Committee appointed last year to inquire into the expediency of establishing tribunals of commerce. This evidence shows pretty clearly why legal business, to some extent at any rate, has been standing still, while business of every other description has been advancing. The mercantile community is thoroughly dissatisfied with our whole judicial system; the costs of procuring a decision in one of our superior courts are so enormous, the delay in the progress of a cause is so great, that a merchant shrinks from any attempt to recover a small sum of money, however unjustly withheld from him. He writes it off rather as a bad debt than undergo the expense and anxiety of prosecuting an action, which, after all, may leave him worse off at the end than he was in the beginning. That litigation is costly, and that our machinery for the administration of justice tends to make litigation lengthy, also cannot be denied, whatever may be thought as to the proper remedy to be applied to the evil, and it is obvious what an injurious effect such a state of things as this must have on commercial morality. It is a soil for rogues to thrive in. "Bring your action," says the fraudulent debtor, and he knows that he is safe in his defiance; dishonesty goes unpunished, and our judicial system is thus responsible for much of the commercial immorality we hear of now-a-days. But to cost and delay are added two further complaints. It is said that it is difficult to bring the real question in dispute before the court in a satisfactory manner, and that when brought, the court is often unable to try the cause, and refers it to arbitration. These complaints are not only made by individual merchants and others in their evidence before the Committee, but they are adopted by the Committee itself, and made the basis of the proposals they afterwards recommend. If true, no charges of more condemnatory character than these could be brought against any system of judicature, and it only remains to be seen whether they are so peculiarly applicable to the mercantile community that they can be remedied only by a special tribunal, and not by the threatened general reform of the whole judicial system. The Committee have felt the difficulty of advising on a matter which is only part of the more general subject under the consideration of the Judicature Commission, but they have nevertheless assented to what they believe to be the general demand of merchants, and recommend:—

"That a tribunal of commerce should be established in such of the large towns throughout the country as might be selected as centres of surrounding districts, having regard to the population and commercial activity of each district, and that the court should be composed of one member of the legal profession as the president, and of two members selected from the commercial classes for the office of

commercial judge, with a registrar to carry out the routine business of the court."

They further recommend that if the business of the court so to be constituted is so extensive as not to admit of the County Court judge and registrar conducting the business of the court, the president and registrar should be appointed by the Crown. The jurisdiction of the tribunals, the Committee recommends, should be compulsory and exclusive over all causes which might be classified as commercial, and it considers it essential that the procedure should be of the simplest and most summary character, like that before the Tribunal of Commerce in France, or before justices of the peace in this country. The intervention of professional legal agents is not to be excluded as it is in France, but it is expected that the character of the tribunal will enable their services to be generally dispensed with. If this last expectation is realized, the public will have just reason to rejoice, while the lawyer will have no more ground for complaint than the artisan would have, whose labour is supplied by an improved machinery. If the new machinery is to be so effective as is promised, it is not, we think, from lawyers, on this last-mentioned ground, at any rate, that its establishment will receive obstruction. Finally, the Committee recognises a right to appeal, and recommends that in every case under £500, the appeal should be allowed with the sanction of the court, and above that amount it should be allowed on the demand of the party.

Such is the tribunal which is to remedy the grievances of the mercantile class. Now it is to be observed that in the proposed courts the position of each judge, so far as regards the decision to be pronounced, is equal; the voice of each mercantile member is as potent as that of the legal president. It is not proposed that the merchants shall fill a position similar to that of the nautical assessors of the Admiralty, in which they might advise the judge on the technical matters comprised in the subject of dispute; but while their special knowledge will certainly be useful in that respect, they will have equal power with the president of declaring the law in every instance. The jurisdiction of the court, moreover, is to be compulsory, and with regard to amount unlimited.

Now, the possible conflict between the constituent elements of such a court appears to us a very serious objection to its establishment. How it might be if we had a code of mercantile law to start from, we will not now stop to inquire; but if it be remembered how almost entirely our law depends at present on precedent, how all arguments in contention and in judgment are based on previous decisions, it must seem absurd that a layman, however acute, can be expected to grasp the

meaning and bearing of legal decisions in which he is wholly unversed, so that his voice in judgment may be of any value. In any case, therefore, in which legal principles are involved, it seems to follow that the merchant judge will be useless, or legal principles must be set aside, and judgment given on what some people are pleased to call common-sense views, that is, views which may vary from day to day and hour to hour, and the glorious uncertainty of law will, we venture to think, be soon outdone by the glorious uncertainty of commercial tribunals. The function of every tribunal of justice, as understood in this country at any rate, is to declare the law; and it is a condemnation of any tribunal, to our minds, if it is formed of persons who cannot be expected to have any knowledge of law whatever. It may be said, indeed, that mercantile judges will have knowledge of the customs of their trade, and that knowing custom is knowing law. There is some truth in this, but not the whole truth. Custom, when established, is law. But it is the law which says what is custom. The merchant may well think that the habits of his particular trade, with which he is himself familiar, have the characteristics of custom; but the law, standing outside the trade, has to consider the uniformity, the generality, and the reasonableness of a habit, before it can be advanced to the dignity of a custom. In this sense, and in view of this distinction, we think we are right in saying that a merchant, though well versed in the habits of his trade, has no knowledge of law.

The advocates of these special tribunals of course point to the satisfaction with which they are regarded on the Continent. On the Continent, mercantile tribunals are cheap, speedy, and always at hand—great advantages we admit: advantages which ought to be attainable under every system of judicature, and all of which may be obtained, we believe, without altering the established constitution of our courts. On the Continent it must be remembered the judges have to deal with a code which is supposed accurately to define the law; and the authority of previous decisions goes for little or nothing. The decisions may, indeed, be satisfactory for the moment, but it is hopeless to expect that any scientific system could be formed, or a code scientifically improved, by the decisions of a court propounded in this manner.

Now, the general idea which gives birth to this wish for mercantile members to sit in judgment seems to be that there is something in mercantile transactions which cannot be made intelligible to the outside public. It may be admitted that a merchant will appreciate more quickly the terms of a mercantile contract and the customary implications involved in it, than a non-trader, but how there can be any fact or custom, necessary

to be known, which cannot be made intelligible to minds of ordinary capacity, is beyond our comprehension. Instances, indeed, occur in the evidence before the Committee, intended to be illustrations of the inability of the unaided legal mind to comprehend mercantile transactions, which we confess, as they stand, appear to us to fall far short of any such result. One instance is this: A merchant orders scales and beams of a manufacturer, the latter supplies cast-iron beams, which the former says ought to have been of wrought iron. In the opinion of the witness, it is impossible for the County Court judge to know whether the trade generally uses cast-iron or wrought-iron beams. We should have thought nothing could have been easier than to show the custom of the trade and its knowledge by the manufacturer if it existed. "With a merchant on the tribunal," continues the witness, "he would say at once, 'cast-iron beams is nonsense; it will not do.'"\* That is, that (though grammatically faulty), he would take judicial notice of a custom without requiring evidence, and this, in some instances, may be an advantage, but, as a general rule, leaves a case at the mercy of the prejudices of the judge, and leaves in uncertainty what shall amount to a trade custom and what not. Another disputed case given is that of an order on a manufacturer for saws, with a stipulation that the order was to be executed "at his best discount." The manufacturer invoiced the saws at 80, the merchant contended that 85 per cent. ought to have been taken off. Judge and counsel expressed regret that there should be so much dispute over so small a matter as 5 per cent. But mercantile men, it seems, were astonished, for they saw at once that it was a question, not of 5 but of 25 per cent. Well, if so, surely evidence could have been brought to show to an average mind that what appears in the ordinary construction of language as 5, by the ordinary custom of trade is expanded into 25.

In such cases the cost of procuring evidence is avoided, it is true, by the judicial recognition of a custom without proof, but the risk is not avoided of creating uncertainty, and doing injury to persons outside a trade, by imputing to them knowledge of a custom which may only be a recent usage. The practice of the French tribunals as described by the French Consul at Liverpool is instructive in this particular. He says (Q. 736), "They (the judges) always go by the Code de Commerce, and they add to it their own practice, *because every day brings new usages in commerce* which are admitted in these causes." This mode of administering justice would be a revolution indeed from the present practice of our courts, and yet such a course seems inevitable if merchants are to sit upon them.

\* Question, 1263.

To import into a contract the general and unvarying incidents of uniform usage is of every-day occurrence in our courts; but to establish as law the new usages which every day brings is measuring the law merchant by the merchant's foot, and introducing more confusion where light and simplicity are wanted. Diminution of cost, speedy decisions, tribunals always ready to administer justice, are objects to attain which every effort is praiseworthy, but they will be dearly purchased at the risk of upsetting well-established legal principles, and of still further obstructing a scientific arrangement of our law; and it is this risk which we believe must be run if the proposals of the Committee with regard to these tribunals of commerce are carried out.

There is, however, another serious objection to the proposals of the Committee. They recommend that the County Court judge of the district should be the president of the new court; that so far as law is to guide the decisions of these tribunals, it is to be furnished by the County Court judge. Now, it must be remembered that the mercantile tribunal is intended to be the court of first instance, *exclusively* for all commercial cases. Setting aside the possibility of the additional work pressing too much in point of quantity for the existing County Courts, and thus breaking down a system which has hitherto worked well and given general satisfaction, it is intended to relegate to an inferior tribunal the decision of questions which for intricacy and general importance are conspicuous among all questions brought into Westminster Hall.

It cannot be denied that the calibre of County Court judges is inferior to that of the judges of our present superior courts; and if the former are capable of dealing satisfactorily with legal questions of the highest moment, it must be admitted that the position of the latter is a mistake, and the expense of supporting them may well be avoided in this economical age.

But this is a conclusion to which not even dissatisfied mercantile suitors have yet arrived; in truth, the mistake is in the proposal which ignores the principles on which the County Courts were established, and in accordance with which their jurisdiction has of late years been extended. On these principles the jurisdiction of the County Court, though exclusive, is limited in amount, so that questions of small value, and, therefore, presumably of small importance, are alone decided there; but if you make this jurisdiction compulsory and unlimited, you must either place over the County Courts men selected from a different grade, or you condemn the extravagant constitution of our superior courts.

In disagreeing with the proposals of the Committee on Tribunals of Commerce, we are not to be understood as saying that the dissatisfaction said to be existing in the mercantile



community is a fiction, or that, if existing, there is no good ground for its existence. We believe that cost and delay are very serious evils to all suitors, and to mercantile suitors more especially, perhaps; and if these evils were remedied, and a simple system of procedure adopted, we are strongly of opinion that we should hear very little as to the difficulty of bringing the question in dispute properly before the court, or of ignorance in the court as to the special customs of particular trades. These are evils which can be, and we hope will be, dealt with in the legislation which must follow on the labours of the Judicature Commission, and it will be well to await the effect of their removal, rather than risk present failure, by introducing into the constitution of our courts changes at variance with their history, and calculated, as we think, seriously to impede improvements in the frame and arrangement of our law.

#### V.—APPEAL IN CRIMINAL CASES.

**I**T is the habit of Englishmen to boast of the excellence of the laws of this country, and of the amount of liberty, freedom, and security they enjoy under the beneficent influence of such laws. There is some reason for this, for there can be no doubt that in most respects we enjoy as much genuine liberty here, as in any other country under the sun. The boast, therefore, is not an idle one, nor without some foundation in fact, but it does by no means conclude that our laws are perfect, and that our liberty is incapable of being extended, and our rights rendered more thoroughly consonant with justice. Unfortunately for us our laws are an ungainly mass of enactments, and not a regular and comprehensive code. They are the growth of ages, and have not yet been digested. Hence our Statute books, though having undergone of late a winnowing and sifting, are still full of enactments which have no applicability in the present day, while many provisions which long ago should have been added thereto are still conspicuous by their absence. Of course there has been a great amount of useful law reform during the present reign; but there are still in our system of jurisprudence some glaring defects, which derogate much from the above boast, and are hardly compatible with true liberty, and there are yet numerous anomalies which disfigure the whole system. As a nation we are much too complacent, we form a notion that our laws are good, indeed, better than the laws of other countries, and become actually blind to the

blemishes which exist, and to a certain extent heedless as to reformation.

But of all the anomalies which exist in our laws there is none more unworthy of us, or more indefensible, than the difference which exists between our civil and our criminal law with regard to the right of appeal. It might reasonably be imagined that in a country like this, where so much is thought of the liberty of the subject, that every guarantee of a fair and thoroughly satisfactory and impartial trial would be accorded to the accused in all criminal cases, and possibly in a manner even more thorough than when the rights of things merely are in question. But, strange to say, it is not so. In civil cases the right of appeal is absolute, whereas in criminal cases there is virtually no right of appeal. It is therefore not to be surprised at that intelligent foreigners who study our institutions and our laws should have arrived at the conclusion that property is far more important and more precious in our sight than life and liberty. How this state of affairs came about is difficult to be understood, unless it is that our legislators have always been, as they are now, of the wealthy class, and the proprietors of land and other property, and who perhaps naturally thought that there was a greater necessity to protect their possessions than there was for securing the fair trial of criminals, who, as a rule, were not of their class. If the state of the law on the subject of appeal be not due to the cause we have here indicated, its continuance at any rate cannot be attributed to any other influence. And in this opinion we are not alone, for we have on our side the high authority of the present Lord Chief Baron of the Court of Exchequer, who once said in Parliament, that "he could not conceive that this omission to apply some remedy to this gross defect in the criminal law would so long have continued a just reproach to us, had it not been that the members of the Legislature were not of that class of persons which for the most part became liable to criminal prosecutions. Had their characters, their liberty, their life, been in proportion so often in jeopardy under the operation of the criminal law as the persons and lives of the classes below them in society, this most unjust incongruity would long since have disappeared from our criminal jurisprudence."

In all civil actions, even though the matter in dispute be not worth more than 5s., there is an unquestioned right of appeal, and there is no hindrance whatever to a most thorough and searching trial. So that if either party to an action at law, or a suit in Chancery, fancies he is aggrieved by the verdict of a jury, or the judgment of a court, he can re-open the case by appeal, and move from the lower tribunal to a higher, and step by step carry his case to the highest appellate

court in the land, until he have strong and substantial justice done him. If he shows grounds why his appeal should be allowed, he may have both the law and the facts taken into consideration, and the verdict set aside, or a new trial accorded to him. There is no difficulty in the way. Every facility is offered, and the only thing to be done is to show a sufficient reason for interfering with the decision of the court against which he appeals. What is a sufficient reason rests with the court before which the appeal is brought, subject, however, to a mass of authorities. Misdirection by the judge, improper admission of evidence, the rejection of admissible evidence, the fact of the verdict being against the evidence, the perjury of the witnesses, the discovery of fresh evidence after the trial, which evidence could not have been adduced by the appellant on the first trial; these, with many others, have been held sufficient reasons in civil cases either to set the verdict aside, or to grant a new trial. And no one will for a moment maintain they are not good and valid reasons.

In criminal cases, however, where something more valuable than property is at stake—where the liberty and may be the life of a being is in issue—this privilege is almost entirely denied. We say almost entirely, because in some cases there is a conditional right of appeal. A distinction is drawn in the criminal law between such cases as amount to felony, or high treason, and those which amount only to misdemeanour. In treason and felony, by far the most momentous, as the question involved is often one of life or death to the accused, there is no right of appeal, unless we consider as such the reservation of points of law for the Court for the Consideration of Crown Cases Reserved; a concession which was tardily made by the 11 & 12 Vict. c. 78. This Act is by no means what it should be: indeed, it falls far short; but of this later on.

With regard to misdemeanours, or the minor offences recognized by our criminal law, a right of appeal is allowed, and a new trial may be obtained under certain circumstances; that is, where the indictment has been either originally preferred in the Court of Queen's Bench, or has been removed thither by a writ of *certiorari*. Where a bill of indictment has been found and the trial has taken place at the Assizes or at Sessions, there are no means of obtaining a new trial except where there has been a mistrial, and a writ of error would be granted, and in the case of *Rev v. The Inhabitants of Oxford* (13 East, 411), the Court of Queen's Bench declined to allow a *certiorari* to be issued to remove an indictment and the proceedings thereon at the Assizes after verdict had been given, and before judgment had been pronounced, in order to found an application for a new trial upon the judge's notes of the evidence, on the ground that the verdict was against the evidence, and contrary

to the direction of the judge. But where the indictment has been removed thither by *certiorari*, the Queen's Bench has full power to set the verdict aside, or to grant a new trial, and for the same reasons as would guide the court in allowing a new trial in civil cases. Even this right was only very tardily conceded, and the history of the change in this respect fully shows how slow we are in removing grievous blots from our system of jurisprudence. There was a time when even in civil cases new trials were not permitted. That, however, being established, the next step was to allow appeals in civil cases which, to a certain extent, partook of the nature of criminal cases. This was followed after a time by the change with regard to misdemeanours. It cannot be denied that these gradual reforms have been found to answer well, and that they have greatly conduced to the attainment of justice.

Now, even though this conditional right of appeal in cases of misdemeanour is better than is the state of the law with regard to felony and treason, nothing can very well be more absurd. The Queen's Bench is the highest criminal tribunal in the land, and its judges are as learned as judges can well be, so that in all probability there would be less likelihood of error being committed there than almost in any other court. If a case, however, has been tried there, the right of appeal exists; while, on the other hand, if the same case had been tried in a remote corner of the country before the chairman of a Court of Quarter Sessions—not even necessarily a lawyer by name—and a jury whose intelligence may be on a par with the legal knowledge of the chairman, the verdict is final and conclusive, and cannot be called in question. It can hardly be expected that a chairman of Quarter Sessions is less fallible than the Lord Chief Justice of England, or that a country jury has a clearer conception of facts and their bearings than a jury of Middlesex tradesmen. It would be idle to try to defend anomalies of this kind, and it is not consistent with common sense that such anomalies should exist. Besides the application of a writ of *certiorari* is not altogether fair. It can only be obtained with trouble, and at no inconsiderable expense. So that it is only in the power of the rich to have their cases removed to the Queen's Bench. It is a luxury which from circumstances must be beyond the reach of an ordinary criminal. There is another objection to *certiorari* in criminal cases. It changes to a certain extent the character of the accused. Instead of a "prisoner at the bar," he is called a defendant, and enjoys, as we saw in a recent *cause célèbre*, the privileges of going and coming in and out of court at his pleasure. Either all accused persons ought to enjoy the same privileges and advantages, or *certiorari* ought to cease altogether. We have in our law too many distinctions

between the rich and the poor, and though, of course, wealth will always be attended with advantages over poverty, still it is our duty to level as much as possible all distinction, and more especially in criminal proceedings.

However, in cases of felony or treason, the accused or convicted have not even these advantages. It had been "completely settled that no new trial could in any case be granted where the proceedings have been regular" (Chitty on Crim. Law). And this was the case whether the indictment had been originally preferred in the Court of Queen's Bench, or had been removed thither by *certiorari*. But, in 1851, an attempt, if it may be so termed, was made to break through this, and with apparent success, for it was on that occasion at any rate decided that a new trial could be obtained in cases of felony. The case we allude to is that of *Reg. v. Scaife and others* (17 Q.B., 238), in which it was held that the Court of Queen's Bench had the power to order new trials in cases of felony where the record was before the Court, on the grounds of improper admission of evidence and misdirection by the judge. The case in question was one of robbery with violence. It was in the first instance removed from the Hull Borough Sessions by *certiorari*, and afterwards tried before Mr. Justice Cresswell and a jury, at the York Spring Assizes, in 1851. The judge admitted evidence which was objected to by the counsel for one of the prisoners, and also neglected to inform the jury in his summing up that a portion of the evidence did not apply to one of the accused. The verdict as against that person was accordingly questioned, and in the term ensuing the Court of Queen's Bench was moved to grant a rule *nisi* to compel the prosecutor to show cause why a new trial should not be allowed. This rule was in due course made absolute, and a new trial was obtained, though in the second trial the appellant fared worse than he did in the first.

This extraordinary decision, which is believed to have been without precedent, though truly consonant with justice, occasioned no little surprise in the legal world, and the advocates of appeal thought, naturally enough, that this was a tacit admission on the part of the judges of the soundness of the principle of appeal in all criminal cases. But it seems to have been considered a dead letter, or, as Mr. Justice Coleridge, in another case, remarked, when treating of this case, "although as is well known the public attention has been much drawn to the subject during the interval which has intervened, and it cannot be doubted that verdicts have since been pronounced which might have seemed questionable, no attempt has been made in this country to press the authority of that case in support of a similar application." And where it was pressed as an authority, not only has it not been accepted as a sound dictum, but it has

been virtually overruled by two cases of appeal from the colonies, which were lately heard before the Judicial Committee of the Privy Council. We allude to the cases, *Reg. v. Bertrand* (L.R., 1 P.C., 520), from the judgment in which we extract the above remark of Mr. Justice Coleridge, and *Reg. v. Murphy* (17 W.R., 1047, P.C.)

The law, therefore, as it now stands with regard to appeal in felony and treason, is the same as it was before the above case of *Reg. v. Scaife* was heard. It is this, that where matters of fact are in question, a convicted person cannot appeal, no matter by what amount of perjury the conviction was obtained—no matter whether facts, which have come into light after the trial, conclusively show that the conviction had been improperly and unjustly obtained. But points of law may be reserved for the consideration of the Court established for that purpose by the Act of 1848, to which reference has already been made, and which will later on be considered at greater length.

In addition to this a writ of error will apply in some cases. A writ of error lies for every substantial defect appearing on the face of the record, but this writ is not issued as a matter of course or of right—it is issued only *ex gratia reginæ*. This was clearly so in all cases of a criminal character up to the reign of Queen Anne, when the judges intimated their opinion that in all cases under treason or felony it should issue *ex debito justitiæ*, and in a later case they went so far as to give their opinion that where the Attorney-General refused to grant his fiat—which is a necessary step in an application for a writ of error—he might be compelled to do so. But this has been questioned, and is not considered sound law. So that in reality in all cases, especially those of treason or felony, it remains, in strict law, entirely in the breast of the Crown whether the writ shall be granted or not. This is a defect. Either the Attorney-General's fiat ought not to be required, or where it is denied the court ought to have power to compel him to grant it. We can easily conceive, in cases of treason especially, this power of the Crown somewhat harshly exercised. Now, with regard to the operation of the writ itself. It applies only to cases where error is manifest on the face of the record. But the record affords no information whatever of the merits of the case. It states the charge against the accused, the finding of the jury, and the sentence, but gives no tittle of the evidence, nor does it give any report of the ruling of the judge. In fact, it gives no information beyond merely a formal entry of the proceedings. If error, however, creeps into the record, it becomes a matter for the correction of an appellate tribunal. And here we have again this extraordinary anomaly, that, while the accused can call to his aid a

Court of Appeal upon a most trivial point of form—often attributable to an accident, as a mere clerical error—he is denied the right of appeal when he has good reason to question the facts adduced against him before the jury and the ruling of the judge—subjects upon which the justice and legality of his conviction must depend far more than on formal errors in the record.

All these anomalies are relics of barbarous times—of the time when, though our law is supposed to have ever followed the maxim that a person must be considered innocent until he is proved guilty, a person accused of a criminal offence was hunted to death, and was denied even the right of being represented by counsel. It is not very long ago that that improvement was introduced, and that after a great struggle, because of the character of the opposition to it. Almost all the judges were arrayed as opponents and worse than confusion was predicted should the measure become law. But the judges who opposed it lived quite long enough to see that what they most dreaded proved fruitful of much good, and contributed considerably to the ends of justice; and if we find that some of our judges have entertained opinions against the right of appeal in criminal cases, we must not slavishly adopt their opinions. Indeed, it is absolutely necessary that there should exist a right of appeal. There cannot be the slightest doubt that many innocent persons have had to suffer imprisonment, banishment, nay, even death itself, who, had there been a right of appeal, would not have had to suffer so grievously.

This gross defect in our criminal law has been felt often by lawyers who have been practising in criminal courts, and the question has been submitted to Parliament on three or four occasions; but the House of Commons, with an obtuseness and pertinacity which reflect no credit upon it, and which show how our legislators dread and abhor any innovation or change, has persistently refused to introduce into our Statutes provisions which justice loudly demands, and without which it must be impossible to prevent the perpetration of grievous wrong and injustice, and that, too, under the cloak of a sacred trial.

The present Lord Chief Baron of the Exchequer, Sir Fitzroy Kelly, then Mr. Fitzroy Kelly, and member for the Cambridge University, in the year 1844 introduced into the House of Commons a Bill to allow appeals in criminal cases. He proposed that in any indictment before the Central Criminal Court, or at the Assizes or other court having criminal jurisdiction, the convicted prisoner should have power to move in one of the superior courts at Westminster for a rule to set aside the verdict, or to grant a new trial, or

to return a verdict of "Not guilty," or, where the law had been erroneously laid down by the judge, to reverse the judgment—in fact, that there should be an appeal both where facts were involved and where the law was impugned; and to confer on the superior courts the same appellate jurisdiction in criminal cases as nearly as circumstances permitted as that which they exercise in civil cases. His speech, on introducing the Bill, was a masterly one, and the question was dealt with in a manner not to be surpassed. He showed in glowing terms how utterly unworthy of this country was the strange anomaly. He met every objection in a fair and candid manner, and pointed out the great advantages which he conceived would result from the proposed change. "He believed it could produce no evil consequences whatever—it broke in upon no legal or constitutional principle—it invaded the rights of no member of the community—it involved not the expenditure of a single shilling, and he believed it would tend to the advancement of the just and pure administration of the law." The Bill was only read once. On the second reading it was withdrawn at the request of Sir James Graham, who admitted the grave importance of the question, and promised that the Government would, during the ensuing recess, give it their serious consideration, and would, should they after deliberation be of opinion that it was desirable, introduce a measure to remedy the evil. We have no means of ascertaining whether the Government did consider the subject or not, but, if they did, the half-promised measure was never introduced.

Again, in 1848, a Bill with a similar object was introduced by Mr. Ewart, than whom there has not been in Parliament a man more energetic in his attempts to reform our criminal law. Mr. Ewart proposed to give the right of appeal on matters of fact, as well as on points of law, in all cases except those of treason or misprision of treason. But this measure met with no better success than the one introduced by Sir Fitzroy Kelly, because it happened that during the very same session Lord Campbell had introduced a Bill for the establishment of a court for the consideration of reserved points of law in criminal cases, and in favour of this measure Mr. Ewart was prevailed upon to withdraw his.

Lord Campbell's Bill was passed, and forms the Statute 11 & 12 Vict. c. 78. Under this Act the Court for Consideration of Crown Cases Reserved was established, a court which is empowered to hear all points of law reserved by the judges in criminal trials. The old practice was a most unsatisfactory one. If a judge thought there was any doubt about a point of law, he submitted the question to the other judges, who used to meet together occasionally for the purpose of determining



such questions. They met in private, and no counsel appeared before them to argue the point, or if counsel did appear, it was only *ex gratia*. This was a most objectionable method of procedure, and could hardly give satisfaction. And hence Lord Campbell's Act, shortcoming as it is in many respects, was a great boon, as it substituted, for this informal and private tribunal, a regularly constituted and open court. But this Act is by no means perfect. It has one great blot, for it leaves the reservation of all points of law entirely in the discretion of the judge; and this, in our opinion, detracts in no little degree from the value of the Statute, and puts the judge himself in a false position. It imposes on him a most unpleasant duty, that of determining whether his own decision should be the subject of review. This ought not to be so. The right of appeal should be absolute, and should never rest in the discretion of the judge, against whose judgment the appeal is sought, to decide whether the appeal should be granted or not. It has been said that if this were altered there would be no end to appeals, that in every case the Court of Appeal would be had recourse to. Now, this cannot be said in earnest. No counsel would prosecute an appeal without some good reason, and those who maintain the contrary scarcely know how absolutely necessary to the success of counsel is the preservation of his reputation. But even supposing there was some little danger in this respect, the evil could easily be met by making some provision similar to that which regulates appeals in Chancery, and renders necessary a certificate under the hand of the leading counsel in the case, that in his opinion the case is one which should be reviewed: To demand that this right of appeal, on points of law, should be made absolute, is by no means derogatory to the judges. Judges are only human, and if they do occasionally show a pertinacity and a determination to stick to their views, this is a trait which we may naturally expect. Sir Fitzroy Kelly, in the speech to which we have before alluded, gave a pointed illustration of this:—

“He could state from his own experience that the most learned and eminent judges might refuse to reserve a point, when it might appear afterwards that the point was a valid and good one. He could state a case from his own knowledge in which that took place. Some years ago a man was indicted, in the county of Huntingdon, for a capital offence, and convicted. So soon as the evidence closed, he who was counsel for the prisoner submitted that, although the man had committed a misdemeanour and was guilty of a grievous offence, yet he could not be convicted of the offence charged in the indictment for the capital felony. This he submitted before the finding of the jury as well as after that finding, but the judge in each case peremptorily refused to reserve the point. He waited on him

afterwards in his own private room, and once went in the middle of the night, and so strongly represented the case that the judge, who had on each occasion received him in the kindest manner, intimated that it would be unworthy of him to persevere any longer in those attempts to induce him to reserve the point. The judge, having thus so long peremptorily refused to reserve the point, the time arrived when the man was about to suffer the sentence of death, when he (Mr. Kelly) again waited upon him, and besought and implored him, and indeed, insisted that if the learned judge would not reserve the point himself, he would at least write to the Chief Justice of the King's Bench, and ask his opinion as to whether the point was good. That was the sixth application which he had made to the learned judge, and on that occasion he at length succeeded, after more than an hour, in inducing him to write to Lord Tenterden and the Lord Chancellor, asking their opinion of the point, and to that inquiry he received a reply from those learned judges, recommending that the point be reserved—the time at which the answer with this recommendation arrived being only eight hours before the man would have been executed, if it had not been for that inquiry. A respite was accordingly sent just eight hours before the time appointed for carrying the sentence into execution. The point, having been thus reserved, was argued before eleven judges in the subsequent term, and they unanimously decided that the objection was valid, and that the judgment ought to be reversed—the learned judge before whom the case was tried being one of the judges who came to that decision. That case was one of those which showed that, however merciful or learned and experienced a judge may be, it did not follow that he would always reserve a point which was submitted to him, even when it was a sound and valid objection. He believed that but for the strong course which he had adopted, the sentence for the capital offence would have been carried into effect on the prisoner. The course which he took, however, produced a contrary effect, and the man who was so near suffering the punishment of death was then alive—a reformed man, and, he believed, a useful and honest member of society."

We have not a word to add to this, for a statement like the foregoing is more conclusive than any arguments that could be adduced. But is it right, is it just, that the life of a man should depend on the energies of counsel beyond his ordinary professional capacity? It is not every counsel who would have persisted so strenuously as did Sir Fitzroy Kelly, and it is not every counsel who can bring the same influence to bear.

Another attempt to secure the right of appeal was made in the year 1853, by Mr. Isaac Butt, who introduced a measure which, had it become law, would have been an improvement on Lord Campbell's Act, as it would have made absolute the right of appeal on points of law as well as in matters of fact. It provided, however, that in no case should the mere fact of

appeal prevent the carrying out of the sentence, which was to be treated as in full force unless, and until, it was reversed. Of course, where the punishment was imprisonment a portion of the sentence would have to be undergone; but in capital cases he provided that a special tribunal—consisting of five commissioners, to be appointed by the Lord Chancellor under the Great Seal—should immediately hear the appeal. The Bill as introduced only applied to Ireland, but Mr. Butt said it could in committee be extended to England also. The second reading did not come on for consideration until late in the session, when it was opposed by Viscount Palmerston, Mr. Napier (the Attorney-General for Ireland), Mr. Phillimore and others, and was thrown out.

The next attempt to effect a change in this respect, and so far as we are aware, the last, was made by Mr. MacMahon (member for Wexford), in 1858. The Bill introduced by Mr. MacMahon contained three main provisions. The object of the first provision was to remove doubts which had existed for many years as to the power of the Queen's Bench to remove indictments after trial into that Court, and to grant a new trial. The second was to remove doubts as to whether or not the Statute of Edward I., with regard to Bills of Exceptions, applied to criminal as well as to civil cases; and by the third provision, subordinate courts were enabled to grant new trials themselves. Sir Frederick Pollock, when examined before the Commissioners on Criminal Law Reform, had suggested the last-named provision; but in the debate it was generally considered objectionable. During the debate a wonderful unanimity of opinion existed in the House in favour of the principle of the right of appeal. Mr. Lowe was the only one who opposed the measure, tooth and nail, and his arguments were characterized as "offensive." The second reading was carried by a large majority—the voting being: ayes, 145; noes, 91—majority, 54. For the committing of the Bill there was also a majority, but at the request of the Attorney-General (Sir Fitzroy Kelly) it was committed for three months, and this again because it was so far advanced in the session that it would be quite impossible to carry it to a successful issue.

The matter has not since been before Parliament, but the question was slightly considered by the Capital Punishment Commission of 1865-66, though it was only incidentally, as it was beyond their power to make any report on the subject, the terms of their commission not warranting it. Several witnesses were asked their opinion as to the desirability of having appeal in criminal cases, and among others were Lord Cranworth, Lord Wensleydale, Baron Bramwell, Baron Martin, the Hon. George Denman, the Right Hon. H. S.

Walpole, and Sir Fitzroy Kelly. The opinion prevailing was certainly unfavourable to such appeal, the only one decidedly favourable to it being the last named. Strange as it may be, it is not the less true that our judges, as a rule, have ever been opposed to the beneficent changes which from time to time have been effected in our criminal laws. They seem to dread innovation, and look upon all reform as the promulgation of new-fangled doctrines and ideas, which must tend to throw everything into a state of great confusion. They were opposed to the abolition of capital punishment for offences no longer capital. They strenuously opposed the movement to secure the aid of counsel to prisoners; and hence, if we find amongst those arrayed against the granting of appeal the names of some eminent judges, we must not at once give in and bow to their views, but examine the grounds upon which they object, and weigh the arguments adduced by them in a fair and candid manner; and it is with these arguments we would now deal.

Many of the opponents of the measure are satisfied with the present state of affairs, and maintain that the existing machinery is sufficient to meet every case. Now, we have clearly shown that in cases of felony, except a writ of error applies, or a point of law be reserved, the only remedy (to misuse the word) a person convicted has is to apply, or rather get his friends to apply, to the Home Secretary for a pardon. If he has been unjustly convicted, it does not remove the stigma, for his conviction still remains a matter of record, whereas if he had been again put upon his trial and acquitted, all imputation on his character would be removed. The appeal is made to the clemency of the Home Secretary, and when through the interference of that functionary a prisoner is liberated, he obtains his freedom as a favour and not, as he deserved, as of right. This is not justice. Besides, the manner in which the Home Secretary exercises the Royal prerogative is very unsatisfactory. The practice at the Home Office is this:—A memorial is presented to the Home Secretary, backed up with all the influence the friends of the prisoner can bring to bear in favour of the application. Statements are made by his friends, unsanctioned by oath and not subject to any searching examination, and the whole matter is laid before the judge who presided on the trial; and as a rule, if the latter is of opinion that there should be a pardon granted, or a mitigation of the sentence, his suggestion is acted upon, but the Home Secretary has the absolute disposal of the matter. And it is hardly necessary to say that decisions of this nature come to in secret have often given the greatest dissatisfaction. Great suspicion has often been aroused; and when the official is asked in the House for his reasons, he invariably falls back upon his

own responsibility, and declines to give them. "Justice," as Mr. Roebuck said, with reference to this matter, "is not justice unless the people believed it to be so, and a dark tribunal of this kind does not conciliate public opinion." Mr. Baron Bramwell, in his evidence before the Capital Punishment Commission, characterized the Home Office "as the worst court of appeal, because it is not a public court, and because it proceeds on written and *ex parte* statements, and is an unsatisfactory appeal from the judgment of a jury." Baron Martin was equally opposed to it, and Lord Hobart objected to "secret proceedings at the Home Office, amounting to a new trial, without the ordinary safeguards, such as publicity, for the due administration of justice." When we thus maintain that in most cases the present system of reprieve by the Home Secretary is objectionable, we must not be thought to be advocates for the determination of the Royal prerogative of mercy. On the contrary, we think it is one of the richest jewels in the Crown, and there are cases, and there will always be cases, where the exercise of this Royal prerogative alone will be able to do justice. For we presume that under any circumstances, if the right of appeal be conceded, the exercise of this right must be limited to a certain short day, such as within four days or so of the beginning of the term next ensuing to the trial, otherwise it would be almost impossible to say where the privilege would lead us to. Supposing, therefore, that a long time transpires before any circumstance arises which tends to prove that the conviction was illegal and not warranted, then the exercise of the Royal prerogative will afford means of repairing, to a certain extent, the injury the convicted has sustained.

Others, again, oppose this reform, because in their opinion the delay which would necessarily arise in case of appeal would neutralize whatever influence punishment has—that the terror instilled into the populace by the quick following of punishment on the commission of crime would be done away with, and that punishment taking place after a lapse of time, and when the public interest in the case had abated, would have no longer any deterrent influence on criminals. This argument, plausible as it may seem to be, involves several considerations. First of all, is punishment deterrent? Do criminals think of it when committing crime? Does a short lapse cause the public interest to abate, and if it did, would that derogate from whatever influence punishments may have? On these points there are various opinions. We are willing to admit, and, indeed, believe, that punishment does to a certain extent deter. But that a short lapse of time would neutralize this, cannot be admitted. Besides, all these are objections which can easily be met, for if provision were made

that the sentence should enure until the appeal would prove successful—we do not here speak of capital cases, for they form but a very small proportion of criminal cases, and the appeal in them should be instant—the punishment would in reality follow the crime without any lapse. In capital cases modern ideas are in favour of a certain lapse. Not long ago we were in the habit of executing criminals sentenced to death within forty-eight hours, and we have ourselves seen a tombstone erected to the memory of a young woman who had thus been expeditiously executed the day next after the sentence was passed upon her. This is not so now: we are not in such unseemly haste.

Lord Palmerston stated, on the second reading of Mr. Butt's Bill, and this was the objection raised by several others, that next to the evil effects of delay, the chief reason for his opposition to the granting of appeal was, that he thought if appeal were granted, judges and juries would not have the same sense of responsibility as they have now, when they know that for good or for evil their decision is final, and that they would therefore become more indifferent as to the issue and more careless in the exercise of their duty. This is certainly not flattering to either judge or jury; but we think it a most unjust aspersion. They are all sworn to do their duty to the best of their understanding, and this we are certain they will always do. The argument is not worth noticing; and were it not for the plausible way in which it was put forward by men of the late lord's position, we should not stop here to discuss it. Can it be said that either judges or juries are indifferent as to what they decide in civil cases because their decisions are liable to be appealed against?

Another argument invariably brought against all the Bills hitherto introduced on the subject is, that the remedy proposed is one-sided; in other words, that the privilege of appeal is to be conceded only to the convicted. If there is one doctrine which is more thoroughly engrafted in our criminal law than another, it is that in no case shall a prisoner be put on his trial twice for the same offence. So that once he is acquitted he is for ever free from liability to be again brought to trial for the same offence; and if he be so brought, he can always seek shelter behind the plea of *autrefois acquit*. It is contended that if the right of appeal be extended to a convicted criminal, the foregoing privilege to an acquitted prisoner should cease. This is certainly a most important point for consideration. It does seem strange, supposing a man be acquitted for the want of sufficient evidence against him at his trial, and that evidence be afterwards forthcoming which clearly proves his guilt, that he cannot again be tried for the offence. But it is so. We think, however, that at any rate

in the most serious kind of criminal cases the Crown should have the power to cause a second trial to take place. Not, however, for the reason adduced by Lord Palmerston. His reason was this: that our criminal law "embraces cases of offences against individuals, such as assaults, or wounding, or other cases in which injury is done to an individual as well as to society," and that, therefore, the prosecutor in such cases being the party principally aggrieved should have equal rights with the accused. The object of our criminal law is not to render satisfaction to the individual, nor is it to wreak vengeance merely on an offender—it is for the protection of society. The prosecutor is more in the character of a witness for the Crown, whose duty it is to prevent crime. For his own grievance he has always a civil remedy; and though it is expected of him to do his duty to the State in the first instance, yet that by no means precludes him from afterwards seeking what satisfaction he may at the hands of the man who has injured him.

It has also been contended that if appeals were allowed, the perjury of witnesses would become far more frequent, because it is said that, in order to save a friend from the gallows or prison, many persons would not hesitate to forswear themselves, justifying their conduct by the specious reasoning that if their end or aim were good, any means to attain it would be justifiable. Under the present state of affairs it is far worse, for statements are made to the Home Secretary, unsanctioned by oath, and often without a foundation in truth; whereas, if a person had to give his testimony in open court on his oath, and withal subject to cross-examination, he would be far more likely to tell the truth, than when he is closeted with an attorney in a private room and untrammelled. We cannot stop here to discuss any more objections. The most important we have dealt with.

In almost all European countries, and in America, the right of appeal in criminal, as in civil, cases is fully allowed. "We have repeatedly had occasion," were the words of Mr. Justice Turley, in the case of *Leake v. The State* (United States), "to assert that in criminal cases we will weigh the evidence, and, if it preponderates against the verdict, grant a new trial. And we do this out of the great regard in which the law holds life and liberty, declaring, as it does, that, in every instance where either the one or the other is sought to be assailed by a criminal prosecution, the guilt of the person charged shall be established beyond a reasonable doubt. In administering the law with this benign provision in favour of criminals, it would be mockery, in a court of last resort, to hold that upon an application for a new trial it would not weigh the evidence, but hold the verdict of the jury

conclusive of the criminal's guilt, if there were any proof by which it could be ascertained. This would be to place no higher estimate upon life and liberty than upon property." "But here," said Sir Fitzroy Kelly, "however palpable the error of the judge or of the jury, however convincing the weight of evidence which circumstances might bring to light after the passing of the sentence, yet if the judge remains satisfied with the verdict and with his own charge, in criminal cases the convicted person, however innocent, has no chance of escape from his sentence."

Is it desirable that this state of things should continue? The answer must be decidedly in the negative; and it is some satisfaction to know that Sir George Jenkinson has notified his intention to apply during this Session of Parliament for a Select Committee to inquire into the subject, and take up the unfinished work of the Royal Commission on Capital Punishment, which sat in 1865-6. It is to be hoped, before a long lapse of time, the whole of our criminal law will undergo a thoroughly rational codification, and that the many anomalies which now exist in it, and more especially those to which attention has herein been directed, will be completely swept away.

J. ROLAND PHILLIPS.

## VI.—THE LAW OF EVIDENCE IN INDIA.

**T**HE Law of Evidence is attracting a good deal of attention in India just at present, owing to the fact that there now is before the Indian Legislative Council an Evidence Bill, which, if it passes into law, is to supersede the existing Law of Evidence, and to take its place. But this subject is important to the profession in other parts of the Empire as well as in India, not only because the laws by which so important a portion of the Empire is governed are or ought to be of interest to every British lawyer, but also because this Bill is avowedly an attempt at codifying the Law of Evidence, and at making the code self-contained as far as possible. Before, however, making the few remarks which the exigencies of space permit of our making here upon the Bill, let us say a few words upon the present condition of the Law of Evidence in India.

According to Mr. Fitzjames Stephen, in his speech\* in the Legislative Council when introducing the Bill, "it would be

\* This speech has been published *in extenso* in Calcutta under the editorship of Mr. Henry R. Fink, Solicitor.



exceedingly difficult to say precisely what, at the present moment, the law upon this subject is. To some extent—it is far from being clear to what extent—and in some parts of the country, though questions might be raised as to the particular parts of the country, the English Law of Evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice, for if the English Law of Evidence has not been introduced into this country, English lawyers and quasi-lawyers have, and the Courts have been directed to decide according to the law of justice, equity, and good conscience.” This is a very sweeping statement, but, unfortunately, although there is a substratum of truth in them, Mr. Fitzjames Stephen’s remarks do not convey the whole truth. The real state of the case is this:—There are in India two great classes of civil courts, the High Courts and the Mofussil Courts. The High Courts have an appellate jurisdiction, by virtue of which they hear appeals from the Mofussil Courts, as well as appeals from divisions of themselves, and they have an original jurisdiction within certain local limits which they inherited from the Supreme Courts. The Mofussil Courts are those having jurisdiction in places beyond the local limits of the High Courts. In determining appeals from the Mofussil the High Courts are bound to apply “the law as rule of equity and good conscience, which the court in which the proceedings in such case are originally instituted ought to have applied to such case.” So that the following questions have to be answered:—(1.) What is the Law of Evidence applicable in the High Courts on their original side? (2.) What is the Law of Evidence applicable in the Mofussil Courts? There is upon the Indian Statute Book at present an Evidence Act (II. of 1855). That Act is in force in the Mofussil, as well as in the local limits of the High Courts. But that Act does not contain the whole of the Indian Law of Evidence, because the concluding section enacts that “nothing in this Act contained shall be so construed as to render inadmissible in any court any evidence which, but for the passing of this Act, would have been admissible in such court.” The old Supreme Courts of India were constituted on the basis of the English courts, and administered the English Law of Evidence; and Act II. of 1859 did not exclude anything admissible in such courts before its passing. The High Courts succeeded in 1862 to the jurisdiction of the Supreme Courts, and so far as they have so succeeded administer the law, which the superseded courts would have administered.

In the Mofussil the English Law of Evidence was never introduced as such. This was thus expressed by Sir B. Peacock, late Chief Justice of Bengal, in *Reg. v. Khyroolla* (6

Suth. W. R., 21), and is in conformity with the judgment of the Judicial Committee of the Privy Council in the case of *Unide Rajah Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (7 Moo. Ind. Ap., 128). We find then that, contrary to the English rule, the evidence of a wife is received both for and against her husband in criminal cases in the Mofussil. The legality of the practice was confirmed by the High Court of Calcutta in *Reg. v. Khyroolla (ubi sup.)*. Again, that principle of the English law that a party to a deed is estopped from setting up a want of consideration for the deed as a defence to an action upon it is of no force in the Mofussil.

When we come to examine Act II. of 1855, we do not find many or marked departures from the rules of the English Law of Evidence. Some of the most salient may be mentioned. (1) Children under 7 years of age are absolutely incompetent to testify; (2) persons who, by reason of immature age, or defect or want of religious belief, ought not to give evidence on oath or solemn affirmation, are to give evidence on simple affirmation; (3) a dying declaration is admissible even though the declarant entertained a hope of recovery at the time of making it; (4) witnesses are not entitled to refuse to answer criminating questions, but their answers cannot afterwards be given in evidence against them; (5) entries or statements in the course of the business, or against the interest of the maker, are admissible during the lifetime of the maker under certain circumstances; (6) the declarations of illegitimate relations and friends are admitted in questions of pedigree. Thus the statement in the preface to "*Goodeve on Evidence*"\* is true "that the English Law of Evidence is the basis of that of India, so that what is explained (*i.e.*, in the treatise) is in fact the Law of Evidence as administered in the Courts of England with those occasional modifications which have been introduced by Indian legislation."

Passing then to the Indian Evidence Bill, its *raison d'être*, as far as can be gathered from the speech of Mr. Fitzjames Stephen, are two—(1) the necessity of having one uniform system of evidence throughout the whole of India; (2) the desirability of having a self-contained code of the Law of Evidence, and one which will be easily intelligible to the Mofussil judges. As to the first there can be no division of opinion, nor, indeed, as to the desirability of the second, but while the Bill effects the first object, it does not seem to effect the second. In the first place the Bill is not self-contained, *i.e.*, it is necessary to go outside the Bill before a complete knowledge of the Law of Evidence, as it will be if the Bill

\* A notice of the third edition of this valuable work will be found in another part of our columns.

becomes law, can be determined. As an instance we may mention that although the Bill affects to deal with presumptions, only two presumptions—viz., the presumption of death from seven years' absence, and the presumption of partnership from parties acting as partners—are mentioned; for the rest, it is necessary to look outside the Bill. Nor again is the language of the Bill, as far as it goes, unambiguous. It will require a whole multitude of legal decisions to clear away these ambiguities, and the Act, when passed, *plus* the decisions, not the Act *per se*, will constitute the Indian Law of Evidence of the future. Besides this, to read the Bill alone, without a knowledge of the principles on which it is founded, will be working comparatively in the dark. So that the expectations entertained by its authors, that it will supersede the necessity of studying the existing treatises on the Law of Evidence, is as absurd as it is illusory. Although the Bill is open to the objections herein mentioned, as well as to several others, and not least, in that part of it which is aimed at limiting, if not destroying, the right of cross-examination to test veracity, which must be struck out before the Bill passes; although it is by no means the piece of legislative perfection that the Council of the Governor-General seem to imagine that it is; still, as a whole, it is not devoid of merit, and will be serviceable at any rate as a rule of thumb to the occupants of the Indian Bench.

In one respect the Bill is well worthy of attention, *i.e.*, as an attempt to codify or systematize the Law of Evidence. The present position of that law both in England and in India is eminently unsystematic. *Apropos* of this, Mr. Fitzjames Stephen remarked in his speech—

“So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which shackle instead of guiding natural sagacity. I pass now to the next proposition, which is, that these rules are expressed in a form so confused, intricate, and lengthy, that it is hardly possible for any one to learn their true meaning otherwise than by practice, an inconvenience which may be altogether avoided by a careful and systematic distribution. For the proof of this proposition, if, indeed, it is disputed, I can only refer in general to the English text-books on the subject. They form a mass of confusion, which no one can understand until, by the aid of long practice, he learns the intention of the different rules of which they heap together innumerable and often incoherent illustrations. I am far from wishing to impute this as a fault to the industrious, and in many cases distinguished, authors of these compilations. They, like all other hand-books, are intended for immediate practical purposes, and are mere collections of enormous masses of isolated rulings generally relating to some very minute point.”

These same words would describe the present condition of

the Law of Evidence in India. This evil the Bill is intended to remedy. Therefore it starts with a series of definitions attaching a certain definite meaning to expressions, to which a considerable degree of ambiguity attaches at present. Thus we get defined, the terms "evidence," "facts," "facts on issue," "collateral facts," "document," "judgment *in rem*," and many others familiar in the lawyer's mouth as chamber words. On the whole, the definitions are satisfactory, although one or two of them are worse than absurd. But this latter defect can, of course, be amended before the Bill becomes law. We may give, as instances of the nature and quality of the defining sections, the definitions of "fact" and "facts in issue." Fact includes (1) any state of things, or relation of things, capable of being perceived by the senses; and (2) any mental condition of which any person is conscious. Facts in issue are (1) any recorded issue of fact; and (2) any fact not admitted by the parties from which the existence, non-existence, nature or extent of any right in suit necessarily follows. Not only does the Bill define "fact," "facts in issue," and "collateral facts," but it goes on to lay down exactly what facts are relevant to the issue, and how relevant facts are to be proved. It is the distinction which the Bill draws between the relevancy facts, and the method of proving relevant facts, which is claimed for it by its authors as its main feature.

J. C.

## LEGAL GOSSIP.

THE International Congress on the Prevention and Repression of Crime, including penal and reformatory treatment, so successfully initiated by Dr. E. C. Wines, commissioner, appointed by the Government of the United States, will receive material support from all the Continental Governments and numerous scientific and philanthropic bodies and associations formed for the purpose. In the Berlin Juridical Society, Professor Baron Von Holzendorf recently fully reported on the subject, inviting the attention of that learned body to this Congress, intended to be held on 3rd July next, in London. Baron Von Holzendorf explained that it was desirable that not a hap-hazard meeting of experts and laymen should pass votes by majorities on the most difficult and important questions of treatment of criminals; but that it was proposed that associations should be formed or meetings held of such persons who had in one way or other given their attention to that subject, and that such associations or meetings should elect fit persons to attend the Congress. He at the same time fully explained the progress made already in England for the purpose, and particularly directed attention to the General Committee

already formed in England, composed of the most eminent public men of Great Britain ; he mentioned that Count Eulenbure, the Prussian Secretary of State for the Home Department, had taken the opportunity to bring the matter forward in the Federal Council of the divers German Governments, that the idea has been well received, and that the Congress would have the support of all the German States. The learned speaker proceeded to show that all the German States had just at the present moment the most lively interest in the questions to be considered at that Congress, for although only lately a general penal code had been adopted and introduced in all German States, some most important links to a sound criminal legislation were so far still wanting that neither a general law of criminal procedure had been fixed upon, nor any general regulations as to the divers forms of punishment, the consequence being that, for instance, personal arrest meant one thing in one of the German States, and quite another thing in another, and that, therefore, the proposed Congress deserved the greatest attention of the German communities. The society received these communications of Baron Von Holzendorf with the greatest possible interest. The feeling that everything ought to be done to render the Congress as useful as possible was unanimous, and evinced itself in a resolution, passed at once, that a committee should be appointed, in order to consider, in what way the society could most appropriately further the objects of the Congress. The committee was at once appointed, and Mr. Delius, President of the Criminal Court at Berlin ; Baron Von Holzendorf ; Dr. Ebert, Judge of the Criminal Court ; and Dr. Edward Zimmermann, of Berlin, were elected as the members of the committee, with power to add to their number. It is certainly satisfactory to learn that the efforts, especially made by careful inquiry and most valuable experiments in British legislation on this important social question, are so readily and fully acknowledged in Germany.

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There are evidences lying about in every direction of the parsimony of the present Government. What we object to is, not their endeavour to cut down the national expenditure, but at their making nibbling, irritating attempts to take tithe of mint and cummin, while they neglect the heavier items which swell the national account. As instances of this we may mention the endeavour made by the Treasury to cut down in wholesale fashion the allowances to the counties for the conduct of prosecutions. Another of these attempts has come to our knowledge in regard to the appointment of legal adviser to the Council of India. That office has been held up to the present time by Mr. Forsyth, Q.C. Any one who knows that gentleman's work on our constitutional law, as affecting the position of dependencies and colonies, will recognize not only that he has very peculiar qualifications for such an office, but that he must have taken special pains to make himself master of this little-known portion of our jurisprudence. His "*Cases and Opinions on Constitutional Law*" is simply the best book in existence on almost every subject of which it treats. The India Office, how-

ever, solely, it is alleged, on the ground of economy, have got rid of Mr. Forsyth, and put an end to the office which he holds. The usual rule is to take a step of this kind on the death of the present holder. The services of Mr. Forsyth have been dispensed with, we hear, without notice. It may be desirable that the Indian Council shall be without a standing counsel. That is simply a matter of opinion; but what annoys everybody about this, as about so many of the proceedings of Mr. Gladstone's government, is the discourteous way in which the change has been made. Mr. Forsyth was paid by a small annual retainer, and received fees in the ordinary fashion. He is to continue to hold the retainer, and the Indian Council is to distribute its fees where it likes. It is impossible to see where there can be any economy in this arrangement. Mr. Forsyth, it will be remembered, was elected member of Parliament for Cambridge, and on its being decided that he could not continue to sit and act as adviser to the Indian Council, he resigned his seat. Of course, had he dreamed that the office would shortly be abolished, he would not have sacrificed his chances in Parliament.

The Law of Libel has received an addition to it from an unexpected quarter. Since the abolition of the Star Chamber, the Courts of Equity have had little to do with this branch of the law. The case of *Dixon v. Enoch* will in future form an important precedent. The plaintiff was Mr. Hepworth Dixon, the well-known author, and the defendant is the printer and publisher of the *Pall Mall Gazette*. Mr. Dixon filed a bill of discovery for the purpose of compelling the defendant to disclose the names and addresses of the persons who, on the dates on which certain articles were published, were the proprietors of the *Pall Mall Gazette* and the *Pall Mall Budget*, to enable him to bring an action against them for damages, alleged to be sustained by reason of libellous matter contained in the said articles. The articles were published May, 1870, and August, 1871, and in the number of the *Pall Mall Budget*, published on the 12th of August, 1871. Mr. Dixon instructed his solicitors to write to Mr. Smith, to inform him that he intended to commence an action for libel against the proprietors of the papers, and inquiring whether he was at the before-mentioned dates, and still was, proprietor of the papers. The letter was forwarded to Mr. Smith's solicitor, who said the publisher was Mr. Enoch, and that it was usual and proper, in cases of alleged libel, to sue, not the proprietor, but the publisher. He requested, on Mr. Enoch's behalf, to be informed what articles were complained of. In reply, Mr. Dixon's solicitor furnished a list of the articles, and again inquired whether Mr. Smith was the proprietor. The name of the proprietor not being furnished, the plaintiff's bill was filed. The case came before the Court on a general demurrer. Vice-Chancellor Wickens's decision rested on his interpretation of 32 & 33 Vict. c. 24, and was to the effect that a person complaining of a libel in a newspaper may file a bill against a printer and publisher to ascertain the names of the proprietors for the purpose of bringing his action against the proprietors alone. The decision is important, as the views hitherto held

at Common Law as to the question whether a defendant could be made by means of interrogatories to disclose the names of proprietors have been at variance. The interrogatories framed for this purpose were in *Tapling v. Ward* (6 H. & N., 749) disallowed. The Court overruled the demurrer, but allowed a month to the defendant to answer the bill.

Mr. Phillip Rose's letter, of the 6th ult., to the Attorney-General, while professedly written to correct a misstatement made by the Attorney-General in the course of his speech in the Tichborne Case, appears to us to be quite as damaging to the claimant as the original misstatement itself, had it remained uncontradicted, would have been. We acquit Mr. Rose of any intention to wilfully damage the plaintiff; but the effect of his letter, unfortunately, tends that way. For while the letter negatives the fact of Mr. Rose's withdrawal from his firm, it corroborates the public impression derived from the rumour of his withdrawal, that some point of dubious professional or personal morality was at length discovered to be involved in the further prosecution or maintenance of the suit; for the letter distinctly refers to an intention of withdrawing, and even mentions certain of the steps that were taken by Mr. Rose towards effectuating that intention; and the letter also indicates the reason of the discontinuance of those steps, and expressly states, that "since January 22nd last, the case for the claimant has been carried on under new retainers from the other individual members of the firm, exclusive of Mr. Rose and his son"! The letter then concludes with an apology for Mr. Rose's withholding, for the present, the reasons for his intended withdrawal from the firm, and with an interim acquittal of his co-partners from anything dishonourable or undutiful in the matter. Now what, we ask, can be the effect of a letter of this sort? In our opinion, it was entirely uncalled for, if the object was merely to justify Mr. Rose and his firm; for no one, whose opinion is of value, would for one moment have imagined that an honourable and independent firm of solicitors, such as that of "Baxter, Rose, Norton & Co.," was knowingly concerned in the perpetration of a fraud. But, in our opinion, this letter of Mr. Rose will be remembered as one of the few instances in which the time-honoured rule of "legal confidence" has been broken through, and in which, therefore, a precedent of evil example has been set which calls for the strong arm of professional etiquette to disapprove it. For the case of a client, whatever its complexion, ought, from the moment it is taken up by counsel or solicitors, to be regarded as a sacred and inviolable trust; the uniform observance of this maxim in the future will prove (as it has proved in the past) the best protection, both of the tranquillity and of the honour of all persons professionally concerned. We have no desire to remark upon the use to which the Attorney-General has applied Mr. Rose's conduct. In war, all feints are lawful; and similarly in advocacy. Mr. Serjeant Ballantine and Mr. Giffard are uninjured by the imputation, and would be the gainers, in our opinion, from a magnanimous forgiveness and forgetfulness of it.

The Attorney-General, in his remarks on the conduct of the case of the claimant in the Tichborne case, has opened the question of the duty of counsel when they know they have a bad case. The remarks themselves were in questionable taste, although the point raised is one in which the whole profession is deeply interested. Nobody doubts that instances frequently occur where barristers believe the cases they are supporting are bad, which cases yet turn out to be good. Without expressing any opinion on the Tichborne case, we may yet point out that it is precisely one of the class where counsel are left in considerable doubt. The claimant, whether he be Tichborne or not, is clearly an unmitigated scoundrel, and any barrister who has to support the case of such a man, though he may feel pretty sure of the justice of his claim, when he is opposed to people of character and position, may well have his impressions biassed by such circumstances. But surely it is in the interests of justice that these cases should be fought out fully; that everything in favour of the persons of bad character should be said that can be said; that every scrap of evidence should be produced that can be produced. There are no doubt instances where it is the duty of the barrister to retire, but they are altogether exceptional, and must of necessity be very rare. If they were not so regarded, we should be in danger of having the decisions of our courts based not on the evidence as to the facts of the case, but on that of character. We believe that Mr. Serjeant Ballantine will have the approval of the profession in determining to insist on a verdict based on the evidence placed before the Court.

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A heavy blow has been dealt to the perpetration of clandestine marriage by flunkeys, by two extreme Courts having different jurisdictions for the same offence. The Master of the Rolls has just decreed, in Equity, that a footman, who had married a young lady of sixteen, belonging to the family in which he was engaged, by falsely representing to the registrar the young lady's age, residence, &c., had forfeited all estate, right, and title, in his wife's property. The magistrate of Worship Street has, under the Criminal Law, committed for trial a lad of seventeen for a similar offence, in marrying a lady of thirty-seven. The prisoner was coachman to the lady, and by her marriage she forfeited a sum of 500*l.* a year which reverted to her children. These marriages probably illustrate the truth of the old proverb, "marrying in haste and repenting at leisure." In the former case, we sympathize to some extent with the lady, who possibly was taken advantage of by a person in whom confidence was placed by his employers; but in the latter there is scarcely any excuse, unless extreme weakness of mind prevailed in the elder. Were it not for the disparity of circumstances, these cases probably would never have been heard of, and the connubial bliss, if such could be attained, would have been established for life. The law is well understood by everybody negotiating for matrimony, and if persons blindly and wilfully render themselves liable to it, they must abide the consequences. The only remedy that appears to us is personal inquiry by the registrar pending the issue of a certificate.



There seems to be but one opinion among members of the Bar, upon the letter of Mr. Justice Willes to the Lord Chancellor, that of extreme regret that so distinguished a judge should have lent the sanction of his authority to a transaction of such a character as that of the appointment of Sir R. Collier to the Privy Council. If Sir J. S. Willes courted criticism, we think that even he must be satisfied with the reception his note has met with; and although, perhaps, Lord Westbury's criticism was a little too severe in terms, there is a strong feeling that the tone of the letter itself is much to be regretted.

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The sketch of the life of the late Mr. Edwin Field, which appeared in our last number, has attracted attention in many quarters, and those who read it will be glad to observe that a proposal is on foot to raise a monument to him. His business, as was there stated, was law, his "hobby" art. The memorial is proposed to be two-fold, representing these two phases in his character. A bust is suggested to commemorate the first (why not a scholarship in the new Law School?), and a medal or scholarship the second. A very influential committee has been formed to carry out these objects, having at its head the Lord Chancellor. Subscriptions are received by Messrs. Coutts & Co.

If, as stated in the letter of the Lord Chief Justice of the Common Pleas, so recently published, he and his learned colleague in the Queen's Bench were not made aware of the fact of the appointments of Mr. Quain and Mr. Grove to judgeships, it is at best an egregious oversight on the part of some one; but it is nevertheless a breach of professional etiquette hardly (if ever) known to have occurred under the like circumstances before.

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It is thought that the object of the Government, in appointing Mr. Jessell Solicitor-General, was with the view of ultimately placing him on the Bench in the triple capacity of Common Law, Bankruptcy, and Chancery Judge. It is said that the Lord Chief Justice of the Queen's Bench protested against the appointment of such a judge, maintaining that it would be impracticable in every respect, as when wanted in Westminster, he would be at Lincoln's Inn, and *vice versa*.

Mr. J. R. Blair, the senior judge of the County Court at Liverpool, having retired, we are informed, upon excellent authority, that Mr. J. A. Russell, Q.C., the judge at Manchester, will be Mr. Serjeant Wheeler's coadjutor at Liverpool; Mr. Osborne, Q.C., in addition to his existing district, taking the Manchester Court as well. Mr. Russell's removal to the Liverpool side of the county is much regretted by the local Bar at Manchester.

**THE NEW CHANCERY Q.C.'s.**—We understand that Mr. Lindley, Q.C., will probably select the court of Vice-Chancellor Wickens as the principal seat of his practice. Mr. Fischer, Q.C., will sit in

the Rolls Court; and Mr. Higgins, Q.C., in the court of Vice-Chancellor Malins. No rumour has reached us as to the intentions of the remaining new Queen's Counsel.

We are glad to hear that Mr. Dickenson, Q.C., whose serious illness we noticed in our last number, is gradually, though slowly, recovering. Some time, however, must necessarily elapse before the learned gentleman is able again to take his seat in court.

The members of the Northern Circuit invited Mr. Justice Quain to a dinner, at the Albion, in Aldersgate Street, in commemoration of his appointment as one of the justices of the Queen's Bench. Between seventy and eighty members of the circuit, including several gentlemen who now hold various distinguished civil appointments, and several members of the Midland Circuit (formerly on the Northern Circuit), sat down to dinner. Mr. Pickering, Q.C., the Attorney-General of the County Palatine of Lancaster, was in the chair. Among those present were a good muster of Queen's Counsel, and a number of other gentlemen of distinguished position on the circuit.

A Commission has been appointed in Canada, to inquire into and report upon the present jurisdiction of the several Law and Equity Courts of Ontario, and upon the modes of procedure now adopted in each, and upon such other matters and things therewith connected as are in the Commission more fully set forth. The Commissioners, who are as follow, are to be called the "Law Reform Commissioners":—The Hon. Adam Wilson, one of the Judges of the Court of Queen's Bench for Ontario; the Hon. John Wellington Gwynne, one of the Judges of the Court of Common Pleas for Ontario; the Hon. Samuel Henry Strong, one of the Vice-Chancellors of the Court of Chancery for Ontario; His Honour James Robert Gowan, Judge of the County Court of the County of Simcoe; and Christopher Salmon Patterson, of Osgoode Hall, Barrister-at-Law.

The correspondence between the Lord Chief Justice and the Lord Chancellor, upon the appointment of Sir Robert Collier to the Judicial Committee of the Privy Council, has been published, as also that between the Lord Chief Justice of the Common Pleas and the Lord Chancellor, together with an opinion from Mr. Justice Willes. The motions in both Houses on the vote of censure on the Government for the translation of Sir Robert Collier were lost. In the Lords the majority was represented by the cypher 1, while in the Commons the motion was negatived by a majority of 268 to 241. A statement made by Mr. Serjeant Simon, in reference to the late Lord Kingsdown sitting on the Judicial Committee, without having had a previous judicial experience, drew forth a letter in the *Times* from Mr. E. Leigh Pemberton, in which he says that the honour conferred upon Lord Kingsdown was unconditional—an acknowledgment of

services already rendered, and not a retainer for services to be rendered in future on the Judicial Committee.

As the final Report of the Royal Judicature Commission will be some time before it is published, the profession and the general public have been allowed a glimpse of what may be expected to be recommended in the Report as the result of the deliberations of the Commissioners. The Courts of Justice Bill, or Bills, to be laid before Parliament, will be to a great extent based on the following resolutions, which in our next issue we hope to discuss at length :—

*County Courts.*—(1.) That the registrar of the County Court, in addition to his present powers, should have power to dispose of the following business (subject to exceptions for special cause), viz. :—(a.) Claims under 5*l.* (b.) Cases in which both parties agree that the registrar may decide. That all other business up to the present limit should be disposed of by the judge ; and that plaintiff should be allowed to commence proceedings in the County Court, whatever be the nature of the suit, and whatever the amount, leaving it for the defendant to remove for cause shown into the Superior Court, if it involves a sum exceeding the present limit.

(2.) That the Court fees should be revised, and should be collected by stamps.

(3.) That the parties should be allowed to serve their own process, other than writs of execution.

(4.) That arrangements should be made for the speedy abolition of the office of treasurer of the County Courts ; and that a considerable reduction should be made in the number of high bailiffs and registrars.

(5.) That a reduction should be made in the number of County Court judges, and a new arrangement made of the districts of County Courts, and of the circuits of County Court judges, and offices substituted for Courts, where the amount of business is not sufficient to justify the continuance of a Court.

*Superior Courts.*—(6.) That a branch of the High Court of Justice be established for each of two districts to be formed out of the counties of Lancaster and York, and the parts of Cheshire adjacent to Lancashire, and the counties north of Lancashire and Yorkshire, such districts to be styled respectively the north-west and north-east districts of the High Court.

(7.) That two judges of the High Court (who shall, unless any other arrangement be made among the judges of the High Court, be the junior judges for the time being) shall discharge the duties connected with the said districts, and shall each be paid a sum of *l.*, in addition to salary, to meet the extra expenses connected with residence in either of the said districts.

(8.) That if, and as may be, necessary, in order to meet the requirements of judicial service in the said districts, one more judge, or two more judges, of the High Court should be appointed.

(9.) That the plaintiff in any cause in the High Court may mark or lay the venue of the same for or in either of the said districts (subject to removal for sufficient cause), and thereupon the trial of

the said cause, and all interlocutory and other proceedings therein, which can according to the rules of the High Court be heard before one judge, and also the Admiralty business, if any, in the said district, and all criminal business within the district, which would be tried at present on circuit, shall be disposed of by the judge of the High Court in such district.

(10.) That any cause not marked for or of which the venue is not laid in either of the said districts, may nevertheless be sent for trial, or for any other specified purpose, to one of the said district Courts, by order of a judge.

(11.) That, with the exception of the times of vacation and of the circuits after mentioned, the Courts in each of the said districts shall sit continuously, the Court of the north-west district of Liverpool, Manchester, or Preston, and the Court of the north-east district at Sheffield, Leeds, or York, and that of the times of circuit the two judges of the said district shall join and become judges of assize for all the assize towns to the north of Preston and York respectively.

(12.) That rules should be made for the trial or hearing of cases in the said districts, and of interlocutory applications therein, at the places and in the manner most convenient to the suitors.

(13.) That a rearrangement of the circuits, omitting the said districts, and that of the metropolis, be made.

*County Courts.*—(14.) That the Report be adopted, so far as it recommends the substitution for the present registrars of paid registrars of fixed salaries, to perform the duties in the Report mentioned, and so far as it recommends the consolidation of County Court districts, which, in the opinion of the Commission, is practicable and desirable, although the exact amount of consolidation and consequent saving will have to be determined hereafter in detail in any legislative measure introduced for carrying the Report into effect.

(15.) That the County Courts in future should administer Common Law, Equity, and Admiralty jurisdiction as one system, in accordance with the recommendations made in relation to the Supreme Court by the first Report of this Commission.

(16.) That the County Courts be annexed to and form branches of the High Court, and the judges and registrars of the County Courts respectively be attached to and be officers of the High Court, and (subject to general rules) respectively continue to have and exercise all such jurisdiction as they respectively now possess, together with such further and other jurisdiction as recommended.

(17.) That in any action for the recovery of debt or damages exceeding 20*l.*, process may be issued at any office of the High Court or of any County Court, although the appearance of other matter is to be, or is required to be, performed elsewhere.

(18.) That where the existing limit of the jurisdiction of the County Court is 20*l.*, the same should be extended to 50*l.*

(19.) That where the existing limit of the jurisdiction of the County Court is 10*l.*, the same should be extended to 50*l.*

(20.) That such jurisdiction of the County Court as last mentioned shall not be limited to certain kinds of torts, but should extend to all actions of tort.

(21.) That if, in any action in the High Court, the plaintiff shall recover a sum not exceeding 50*l.*, the costs (if any) allowed him shall not exceed the amount which he would have been allowed if the action had been commenced and prosecuted in the County Court, unless a judge shall otherwise order.

(22.) That a judge may order the plaintiff to compensate the defendant for any additional costs incurred by him in consequence of the action not having been commenced and prosecuted in the County Court.

(23.) That in all actions commenced and prosecuted in the High Court, in which the amount recovered, or sought to be recovered, does not exceed 100*l.*, the costs (if any be recoverable) shall be taxed on a lower scale than that from time to time applicable to other actions in the High Court, unless a judge shall otherwise order.

*Local Courts.*—(24.) That the jurisdiction of the Chancellor's Courts of the Universities of Oxford and Cambridge should be abolished, in respect of all actions, suits, or matters cognizable in the Superior or County Courts.

(25.) That the jurisdiction of the Court of the Vice-Warden of the Stannaries should be transferred to the courts or judges exercising bankruptcy jurisdiction within the stannaries of Devon and Cornwall.

(26.) That the jurisdiction of the Mayor's Court of the City of London, the Passage Court of Liverpool, the Tolzey Court of Bristol, and the Salford Hundred Court of Record, should be abolished in respect of all actions, suits, or matters cognizable in the Superior or County Courts.

(27.) That all other local and inferior Courts of civil jurisdiction should be abolished.

(28.) That the Court of Common Pleas at Lancaster, and the Court of Pleas of the County Palatine of Durham, should be abolished.

(29.) That the Admiralty Court of the Cinque Ports should be abolished.

(30.) That it is desirable that registries or offices of the High Court for the transaction of interlocutory and other business to be defined, should be established in certain places to be named from time to time. The registrars or officers at such registries or offices to be the registries of the County Courts when thought fit, or persons specially appointed for such purpose.

(31.) That the district registries of the Probate Court be abolished, and their business transferred to the registries established under the foregoing resolution, and when no such registry is established, then to the registry of some County Court.

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The resolutions of the Committee of the Four Inns of Court, recommending, *inter alia*, a compulsory examination of students prior to their being called to the Bar, and an increase of the Council of Legal Education from eight to twenty, were adopted by the four Inns at meetings of the several Benches, specially called for that

purpose in December of last year. By these resolutions all students admitted to any of the four Inns of Court after the 31st of December, 1871, were made subject to such examination.

In Hilary Term, 1872, the members of the New Council of Legal Education were appointed by the several Inns, and consist of the following :—

Inner Temple.—The Right Hon. Sir Barnes Peacock, Charles Shafland Whitmore, Esq., Q.C., Dr. Deane, Q.C., Henry Warwick Cole, Esq., Q.C., and Holdsworth Hunt, Esq.

Middle Temple.—Lord Westbury, Sir R. J. Phillimore, James Anderson, Esq., Q.C., Thomas Chambers, Esq., Q.C., M.P., and J. R. Kenyon, Esq., Q.C.

Lincoln's Inn.—Sir Edward Ryan, the Solicitor-General, B. S. Follett, Esq., Q.C., R. P. Amphlett, Esq., Q.C., and Henry Cotton, Esq., Q.C.

Gray's Inn.—J. W. Huddleston, Esq., Q.C., Henry Manisty, Esq., Q.C., A. J. Stephens, Esq., Q.C., Thomas Southgate, Esq., Q.C., and J. A. Russell, Esq., Q.C.

Lord Cairns sat on Thursday last, at 3, Victoria Chambers Westminster, to hear several important cases respecting the claims of policyholders in the late Albert Assurance Company.

We call attention to the resolutions adopted on the 31st of last month by the Judicature Commission, and printed in another portion of the Magazine. If carried into effect, they will influence very seriously the position of both branches of the profession, and they are well worthy of the most careful consideration.

#### IRELAND.

THE Right Hon. John George, by whose death a vacancy was lately created in the Queen's Bench, in Ireland, was born in the year 1804, and inheriting a considerable property from his father (a merchant, of Dublin), he was, throughout his career, known less in professional circles than amongst his neighbours, in the county of Wexford, by whom he was very highly esteemed. He was not remarkable for his legal attainments, but being a man of high personal qualifications, amiable, courteous, and upright in all the relations of life, he was very properly selected as M.P. for his own county; and having attained the rank of Q.C., and attached himself to the Conservative party, especially following the political lead of Mr. Whiteside, there was no complaint uttered when he became a law officer of the Crown. His promotion to the Bench rapidly followed, at a time when very numerous vacancies opportunely enabled Lord Derby to reward most of his legal supporters. His public duties were conscientiously discharged, and the Bar, on whom a courteous demeanour rather than legal *acumen* makes the most favourable impression, sincerely regretted the news of his illness, and of his death in December last. The two sons of the late judge adopted the military profession.

The vacant seat in the Court of Queen's Bench being filled by the appointment of the Right Hon. Charles R. Barry, lately Attorney-General for Ireland, Mr. Dowse, M.P., was, as a matter of course,

promoted to the Attorney-Generalship. After a long delay, and after an exciting contest between several Parliamentary and non-Parliamentary candidates, Mr. C. Palles, Q.C., became Solicitor-General. Mr. Palles is comparatively a young man, who by rare abilities and unrivalled aptness in his profession, has rapidly gained the first position at the Irish Equity Bar. He is one of the many Roman Catholics who have graduated, with honours, in Trinity College, Dublin.

One of the "sensation causes" of the past month has been an action at law, brought by Mr. John Rea, a well known northern attorney, against Colonel Hillier, who, while in command of a force of constabulary, took Mr. Rea prisoner, and prevented him from figuring as a leader in the noisy and even dangerous scene of uproar for which the historic city of Derry is on certain anniversaries distinguished. Mr. Rea has a large practice as an advocate at sessions and other local courts, and being an ardent though erratic politician, is highly popular both with Nationalists and Orangemen, who like a fluent and vituperative style of oratory. On his return home, after having gained a verdict, with 100*l.* damages, the fact of his having "beaten the Castle," made him more popular than ever with the thousands who crowded the streets of Belfast, shouting hymns of victory in honour of the successful plaintiff. The damages and costs will come out of the public purse, as Colonel Hillier is understood to have done no more than any prudent civic or military authority would do on an occasion of tumult and anticipated riot.

The heaviest Chancery suit which has been known in Ireland for the last decade came to a climax on Friday. It involves a large sum of money, dependent on certain abstruse dealings between the Dublin, Wicklow, &c., Railway, and some of its creditors in its less prosperous days. About thirty counsel appeared at the hearing, and on appeal. The Lord Chancellor and the Lord Justice of Appeal differing (as they often do), the Vice-Chancellor's decision stands, but the suit is said to be on its way to the House of Lords.

Mr. Justice Lawson's "specimen code" of the Law of Evidence, summed up in forty clauses, has been published as a pamphlet, and it will also appear amongst the "Transactions" of the Dublin Statistical Society. It attracts much attention in legal circles, as being a valuable contribution towards the solution of an enormously difficult question.

Amongst the extraordinary personages, whether civil, military, ecclesiastical, or political, who have held the Great Seal of Ireland, there was one whose career must have been truly singular. Colonel Miles Corbet was one of the judges of King Charles I.; some five years after which event he came over to Ireland as one of the Commissioners of the Great Seal. How he decided the causes we are not informed, but he quickly transferred his attention from Equity to Law, returning to England as Chief Baron. He was executed as a regicide soon after the Restoration. This and other curious passages of history have been lately brought to light by Messrs. Burke and O'Flanagan, in their rival biographies of Irish Chancellors, and many of these events formed the groundwork of a public lecture

on "The Lord Chancellors," which was given last month in Dublin by Mr. Denny Urlin, the principal officer of the Registry of Titles.

No single writer in the journals has drawn the right moral from the conviction of Kelly for shooting the second policeman. On the first trial the charge was a capital one, the victim having died, and in spite of the clearest evidence there was an acquittal. On the recent occasion the charge was not capital, for the policeman in this instance was fortunate enough to escape. The jury were not long in agreeing to a verdict, and the judge (Morris) sentenced Kelly to fifteen years' penal servitude. The fact is, that juries exhibit an almost morbid unwillingness to assist in a process which is likely to end with the most terrible penalty of the law, although in general willing to aid intelligently in the administration of justice.

Mr. Loftus Bland, Q.C., who died recently, held for some years the office of Chairman or County Court Judge of Tyrone. He was called to the Bar in 1829, and for a time represented the King's County in Parliament. The vacant chair is filled by the translation of Sir F. Brady from Roscommon, his place being filled by Mr. Hamill, Q.C., whose chair in the West Riding of Cork will be filled by the appointment of Mr. Robert Ferguson, of the Munster Circuit, called to the Bar in 1839.

Mr. William Gibson, one of the two Taxing Masters in Chancery, died suddenly last week, at the age of sixty-four. He retired in the year 1868 from very large and lucrative practice as a solicitor, and was nominated to the Taxing Mastership by the late Lord Chancellor Blackburne, a steady, political, and private friend.

#### SCOTLAND.

It is reported that the Lord Advocate will not, in consequence of the pressure of other Scotch business in Parliament, be able to deal with the judicial arrangements for Scotland this Session, although the Bill for that purpose is said to be in draft. This has caused some disappointment, as the public mind seems to have been quite ripe for the discussion of the proposed measure, if not ready to accept the change. A wish is pretty generally expressed that his Lordship should bring in the Bill, that the legal bodies throughout the country may have an opportunity of discussing it; and even if not passed this Session, there seems to be an advantage in its being introduced to the public. Last year, Mr. Gordon brought in a Bill, as did also the Lord Advocate, dealing with land rights in Scotland. The Scotch people have had a grievance in consequence of the strictness and thoroughness with which feudal notions had possessed themselves of the minds of the lawyers and were applied to transactions in land. Many improvements have been made in this respect within the last fifty years in the direction of simplifying title and lessening the expense of it. But all throughout the feudal doctrine was retained, on the ground of its being so susceptible of adaptation to the ever altering circumstances of the country, and because it was so well understood of the people. Its retention leads to a grievance which must be abolished, and that speedily. We mean the grievance caused by the fact that the law agents of the great proprietors,



whenever a vassal dies, claim the right to invest his successor in the right of his predecessor's property by giving, at enormous expense, a *writing* which is useless for any purpose but the law-agent's fees. The legislation on this point might be very simple. Some dues are payable on the vassal's death; that is to say, by the terms of the contract of feu. Let them be paid by all means, and let it be made law that a simple receipt shall invest the heir, and be an acquittance for the dues. This, we venture to think, is all that is required, and in this view the great majority of Scotch lawyers concur with us. Substantially, this is Mr. Gordon's Bill. The Lord-Advocate, however, proposes to abolish feudal tenure entirely, and create in place of it what we have heard called uncertainty of tenure, or no tenure at all.

The Scottish Law Amendment Society is to discuss some proposals in reference to private legislation, whenever a quorum of its members can be got to attend for that purpose. The society is new but flourishing; yet, somehow, they do not feel disposed to talk on the above subject. We suspect that the members generally do not think the proposals, which are to have evidence in regard to private Bills taken in hand in Edinburgh and Dublin, contain anything so objectionable that they can be brought within the region of debatable subjects.

The judges and the different legal bodies in Edinburgh attended a thanksgiving service for the recovery of the Prince of Wales, in St. Giles's Cathedral, on Tuesday last. The chiefs of the Court and the leaders of the Bar were invited, and were present at the national ceremony in St. Paul's.

The annual dinner of the Glasgow Juridical Society takes place on Friday, 1st March.

There is a proposal, which is likely to be carried into effect, to appoint a stipendiary magistrate for the city of Glasgow, at a salary of 1500*l*. This would be a step in the right direction; it is surely not expedient that so large a population should in all matters of police be subject to the enlightened legal notions of untrained magistrates. But the proposal should be carried out with the proviso that the appointment should be conferred only on a barrister of not less than seven years' standing. Otherwise there is some danger that a lawyer badly trained for the duties of the office may get the appointment, and we know of no greater misfortune for any community than to be at the mercy of a man professing law without complete and competent knowledge of it.

## BOOK NOTICES.

[\* \* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

**Principles of the Law of Scotland.** By George Joseph Bell, Professor of the Law of Scotland, in the University of Edinburgh. The Sixth Edition. Edited by William Guthrie, Esq., Advocate. Edinburgh: T. & T. Clark. 1872.

THREE Scotch lawyers have risen to real greatness as writers on the law of their country. These we style institutional writers, and their opinions, when they agree, which for the most part they do, are received by our courts as conclusive. The three wrote, at considerable distances from each other in point of time, and the work of each marks an epoch not only in our legal, but also in our national history. First and greatest was James, Viscount of Stair, and Lord President of the Court of Session, whose great work was published in 1693, a time when our law existed merely in the great possibility and probability of its some day, through the influence and action of some great mind upon such rules as existed among ourselves, along with what could be borrowed from the different continental forms of civil law and common law, becoming a system of objective law. Such a mind was Stair's. He brought to the work an intellect trained in all the learning, and deeply imbued with the refined philosophy of his time. Fond of theory, speculative from force of habit and by natural disposition, yet a man of sterling common sense, in him were found all the great qualities requisite for the systematizing, if not actually making, the laws of a nation that was destined, in the years to come, from the rapid developments of its commercial activities, and the consequent and wonderful increase of its material wealth, to find the necessity of a well-defined yet elastic code. It was not to have been expected that the seventeenth century should have given us the key to the multifarious complications which the great commercial activity of the nineteenth has such a tendency to cause; yet Stair was able to lay down many of the principles which are even in our own time received as orthodox. This was owing in great part to the high qualities of his mind; but more, we think, to the intercourse—so intimate and long continued—that then existed between Scotland and France. Our young lawyers studied at Paris; the Parliament of Paris was the model after which our Supreme Court was formed, and the French pleaders were the models of our early forensic orators. The doctrines of mercantile law were early cultivated in France. Can it be doubted that the new doctrines would be received and studied by our predecessors of the Scotch Bar with as much delight as if a new philosophy had dawned upon their minds, or a new school of poetry had arisen among them? This new law must have been discussed, as theoretical jurisprudence, long

before the practical necessities of the country demanded the recognition of its doctrines; and hence it is that Stair fell in with the theories which are the foundation of his chapters on mercantile law.

The next great writer, in point of time, though far from being next in point of real greatness, is John Erskine, of Carnock, Advocate, Professor of Scots Law in the University of Edinburgh. His *magnum opus*, "An Institute of the Law of Scotland," was published, after the author's death, in 1773. Since the publication of Stair's work, Scotland had seen two rebellions, occurring within the same half century. These had produced many forfeitures of estates and complications of land-rights. Hence the legal genius of the country was devoted to the study of what was, for the time being, most marketable, namely, feudal law. The result is that there is but little attention paid to mercantile jurisprudence by Erskine. This, at first sight, is surprising, considering that the union with England—the generally supposed source of Scotland's commerce—had taken place; the explanation is probably twofold. The splendid Darien expedition had failed, and the country was paralysed from internal convulsions. Measured by the respect in which he is held by the profession, no author in our legal literature is greater than Erskine. But judged by an absolute standard, he sinks into insignificance in comparison with the philosophic grandeur of Stair, or the wider jurisprudential culture and profound legal dialectic of Bell. His work, as will always be the case with the works of men whose mental vision is limited to the things before them, in the flesh, and the expression of the thoughts appropriate to these, is widely read and as widely honoured and esteemed. Scotch lawyers, who have edited Erskine, may, without any serious exaggeration, be said to be quite as numerous as those who have read Stair. But men never worship the greatest gods—only those they are in sympathy with, and, of course, those are, almost always, insignificant.

In 1770, three years before the publication of Erskine's "Institute," George Joseph Bell, the father of the commercial jurisprudence of Scotland, was born at Edinburgh. He was elected, by the Faculty of Advocates, to the Chair of Scots Law, on 2nd February, 1822. The motion for his election was made by John Clerk, of Eldin, then leader of the Bar, and was seconded by Sir Walter Scott. Thenceforward Bell, perceiving the growing necessity for a better understood and more universal commercial law, set himself to study its principles, in a scientific manner, with the view of finding whether Scottish jurisprudence was in itself capable of having its poverty in this respect supplied from external sources without causing injury or uncertainty. Lord Mansfield had in the same way already created a commercial law for England, and Bell naturally thought that the same thing should not be impossible in his own country. The first result of his labours was the publication of the "Principles of the Law of Scotland," in the year 1825. The "Commentaries on the Law of Scotland," of which the principles are in a sense but an abridgment, came later. These are the works on which rests the fame of George Joseph Bell, and in virtue of which he is well known to the lawyers of all civilized nations.

The work before us belongs to a class peculiar to Scotland. It is written on the principle, and for the purpose, of giving, within the narrowest possible compass, a statement of the whole doctrine of Scots municipal law. It is not quite an abridgment of Bell's larger work, for it deals with many subjects which are scarcely noticed in the commentaries. But not the least of its attractions is, that so far as it is an abridgment it is closely reasoned without the reader being made conscious of this, since each step is a concrete statement of actual law, deduced from the preceding statement, the intermediate processes not being given. The work has been found so extremely useful by the legal profession in Scotland, that we never heard of any person at all connected with the law who ventured to live without it. It has gone through many editions, and to all appearance will go through many more. The original text is, however, carefully preserved, while notes and brackets mark the labours of successive editors. Ten years have elapsed since the last edition, and these years were fruitful in changes in our law. Many departments had been entirely recast, thus rendering several new chapters necessary in this edition; and so various was the effect, on the text, of new decisions, that every sentence would require to have been carefully weighed. That this was done is quite apparent from the many new points introduced into almost every page of the book. We have no hesitation in saying that no Scots law book at present exists which, with less trouble to the practitioner, or with greater accuracy, indicates the road to sound legal doctrine. In itself, the book is of course quite authoritative; but, perhaps, a greater virtue in it is, that it brings light from all quarters to a focus; thus making many things easily discernible that should otherwise require to have been groped for.

Mr. Guthrie, as was to have been expected of the translator of Savigny, and the editor of Erskine, has done his work thoughtfully and well. To a stranger wishing to acquire a knowledge of Scots law the work is invaluable, as indeed it must be to every lawyer in England who has anything to do with people north of the Tweed. We read English law daily: we know its principles and its procedure with tolerable accuracy; but had we such a book on English law as this, many of us would be as learned in the law of England as a Chief Justice. English ignorance of Scots law is far from creditable, and can scarcely be quite convenient. Whoso, having a trained legal mind, will read this book will be able to advise clients to some extent with reasonable safety, and he will have the consolation of having acquired a new mental possession.

**The Constitutional History of England since the Accession of George III., 1760—1860.** By Sir Thomas Erskine May, K.C.B.  
London: Longmans, Green & Co. 1871.

THIS is a third edition of Sir Erskine May's history, containing a supplementary chapter, bringing the history down to the year 1871. The work takes up the history of the constitution at the point where Hallam left it, and continues it, as the title indicates, down to our own time. As we contemplate making some of the questions of which it treats the subject of a separate article in these pages, we will

only say for the benefit of those who are unacquainted with Sir Erskine May's book, that in impartiality it will bear comparison even with Hallam, while the style, as probably is inevitable after Macaulay has shown us the way, is far more readable.

Gaii Institutionum Juris Civilis Commentarii Quatuor ; or, Elements of Roman Law by Gaius. With a Translation and Commentary. By Edward Poste, M.A. Oxford : Clarendon Press.

It is really marvellous to see what a number of good books on the subject of Roman law are coming from the English press. Five years ago the manuscript of Gaius, so far as English publishers were concerned, might as well have remained buried in the library at Verona or have been altogether lost. We have now three really good translations of him. That by Mr. Abdy presented the original, with an excellent translation and useful notes. We have now another version by Mr. Poste. We have already expressed our high opinion of Gaius's work as a foundation for a knowledge of Roman law. Read as it ought to be, with such notes as are here placed before the reader, and with Maine's invaluable "Ancient Law," a law student gets glimpses of the origin and development of law which can be obtained in no other way. The use of the *sacramentum*, with the growths from it of conveyances and contracts, the fictitious actions, the ancient symbolism, the gradual rise of the remedial legislation of the *prætor peregrinus*, of the *jus gentium*, and its development into the *jus naturale*, through the influence of the Greek philosophy, constitute together one of the most interesting chapters in the whole history of human development, and may be said to form a veritable romance of law. In no way can this history be so well traced as by the study of Gaius. Of the translation before us, we can confidently say that in every respect it will bear favourable comparison with those which have preceded it, and that it has several special advantages to recommend it. We prefer the translation to any which has yet appeared, though even here the remark we made of Mr. Abdy's applies, that a more thoroughly English and idiomatic rendering would be more to our taste.

The Law Relating to Works of Literature and Art : embracing the Law of Copyright, the Law relating to Newspapers, the Law Relating to Contracts between Authors, Publishers, Printers, &c., and the Law of Libel. With the Statutes relating thereto, Forms of Agreements between Authors, Publishers, &c., and Forms of Pleadings. By John Shortt, LL.B., of the Middle Temple, Esq., Barrister-at-Law. London : Horace Cox, 10, Wellington Street, Strand. 1871.

WE intend shortly to treat fully in these pages on the law of libel, and shall have then an opportunity of writing at greater length on Mr. Shortt's volume. For the present, we can only say that having carefully gone through several of the most important chapters in the book, we can testify that the author has presented to the profession and the public an exceedingly useful text-book on everything relating to the law of literature and art. It is a work displaying

great industry, and very considerable power of generalization. We have noted some few points on which we should be inclined to differ from him, but they are not on material questions, and certainly would not prevent us from giving our cordial approval to the book before us.

**A Manual of the Law Relating to Divorce and Matrimonial Causes.**  
By Robert Cullen Dewy, Solicitor. Longman, Green & Co.  
1872. Price 3s.

THIS book is intended for non-professional readers, and explains, in a manner to be comprehended of all, the grounds on which Lord Penzance will be able to afford his aid in getting rid of matrimonial bonds. It has been written, and not merely compiled, and when we say that it is done in such a way that any one of average sense can understand it, and that it is accurate, we have given it no small praise. The Married Women's Property Act is given in the appendix at full length, and a summary of it; the latter being really well done.

**The Princes of India; their Rights and our Duties.** By F. W. Chesson. London: William Tweedie, 337, Strand. 1872.

THIS is a lecture delivered before the Indian Association. Its object is to show that we have not done our duty towards the princes of India, and that in acting unfairly we are not only guilty of injustice, but are acting with bad policy. To illustrate the positions he assumes, the writer takes in illustration the confiscation of Dhar, the Mysore Adoption case, the deposition of the Nawab of Tonk, the Nawab Nazim of Bengal, and other cases. Of one of these cases, that of the Nawab of Tonk, we have already expressed our opinion in the *LAW MAGAZINE*. To that opinion we adhere: we express no opinion of the innocence or guilt of the Nawab. That does not affect our argument in the slightest degree. But we do hold that it is monstrous as well as impolitic that so severe a sentence as deposition should follow on so slight and so utterly inadequate a trial, and that from such a farce of trial there should be no appeal. We are unable to give more space to Mr. Chesson's lecture than to quote his remedy. Alluding to Mr. Pritchard's suggestion of a Court of Appeal, presided over by a judge of one of the High Courts in India, he says:—

"There are fatal objections to the institution of a final Court of Appeal in that country. Such a court or international tribunal ought to be established in the serener atmosphere of England, where neither party feeling nor official influence would be likely to affect the impartiality of the judges. At all events, the present unsatisfactory state of things ought not to continue. As a rule, the Indian Government and the India Office pull together. They are masters of the situation, while a Nawab of Tonk, or a Nawab of Bengal, or a Rajah of Sooshung, has no hope of redress unless he can move a private member, from motives of sympathy or of injustice, to take up his case, and to do battle for it session after session. Sir Bartle Frere struck the true keynote when he said, 'I trust the day is not far distant when the sovereign may have at hand a tribunal forming

a part of Her Majesty's Privy Council, or possessing the same relation to the Crown, which may at command sit in judgment on questions of executive administration, whether appealed from or referred by the Government of India, and which may decide such questions with an authority which shall be conclusive with Parliament and the public, as well as against any possible appellant. For the present, however, the princes of India have virtually no appeal, save to the High Court of Parliament. The Foreign Office at Calcutta is a secret tribunal, in which it is impossible that they can feel confidence. From the Judicial Committee they are banished, because that tribunal has no power to meddle with affairs of State.

"The India Council is simply a branch of Indian administration, and it is impossible that the Executive, or its subordinates, can be safe judges in their own cause. Parliament, therefore, is the only Court of Appeal which is now open to the princes of India, and that day will be fatal to its reputation and influence when it refuses to investigate grievances which are brought before it by those against whom every other door is shut. Yet we have repeatedly seen a conscientious minority, who have studied the questions upon which they were called to vote, swamped by an ignorant and thoughtless majority, who look to Taper, or Tadpole, or Fugleman to guide them to the lobby in which they are to show how servile the spirit of party can make the gentlemen of England; and how influential is that office, which my friend, Mr. Jenkins, writing in 'Lord Bantam,' says, 'seems so concrete and abject a recognition of the baseness of humanity.' Several of the natives of India, of different creeds and races, have recently delivered lectures or speeches on the affairs of their own country, of so much ability, as to make one anxious for such a modification of our political system as would allow them to find a place in a tribunal, the decisions of which would so largely affect their interests and those of the teeming millions of Hindostan. Moreover, I, for one, do not see why some of them should not represent their country in the Imperial Parliament, or in a Federal Council of the nation."

**Precedents of Indictments.** By T. W. Saunders, Esq., Recorder of Bath. London: Horace Cox, 10, Wellington Street, Strand. 1872.

It is not often that we can say of a book that which we can unhesitatingly affirm of this—that it supplies a want. There is continually issuing from the press a stream of legal literature, on which much time and labour has been bestowed, and on which, occasionally, considerable thought has been expended, to say nothing of a very free use of paste and scissors. But for all this many of them might as well remain unwritten. It is no inconsiderable praise to say of Mr. Saunders's book that it is one of those which those who draw indictments will have on their table ready to hand. The introduction considers indictments with reference to their venue, the commencement, the statement, and the conclusion; and treats of the law as to the joinder of several offences and the amending of indictments. We could have wished the introduction to have been fuller, and in a second edition

would suggest to Mr. Saunders the desirability of making it so. The book contains a useful index.

**Elements of Law, considered with Reference to Principles of General Jurisprudence.** By W. Markby, Judge of the High Court of Judicature, at Calcutta. London: Macmillan & Co. 1871.

THIS little volume covers ground which has not yet been occupied by so small a production. Austin's book on "Jurisprudence" treats on many matters which are by no means necessary to be gone into by a beginner in legal studies, and devotes to them an altogether disproportionate share of attention. The subjects written of in his first volume has always seemed to the present writer unduly lengthy, while many subjects treated of in the second and third have only the most fragmentary share of attention. Of course, we are not forgetting the fact that the later chapters are rather notes of lectures than lectures themselves, but readers of Austin will understand what we mean. The present little volume, while its writer is evidently largely indebted to Austin, seems to us to avoid this fault. It is in our opinion expedient that the law student shall begin with some knowledge of the *generalia* of law, and should then proceed to the study of some particular system or portion of a system. This is the course which our universities, following the example of those on the Continent, are now marking out for their students. In such a course this little book will deservedly hold a high place.

**Precedents of Leases, with Practical Notes.** By John Andrews, B.A., Solicitor. London: Shaw & Sons. 1871.

MR. ANDREWS'S book is a very excellent collection of short practical precedents of leases, accompanied with notes of an equally practical and valuable nature. The notes are accurate and to the point; the precedents are carefully and well chosen, being neither too numerous nor too occasional. There are eleven precedents of leases, six precedents of agreements, and nine precedents of assignments, underleases, surrenders, and such like. The book contains also a summary of the stamp duties which are payable on the various forms, and a statement of the costs of lease and counterpart. The Statute 8 & 9 Vict. c. 124, under which most modern leases of an ordinary kind are made, is given *in extenso* in the concluding portion (Part VI.) of the volume, as are also (among other Statutes) the 14 & 15 Vict. c. 25, relative to emblements and fixtures; the 19 & 20 Vict. c. 120, relative to settled estates; and the 22 & 23 Vict. c. 35, relative (among other matters) to the effect of licences, to the apportionment of conditions, to insurance covenants, and to the liability and relief therefrom of executors and trustees in respect of onerous leaseholders. Altogether the work is calculated, and cannot fail, to be of ready service to both solicitors and agents.

**The Law of Evidence, as administered in England and applied to India.** By Joseph Goodeve. New edition. By L. A. Goodeve. Calcutta: Thacker & Co. 1871.

WE have before us a new edition of "Goodeve on Evidence," which



has for a long time been the text-book and the subject at the Calcutta University, and was, in 1869, made a part of the *curriculum* of a pleader. But for the obstinacy of the Civil Service Commissioners, who seem to prefer their own crotchets to the welfare of the service in the case of the Indian Civil Service, it would long ago have been the text-book for the selected candidates for that service. The principle adopted by the author was to take the English Law of Evidence, and explain with what differences this law applied to India, omitting, of course, matters of mere local application here. At the time when the first edition appeared it was true, as stated in the preface, that "English treatises were silent as to the peculiarities of the Indian system;" but the statement, which is incorporated into the preface of the new edition, is not correct now, for in the third edition of "Powell on Evidence," published 1869, "the salient rules of evidence adopted in the Anglo-Indian Courts" are incorporated. Mr. L. A. Goodeva has done his share of the work well, and that share is not inconsiderable, for the changes during the ten years which have elapsed since the first edition appeared, both in the English and the Indian Law of Evidence, are considerable, and these are worked into the new edition. We can conscientiously recommend the work to Indian students, as well as to those practising, or about to practise at the Indian Bar.

**The Law of Gas and Water Supply; comprising the Rights and Duties, as well of Local Authorities as of Private Companies, in regard thereto, and including the Legislation of the last Session of Parliament.** By W. H. Michael and J. Shiress Will, Barristers-at-Law. Butterworths, 7, Fleet Street. 1872.

MR. MICHAEL is already well known as an authority on the subject of sanitary law and that relating to local government, and his name in connection with the subject of gas and water supply will be a sufficient guarantee that the book in which he treats of these subjects is written by one who understands what he is writing about. It is a little curious that in this day, when every new-called barrister seems to be on the look-out for some subject which has not yet been written on, there should not yet have appeared a work treating on that of gas and water supply. Even, however, if there had been such a work, the legislation of the last two sessions would have rendered it practically useless. The volume before us contains an introduction containing a general account of the law as affecting gas-works and gas supply, water-works and water supply. Then follow abstracts of the Gas-Works Clauses Acts, 1847 and 1871, with these Acts themselves. Every other Act directly affecting the subject is also set forth, and the work itself is brought to a conclusion by a very copious index. The whole work occupies upwards of 700 pages.

#### PARLIAMENTARY PAPERS.

**THE following is a list of Parliamentary Papers, relating to the profession, issued since the commencement of the Session.\***

*Bar of Ireland.*—Bill to Repeal an Act passed in the Parliament

\* Any of these may be had of P. S. King, Parliament Street.

of Ireland, in 1541, requiring the attendance at one of the Inns of Court in England, as a necessary qualification for admission to the Irish Bar. *Capital Punishment*.—Bill to Abolish. *Charitable Trusts*.—Bill to Facilitate the Incorporation of Trustees of Charities for Religious, Educational, Literary, Scientific, and Public Charitable Purposes, and the Enrolment of certain Charitable Trust Deeds. *Collier, Sir Robert*.—Correspondence relative to his Appointment to the Judicial Committee of the Privy Council. *Corrupt Practices*.—Bill to Amend the Corrupt Practices Prevention Act, and the Parliamentary Elections Act, 1862. *County Courts*.—Return of Plaints, Executions, Imprisonment, &c., for 1870. *Court of Chancery*.—Bill to Abolish the Office of Accountant-General of the High Court of Chancery in England, and to Amend the Law respecting the Investment of Money paid into that Court, and the Security and Management of the Moneys and Effects of the Suitors thereof. *Criminal Trials*.—Bill to Provide that Jurors in Criminal Trials in Ireland shall henceforth be chosen in Civil Trials by Ballot, and to Abolish the Power of the Crown in such Trials to set aside Jurors without cause. *Eyre, Mr.*—Papers Relating to the Legal Expenses incurred by Mr. Eyre in Respect of Proceedings in Courts of Law, having Reference to the Jamaica Insurrection. *Jamaica*.—Correspondence regarding the Alleged Keeping of Private Lock-ups by Magistrates in Jamaica. *Justices' Clerks*.—Bill to Improve the Administration of Justice at Petty Sessions, by Providing for Payment of Clerks to Justices by Salary. *Local Legislation*.—Bill to Facilitate the Obtaining of Powers for Legislation on Public Local Matters in Ireland. Bill to Diminish the Expense and Delay of passing Local and Personal Acts relating to Ireland through Parliament. *Metalliferous Mines*.—Bill to Consolidate and Amend the Law Relating to. *Middlesex Registration of Deeds*.—Bill for Discontinuing the Registration of Deeds, Wills, and other Matters Affecting Lands, in the County of Middlesex. *Mines*.—Bill to Consolidate and Amend the Acts relating to the Regulation of Coal Mines, containing Inflammable Gas. *Municipal Corporations*.—Bill to Amend the Municipal Corporations Acts of 1835 and 1859, with Respect to the Qualification of Aldermen and Councillors, and the Division of Boroughs into Wards. Bill to Authorize the Application of Funds of Municipal Corporations and other Governing Bodies in England and Wales in certain Cases. *Parliamentary and Municipal Elections*.—Bill to Amend the Law relating to Procedure at. *Public Prosecutor*.—Bill for the Appointment of a. *Real Estates*.—Bill to Amend and Extend the Act to Facilitate the Proof of Title to and Conveyance of Real Estates. *Reformatory and Industrial Schools*.—Bill to Amend the Law relating to. *Registration of Borough Voters*.—Bill to Amend the Laws relating to the Registration of Parliamentary and Municipal Voters in Boroughs in England, and to alter the Dates for the Qualification of Voters. *Women's Disabilities*.—Bill to Remove the Electoral Disabilities of Women.

## SPRING CIRCUITS.

**HOME CIRCUIT.**—(The Lord Chief Justice Cockburn and Lord Chief Justice Bovill.)—Hertford, Monday, March 4; Chelmsford, Thursday, March 7; Maidstone, Monday, March 11; Lewes, Monday, March 18; Kingston, Monday, March 25.

**WESTERN CIRCUIT.**—(Mr. Baron Martin and Mr. Baron Bramwell.)—Devizes, Wednesday, Feb. 28; Winchester, Saturday, March 2; Dorchester, Friday, March 8; Exeter, Tuesday, March 12; Bodmin, Tuesday, March 19; Taunton, Friday, March 22; Bristol, Thursday, March 28.

**NORFOLK CIRCUIT.**—(Lord Chief Baron Kelly and Mr. Justice Blackburn.)—Oakham, Wednesday, Feb. 28; Leicester, Thursday, Feb. 29; Northampton, Monday, March 4; Aylesbury, Thursday, March 7; Bedford, Monday, March 11; Huntingdon, Thursday, March 14; Cambridge, Saturday, March 16; Norwich, Thursday, March 21; Ipswich, Wednesday, March 27.

**OXFORD CIRCUIT.**—(Mr. Justice Byles and Mr. Baron Cleasby.)—Reading, Monday, Feb. 26; Oxford, Thursday, Feb. 29; Worcester (and City), Tuesday, March 5; Stafford, Monday, March 11; Shrewsbury, Monday, March 18; Hereford, Monday, March 25; Monmouth, Saturday, March 30; Gloucester (and City), Thursday, April 4.

**MIDLAND CIRCUIT.**—(Mr. Justice Keating and Mr. Justice Quain.)—Warwick, Saturday, Feb. 24; Derby, Friday, March 1; Nottingham, Wednesday, March 6; Lincoln, Monday, March 11; York, Saturday, March 16; Leeds, Thursday, March 21.

**NORTHERN CIRCUIT.**—(Mr. Justice Mellor and Mr. Justice Lush.)—Appleby, Friday, Feb. 16; Carlisle, Tuesday, Feb. 20; Newcastle, Saturday, Feb. 24; Durham, Thursday, Feb. 29; Lancaster, Thursday, March 7; Manchester, Monday, March 11; Liverpool, Friday, March 22.

**NORTH WALES.**—(Mr. Baron Channell.)—Welshpool, Monday, March 11; Dolgelly, Thursday, March 14; Carnarvon, Saturday, March 16; Beaumaris, Wednesday, March 20; Ruthin, Saturday, March 23; Moll, Tuesday, March 26; Chester, Saturday, March 30.

**SOUTH WALES.**—(Mr. Justice Grove.)—Haverfordwest, Monday, Feb. 26; Cardigan, Thursday, Feb. 29; Carmarthen, Monday, March 4; Swansea, Saturday, March 9; Brecon, Friday, March 22; Presteign, Wednesday, March 27; Chester, Saturday, March 30.

Mr. Justice Willes remains in town.

## FINAL EXAMINATION.

*Hilary Term, 1872.*

At the examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Edgar Lubbock, Edward Powell, Beaumont Shephard, John Cook, Walter Reginald Collins, George Ashmall.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books:—To Mr. Lubbock, the Prize of the Honourable Society of Clifford's Inn; to Mr. Powell, the Prize of the Honourable Society of Clement's Inn; to Mr. Shephard, Mr. Cook, Mr. Collins, and Mr. Ashmall, Prizes of the Incorporated Law Society.

The Examiners have also certified that the following candidates, under the age of 26, whose names are placed in alphabetical order, passed examinations which entitle them to commendation:—Arthur George Boulton, Samuel Chester, George John Coldham, Edwin Gray, Henry Edward Herman, George Edward Lake, Charles Herbert Owen, Samuel Pilley, jun.,

Frederick Vaughan. The Council have accordingly awarded them certificates of merit.

The Examiners further announced that the answers of the following candidates were highly satisfactory:—Horace Ockerby, William Henry Herington, William Baildon Craven, James Rawlinson. That Mr. Ockerby, Mr. Herington, and Mr. Craven would have been entitled to Prizes, and Mr. Rawlinson to a Certificate of Merit, if they had not been above the age of 26.

The number of candidates examined in this Term was 157; of these 143 passed, and 14 were postponed.

### APPOINTMENTS.

Mr. Arthur Hobhouse, Q.C., has been appointed Legal Adviser in the Legislative Council of India; Mr. Serjeant O'Brien, Recorder of Lincoln; Mr. Edlin, Q.C., Recorder of Bridgwater; Mr. J. A. Russell, Q.C., Judge of the Manchester County Court; Mr. Joseph Kay, Q.C., Solicitor-General for the County Palatine of Durham; Mr. C. Walter Campion, Barrister-at-Law, Secretary to the Speaker of the House of Commons; Mr. J. D. Davenport, Barrister-at-Law, Secretary to the Winchester School Commission; Mr. Frederick J. Fegen, Barrister-at-Law, Secretary to Sir Alexander Milne's Committee to investigate certain of the Alabama Claims; Mr. Charles Saville Roundell, Barrister-at-Law, Secretary to the Universities Commission; Mr. Robert Donnell, M.A., Barrister-at-Law, Whately Professor of Political Economy in Trinity College, Dublin; Mr. Daniel Henry Owen, one of the Registrars of the Principal Registry in London, to fill the vacancy caused by Mr. C. J. Middleton becoming Chief Registrar on the retirement of Dr. Bayford; Mr. George Robert Harman, District Registrar of the Court of Probate at Norwich; Mr. James Cherry, Barrister-at-Law, Clerk of the Peace for the County of Suffolk.

IRELAND.—Mr. William M'Laughlin, Circuit Crown Prosecutor for the County of Tyrone; Sir Francis W. Brady, Bart., Q.C., to fill the vacancy occasioned by the death of Mr. Loftus H. Bland, Q.C.; Mr. Arthur Hamill, Q.C., Chairman of the County of Roscommon; Mr. Robert Ferguson, Chairman of Quarter Sessions for the West Riding of the County of Cork.

SCOTLAND.—Mr. E. E. Harper, Barrister-at-Law, and Advocate Legal Assessor of the Burgh of Leith.

INDIA.—Mr. V. A. Williamson, Barrister-at-Law, has been appointed in conjunction with Mr. W. E. Frere, late of the Bombay Civil Service, a Commissioner to Inquire into the Condition of the Indian Immigrants at the Mauritius.

QUEBEC.—The Hon. Christopher Dunkin, Puisne Judge of the Superior Court of Lower Canada, now Quebec.

### CALLS TO THE BAR.

*Hilary Term, 1872.*

INNER TEMPLE.—Mr. Hassard Hume Dodgson, one of the Masters of the Court of Common Pleas; and Mr. William Henry Mason, B.A., Cambridge.

## NECROLOGY.

### *December.*

- 28th. BURT, A. P., Esq., Attorney-General of the Island of Granada, aged 33.  
 29th. MAYNE, R. St. G., Esq., Barrister-at-Law, aged 60.

### *January.*

- 20th. WESTON, Robert, Esq., Solicitor, aged 85.  
 21st. BORTON, J. Henry, Esq., Solicitor, aged 72.  
 24th. TATHAM, Montagu John, Esq., Solicitor, aged 63.  
 27th. KETTLE, J. L. Ross, Esq., formerly County Court Judge, aged 62.  
 28th. CUF AUDE, Lomas, Esq., Solicitor, aged 61.  
 29th. REED, E Haythorne, Esq., Solicitor, aged 42.  
 29th. STANSFELD, James, Esq., late County Court Judge, aged 79.  
 31st. HARGREAVES, Henry, Esq., Solicitor, aged 82.

### *February.*

- 1st. PRICE, Thomas, Esq., Solicitor, aged 52.  
 1st. PRANCE, Vaughan, Esq., Solicitor, aged 54.  
 10th. YONGE, John, Esq., Solicitor, aged 67.  
 11th. CARLINE, Henry G., Esq., Solicitor, aged 38.  
 14th. BENNETT, E. Holland, Esq., Barrister-at-Law, aged 35.  
 15th. ELDRED, C. Joseph, Esq., Solicitor, aged 47.  
 16th. ROSE, W. Barker, Esq., Barrister-at-Law, aged 27.  
 16th. EVANS, W. David, Esq., Barrister-at-Law.
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THE

# LAW MAGAZINE AND REVIEW,

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No. III.—APRIL 1, 1872.

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## I.—POINTS OF DIFFERENCE BETWEEN INTERNATIONAL AND STATUTE LAW, AS ILLUSTRATED BY THE ALABAMA QUESTION.

**T**HE present phase of what is known as the Alabama Question belongs to the domain of politics rather than of international law. Indeed, the questions arising out of this celebrated case had reference throughout rather to municipal, or statute law, than to any department of the law of nations in the strict sense of the term, as acknowledged by civilized communities. Into the merits of this great controversy, as it now stands, it would be unprofitable for us to enter, with the imperfect documentary evidence which we as yet possess, and with many of the most material facts still withheld. But what may be useful to some of our readers, as assisting them to a knowledge of what are the legal principles involved in the case, would be to state in outline: (1.) What, independently of the Treaty of Washington, was the rule of the law of nations—that common public law which, apart from the express legislation of any one particular State or group of States, governs the relations of the neutral and the belligerent—upon the question of the rights of private persons citizens of a neutral country, to make and export for the service of a belligerent, contraband, arms, and ships of war? (2.) What is the municipal or statute law on this subject in the two principal maritime countries in the world, England and the United-States? and, (3.) What is the relation between these systems of law; is one the complement of the other, or are they in conflict, and if so, to what extent? Questions which will render necessary some notice of the “three rules

of conduct," under the Treaty of Washington. These points it is proposed briefly to examine.

I. Now, as regards these classes of articles of commerce, known respectively as ordinary or conditional contraband, munitions of war, and armed vessels, it is, in the first place, to be observed that international law makes no distinction whatever between them. Municipal law, indeed, does so, for reasons which we shall presently notice; but in the view of the common law of nations, all these commodities stand precisely on the same footing, and that footing may be simply expressed by the words, "perfect freedom of manufacture and export, subject to the incidents of capture as prize." Apart from municipal legislation, even a ship completely armed and equipped may, in the opinion of Wheaton, be sold within the neutral territory; and a belligerent would have no right, upon any principle of international law, to complain of it. (*Law of Nations*, p. 312.) So in the correspondence between Mr. Jefferson and Mr. Hammond, the British Minister, in 1793, before the Foreign Enlistment Acts had passed, either here or in the United States, the former eminent statesman thus expresses the opinion of the American Government:---

"Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress those callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle, and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent Powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned." (*Jefferson's Works*, p. 558.)

To a similar effect is the language of Mr. Justice Story, in what may be termed the leading case on this branch of the law:

"There is nothing," he said, "in our laws, or in the law of nations, which forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." (*The Santissima Trinidad*. 7 Wheaton's Rep., p. 283.)

And, generally, it may be stated that the American Courts of Prize, which had during the European contests of the earlier part of the present century, singular opportunities for the study of international law in its relation to the position of

neutrals, have invariably held that an enemy may come into the territory of a neutral Power, and there purchase, and thence remove, any article whatsoever, even instruments of war. This they considered as a law of nations, long and universally established. (Op. of Att. Generals, Vol. 1, p. 62.)

Later down in our own country and in our own courts the same question arose, and the same doctrines were upheld. In a comparatively recent case,\* Lord Westbury held that, as in the view of international law, the commerce of nations is perfectly free and unrestricted, if hostilities occur between two nations, neither belligerent has a right to impose, or to require a neutral Government to impose, any restrictions on the commerce of its subjects. The right which the laws of war give to a belligerent does not involve, as a consequence, that the act of the neutral subject in so transporting munitions of war is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint, either against the neutral trader personally, or against the Government of which he is a subject. And this traffic, even when carried to the fullest extent that international law permits, is not, as some have argued, illegal, as being *contra bonos mores*.† The rights, indeed, of the neutral merchant to export, and of the belligerent to intercept, may, as Chancellor Kent expressed it, be “in conflict;” but by that expression he must merely be understood as saying that the law of nations does not impose upon the Government of a neutral State the obligation of preventing its merchants from engaging in this species of trade, while the same law justifies the belligerent in treating it as hostile. And this is the view taken in the matter by Lord Westbury in the case already quoted,‡ and by Dr. Lushington, in the case of the “Helen.” § The act of the neutral trader in transporting munitions of war to the belligerent country is, in fact, quite lawful; and the acts of the other belligerent in seizing and appropriating the contraband is equally lawful. Their conflicting rights are co-existent, and the act of the one party does not render the act of the other wrongful or illegal.

II. We have endeavoured to state, with accuracy, the principles of international law in this matter, familiar as they may be to many of our readers, as it is very necessary they should be borne in mind in estimating the importance of the change which statute law has made; for both in this country and the United States the interference of the Legislature has been

\* *Ex parte Chavasse*, Jurist Rep., N.S. May 20, 1865.

† See on this point the observations of Mr. Duer, in discussing the passage from Kent's Commentaries (Marine Insurance, Vol. 1, p. 750). Sir R. Phillimore differs from Mr. Justice Story. (Inter. Law, Vol. 3.)

‡ *Ex parte Chavasse*, *ut. sup.*

§ Jurist, N.S., Dec. 30, 1865.



sought to define, and in a material degree to abridge also, the rights of the private neutral citizen to deal in articles contraband of war. In England, the statute law on this subject is contained in two Acts of Parliament, known respectively as the Foreign Enlistment\* and the Customs Consolidation Acts.† The Customs Consolidation Act, to which we need here no further allude, empowers the Queen to prohibit every species of contraband but ships, which are left to be dealt with under the Foreign Enlistment Act; and it is upon the construction of this latter statute, and chiefly upon the famous seventh section, that the conflict as between municipal and international law, on the question of contraband, almost exclusively turns.

Now what this Act, the Foreign Enlistment Act, did was this: it abridged the right which generally, under what we may term the common law of nations, private persons enjoyed of manufacturing, and delivering pursuant to contract, or exporting, contraband articles, including armed vessels of war. And, in the next place, it legislates for this latter class, armed ships, expressly; regarding it as a commodity the building, "equipping," and furnishing of which is attended with certain incidents of a peculiarly dangerous kind, as tending to compromise the neutrality of the State of which the person who builds, or contracts to build, the ship is a subject. Some of the incidents which no doubt induced the Legislature to restrict the trade in ships, while it left that in other contraband comparatively free, were these: that a person who carries ordinary contraband to a belligerent is engaged in a mere mercantile adventure which does not become a warlike operation until the contraband having escaped capture is delivered in the belligerent country. A ship is, on the other hand, not only in itself an engine of war, but carries other engines of war and men to work them. She has also a nationality, and for some purposes is, as it were, an inhabited territory, exempt from the civil jurisdiction of the foreign country into whose ports she may come.‡ So that, as has been remarked, a vessel of this kind armed, equipped, and manned, is in fact a floating hostile territory, and the elements of armament are combined in her whether she is on the high seas or within the territory of a neutral State. And moreover, the person who deals in ordinary contraband, trades with his own goods for his own profit; but if a belligerent State by its agent orders ships of war to be built and equipped in a neutral State, there is, at least on the side of one of the parties to the contract, no object of commercial ad-

\* 59 Geo. III. c. 69.

† 16 & 17 Vict. c. 107.

‡ The "Exchange," 7 Cranch Rep., p. 116. The "Invincible," Wheaton's Rep., p. 238.

vantage, but a simple operation of war. These considerations, and others which might be named, no doubt were sufficient to induce the Governments both of England and the United States to make the equipment and supply of armed vessels the subject of exceptional and restrictive legislation, in order, by positive enactments, to secure a remedy for an evil which the ordinary law of nations was inadequate to meet.\* But the mere building of ships, even of ships of war, is not, it should be observed, forbidden. That important branch of British industry remains untouched by any legal disability; it is only when the vessel is, to use the words of the Act, fully "equipped, furnished, fitted out and armed," in any part of the United Kingdom or the Colonies, with the intention, moreover, of "conizing or committing hostilities against" a foreign Government with whom this country shall be at peace, that the offence struck at by the Act is complete. And further, if the forbidden acts are committed, though by a British subject, yet out of the Queen's dominions, they constitute no offence at all; so that in view of the entire section dealing with this subject, the conclusion is plain that it is not so much the act of "equipping," &c., armed vessels, or the intention of using them in "conizing or committing hostilities" that was in view of the Legislature in passing the Act. Rather was it *the place*, a British port here or abroad, which it was designed to preserve from being made ports of hostile equipment, a base as it were of unfriendly operations against a belligerent power with whom this country might be at peace.†

III. This short account of the law of nations, and of the express legislation upon this important subject, will lead us to examine how far these systems of law, as we may term them, international and statute, fit into each other; and if antagonistic, to what extent they are in conflict. This inquiry will bring us face to face with the Alabama Treaty in its present phase.

It may then at the outset be stated, that any attempt to interpret an Act, such as the Foreign Enlistment Act, by the light of international law must necessarily fail. The scope

\* See as to the difference between arms, and armed vessels, 3 Jefferson's Works, pp. 558, 571.

† And for a similar reason the Government of the United States has always held independently of any statutes that the act of *commissioning* a vessel in the port of that country to cruise against a belligerent with whom they were at peace, was an inceptive act of war, and, as such, incompatible with the territorial sovereignty of the United States. (Jefferson's Works, Vol. 3, p. 571.) And so it was observed by Mr. Justice Thompson, in giving the judgment of the Supreme Court, in the case of *United States v. Quincey*, (6 Peter's Rep., 445), that "all latitude necessary for commercial purposes is given to our citizens, and they are restrained only from such acts as are calculated to involve the country in war."

and aim of the two are, as may be easily seen, distinct, and indeed in more than one point at variance; nor is the spirit of international law at all the same as that which prompted the direct legislation which has taken place. A leading principle of the law of nations is, as we have seen, to encourage the freedom of commerce in favour of the neutral merchant or manufacturer. Statute law, on the other hand, in one important point at least, restricts this commerce, and makes that freedom subordinate to what are considered to be the larger necessities of Government. And hence it is that the Foreign Enlistment Act with us, or the similar Act passed by the United States Act of Congress of 1794, and re-enacted in 1818, are not to be taken as the measure of international obligations as arising under or defined by the law of nations; they are not the expression of that law, nor to be construed in the light of it. The object of the framers of the Act was not to compel compliance with neutrality, as expounded by international law, or to employ the Act merely as a method of giving effect to neutral obligations, but to supply what was considered as a *casus omissus* in that law—to create a new class of duties hitherto unknown, with new and exceptional penalties attached to their violation. Were it not for such an Act, the “Alabama” would form no ground of complaint against this country; for neither in her construction, nor in the service on which she was employed, was there anything which offended against international law. There may have been a breach of municipal law and a particular statute; but otherwise, no act was committed of which a belligerent at peace with this country had a right to complain.

The policy of merging private rights into public obligations is one which it is not difficult to see it is the object of the maritime States to extend, as the chief if not the only means of guarding against those grave diplomatic embarrassments which recently, for example, during the American and Prusso-Frank wars, tended seriously to compromise our position as a neutral State. Everything leads to the opinion that, as respects at least more than one important branch of industry, there will be gradually a more complete identification of the citizen with his Government, owing to the powerlessness of the undefined system of law known as “international,” to secure the observance of State duties, or to reconcile these when in conflict with private rights. And this consideration will serve to show the importance of the alteration in the law of nations which it is the design of the Treaty of Washington to introduce. The very object and purpose of that treaty is to give legality to all claim for compensation which can be established under the three following rules of conduct—rules which never before could have been held binding on neutrals,

and which now, for the first time acknowledged as binding on the parties to the treaty, confer a legal *status* on certain claims which before were wholly untenable. The rules are these:—

A neutral Government is bound, first: To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise, or carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

Secondly: Not to suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of renewal or augmentation of military supplies or arms, or the remitment of men.

Thirdly: To exercise due diligence in its own ports and waters; and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

And it is to be remarked that in the treaty the legal responsibility entailed by these rules is acknowledged and accepted now for the first time; for it is declared in so many words that:—

“Her Majesty’s Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Art. 1 arose; but that Her Majesty’s Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provisions for the future, agrees that in deciding the position between the two countries arising out of the claims, the arbitrators should assume that Her Majesty’s Government had undertaken to act upon the principles set forth in those rules.”

Whatever difficulty may be found to exist in the interpretation of these rules, or the carrying of them into practice, there can be but one opinion as to their importance upon the position of neutral Powers. The chief effect will, in all probability, be that of rendering the observance of an attitude of complete neutrality more difficult in the face of the enterprise of private traders, whose constant endeavours to realize the advantages of the stimulus which in many important branches war gives to commerce, will have a continual tendency to compromise their Government. But into such considerations it would not be possible, in a mere sketch like the present, to enter; it has been rather our present object to bring clearly out, as a matter of legal history, the difference between the past and the future of international law in one of

its most important aspects, than to observe upon any consequences likely to follow from the incorporation of the rules of the Treaty of Washington into the public law of nations. But there can be no doubt but that, to use the words of a distinguished American writer, the progress of modern times has been to insist on an entire and perfect neutrality, and to require, it may be added, a neutral State to mould its internal legislation, and abridge, if necessary, the privileges, and check the industrial energies of its population, in order the better to secure that end. It will become gradually more difficult to conceive of a State being permitted to continue that condition of limited and partial neutrality which has under the necessities of private commerce hitherto existed; and whatever may have been the language of the older writers on the law of nations when treating of this subject, the course of modern opinion points to the conclusion that a belligerent would be considered as justified in treating any State as hostile throughout which rendered any aid, directly or indirectly, to its enemy, just as a Power would be regarded as hostile which, whether in pursuance of treaty obligations or not, gave or withheld belligerent privileges unequally.\*

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## II.—COMPANIES IN *COMMANDITE*, AND THE DESIRABILITY OF THEIR INTRODUCTION IN ENGLAND. By HENRY D. JENCKEN, Barrister-at-Law.

IT is a strange anomaly of our law, that in the face of the vast interests involved in Joint-stock enterprise, no effort has been made to organize the maxims of our jurisprudence, and the sound practical rules of our commercial men into a complete system. The day I conceive is, however, not far distant when the Legislature will have to intervene; even a superficial view of the law as now administered would convince a mere tyro that something is wrong. The ever varying decisions of our Equity and Common Law Courts prove, that the principles upon which the judgments are given are not settled. As illustrative of the strange contradictions our law-makers have been guilty of, I may cite the Partnership Amendment Act, 1865. After centuries of battling with a faulty maxim of law, namely, "that he who shares profits

\* See note by Mr. Dana, Wheaton's Inter. Law, p. 425.

shall share the liabilities," the urgent necessities of our ever increasing commerce, and the example of the *commandite* on the Continent, finally compelled the Legislature to change the obstructive rule our Equity judges had laid down. It at last occurred to our lawyers, that possibly the soundness of the law of partnership liability was not founded upon the fact of the sharing of profits, but was based upon the principle of an implied agency, which naturally attaches to those who transact business in common, and deal with the world at large. This principle of implied agency, those great masters of law, the civilians, well understood; the *Societas* with them was much what the codes of Italy, France, and Spain define it to be, namely, a joint venture, in which service, money, or goods are united to effect some object in common; but the law allowed that, if so specially agreed, and those who found capital held aloof from dealing with the world, the capital provided might be deemed a *depositum* (*Dig. pro socio, l. 34*). I merely allude to the source from whence this rule has been taken, to show that, at all events, the sanction of jurists for upwards of 2000 years may be cited in excusing my expression of amazement of the reluctance to understand these principles, both our lawyers and legislators have evinced. Mr. Lowe, who ought to know better, actually told the House of Parliament, "that the *commandite* is not suited to our habits, and that its introduction would be tantamount to a new law of partnership." (Speech, House of Commons, 1856.)

Let us now examine how this principle came into use in the 10th and 11th centuries; and how it gradually grew in importance, until finally the Ordonnance of Louis XIV. (A.D. 1673) gave, so far as France extended, legislative sanction to those rules which the trading community had created for itself.

As far back as the year 1063, Pardessus tells us, that the Statutes of Trani contain a clause in which the *societa accommandita* is described; and further, that in the 12th and 13th centuries, the great trading towns of Marseilles and Genoa appear to have fully adopted the *commandite*. It is true, that primarily this form of partnership was only used in maritime adventure, more rarely in ordinary trading undertakings, but its extreme usefulness, and the rigorous rule of the canon law against usury, compelled capitalists to turn their attention to a form or participation in profits allowable by the schoolmen. That *depositum et commendatum idem sunt*, Bartole (*sur loi 23, D. deposit*), informs us, for he says, "it was suited both to the laity and clerical interests." The latter holding as they did more than half the land, intrusted their flocks and herds in *depositum*, to the faithful, able at any time by these means to reclaim their capital. Delaurière terms this the *commande de bestiaux*. This very principle is carried out in our stock and

sheep farming in our colonies; in our whaling trade, the lay, or share of the seamen is but a *commandite*. Indeed, though buried beneath a mountain load of decisions both in Equity and Common Law, the self-assured, sleeping, or dormant partner is but a *commanditaire* who sleeps on and on until rudely awakened by a call upon his purse, and ruin staring him in the face. Passing onward to the end of the 17th century, we find the European world busy and astir with the new field of enterprise the East and West Indies offered to those who had the courage to venture. It was indeed this onward movement that induced Louis XIV.'s great minister Colbert to organize into a system the forms of joint-stock enterprise then in fashion; always preserving, however, the fundamental principle, that the capitalists agreed only to stake the amount contributed, or agreed to be furnished. How completely this system was understood, Mr. Law's famous *Société en commandite* (1716) illustrates. The scope and system given to the *commandite* by Louis XIV. soon imparted an enormous impulse to commerce. The fact that the *commanditaire* could remain unknown and intact, proved the charm; and it is really of interest to trace in the judicial records of that period, to the days of the Revolution, how courtiers and prelates, men and women of all grades, furnished their mite towards the accomplishing of great national undertakings. This same spirit of aggregate action has in our century given railroads and telegraphs, and the means of civilization to the European races.

Paired with this great advantage of exemption from personal liability, the law of the *commandite* required, still following up those first principles of the Roman law, that the *commanditaire*, if he chose to be exempt, should not transact the business of the enterprise personally, nor place himself in direct communication with third parties. This wholesome rule was infringed upon during the days of turmoil of the great French Revolution; indeed, the disregard of this fundamental principle led to the *avis* of the 29th April, 1809, which provides that "*à faire une acte de gestion c'est exercer les positions d'un gérant de société.*" (*Vide* Code Napoleon, Art. 27 & 28. Sirey J. 3, 381.) This very point, as may be conceived, proved a *quæstio vexata*. It has been argued over and over again before every tribunal in France, Spain, Italy and Belgium; those of Belgium rather favouring the right of control of the *commanditaire*, whilst in France a more rigorous rule as to *immixtion* has been throughout followed, and even the *deliberation intérieur* is regarded by the law with the utmost suspicion. The *commanditaire* is, indeed, a partner, not a mere creditor, which unreasoning and unsound view has been adapted by that singularly defective Act, the 28 & 29 Vict. c. 86 (1865); the

*commanditaire* possesses all the rights of partner (*inter esse*), but is held exempt, as regards third persons, from any liability towards these, both as to his unpaid contribution as well as regards the debts and liabilities contracted by the *commandite*. Hence, and to prevent deception, registration of the *commandite* is required by the laws of North Germany, Austria, Bavaria, France, Spain, Portugal and the Netherlands. This, of course, necessitates that the partnership agreement shall be in writing. The style or firm of the *commandite* must be that of one of the *gérants*, and must not be that of a fictitious person, nor that of one of the *commanditaires*.

I have thus far dealt with *commandite* ordinary, and have now to treat of the *commandite par actions*. This form of the *commandite* is the most usually adopted where larger enterprises are in contemplation. The *loi du 24 & 29 Juillet, 1867*, of the French code, presents an excellent exposition of the juridical principles adapted to practical use, and I only regret, that I have not space to dwell upon this well-conceived and admirably drawn Law which contrasts so favourably with our ill-framed, badly-reasoned-out Joint-Stock Companies Acts. Equally systematically framed are the laws of the North German Confederation (June 11, 1870). The Art. 151 gives the following definition which I have selected as rendering the precise meaning given by the laws of the Continental States. "A company in *commandite*," says the law, "exist, when an ordinary trade business is carried on under a common name, but in which one or more of the partners participate only by contributing capital." The contributions are, however, unlike as in the case of an ordinary *commandite*, divided into shares; these may be to bearer, provided 50 per cent. be paid (French code; 40 per cent. North German law). The characteristic difference between the ordinary *commandite* and that *par actions* being, that the latter must have a council of control, *conseil de surveillance*, or, as the German law terms this, *Ein Aufsichtsrath*, composed of at least three members. The *gérants*, and whose names must be registered, remain liable as to third persons; they have the whole conduct of the business; in fact, their rights and liabilities are the same as in an ordinary *commandite*. By the *loi* of 24-26 *Juillet, 1867* (French code), a fourth of the nominal value of the capital must be paid up. The same law provides that this form of partnership shall from the date of its promulgation be exempt from State control and State sanction; whilst in North Germany, Austria, and most of the Southern German States, the sanction of the Government is needed. On the other hand, however, the German law does not require that the payments shall be in money: all that is required is to state the money value of the contribution,



and of which a valuation has to be made by competent persons. In all these countries registration and the appointment of a council of administration are absolutely necessary.

In the case of liquidation, the rights and liabilities of the company pass to a receiver appointed by the court, by whom and against whom all legal proceedings must be taken.

I have thus far traced out the boundary lines of the laws that regulate the *commandite*. Originating in a *quasi depositum*, it has gradually merged into a definite form of partnership, the *gérants* or *solidaires* being as between themselves in the position of ordinary partners, whilst the *commanditaires* take the position of qualified partners. Throughout, however, the element of the *societas* prevails; it never entered the minds of those able jurists who have written on this subject, that the character of a mere money lender, a bare creditor, could be united with that of a partner. Troplong, Tripièr, Mittermaier, Rénaud, Savigny, or Thibaut—it matters not to whom we refer, not one of these great jurists would have for a moment tolerated the strange anomaly presented by the Partnership Amendment Act of 1865, by which “the lender shall receive a rate of interest varying with profits, or shall share in the profits.” This Act further provides, Clause 5, that the “lender shall not be entitled to receive any portion of his principal, or of his profits or interest, until the claims of the other creditors of the said trader *have been satisfied*.” No registration is required. The extreme obscurity of this Act, the fatal error in not clearly defining the relative position of the parties, has justly inspired the public with a dread in the use of this most valuable form of joint-stock partnership.

The Act is not only too loosely drawn, but, to use Mr. Howell's expression, “it is a mere string of negatives; for it fails altogether in defining the rights and liabilities of the persons engaged, and leaves to expensive litigation the task of eliciting from the lips of our Equity judges where the line of demarcation has to be drawn between the creditor partner, and the person who is answerable for the debts of the partnership to third persons.”

It is truly lamentable to study the various Acts of Parliament that have, since 1847, of railway speculation; notoriety, been enacted to modify the narrow and obstructive legal rules laid down by our judges, and watch how regardless the framers of the laws have been, not only of the effects upon the morality and prosperity of the people, but how the Legislature has proceeded in utter defiance of every known juridical principle. We are told, that the *commandite* is unsuited to our English tastes, and because it is unsuited we violate, in the very same moment of time, some of the fundamental principles that must underlie joint stock co-operative enterprise.

The day however has passed for men to shrug their shoulders and to leave the vast interests involved in this state of confusion and uncertainty. The Legislature, with the utmost self-complacency, tolerates a systematic disregard of every known principle of law; but, alas! it is the community at large that suffers the consequences, both by direct losses and by a just dread of the uncertainty of their position, which uncertainty necessarily paralyses useful enterprise. France owes much of its commercial prosperity to the *commandite*. The silk trade of Lyons, which in 1867 purchased 10,000,000*l.* sterling worth of raw silk, against 2,500,000*l.* consumed in England, proves what the *commandite* has done. In Belgium, nearly half the great trading companies of that wonderfully prosperous country are *en commandite*, and in Germany and Austria the wonderful impulse given to trade and manufacture is in a great measure attributable to the security the well-framed Joint-Stock Company Acts offer to the public. The disgraceful wrecking system—I allude to the liquidation of English companies—would not, could not, be tolerated, if our laws were well framed, and our judges had power given them to put a stop to a system that is causing so much misery, and checking enterprise and industry. All that human energy can do our overworked Equity judges are conscientiously doing. But that their individual efforts fall far short of what might be done, and what ought to be done, any one who has studied the judgments of these able men must have noticed the insuperable difficulty they have to contend against. And all this disaster arises, I maintain, from the imperfection, the want of sound juridical principle, of our Joint-Stock Companies Acts.

### III.—LAW AND COMMAND.

#### I.

IT may seem inopportune in the present state of English jurisprudence to discuss the merits of the only definition of positive law which has obtained any serious acceptance in this country. The importance of keeping in prominent view the necessity of scientific treatment is still so paramount that the degree of success attained in any particular application of the principle may well appear of little moment in comparison with the establishment of the principle generally. It may be urged that our business for the present is to get our abundant

but chaotic matter into form of some kind, not wasting over much curiosity on a search for the best possible form. Certainly in the days of Bentham and even of Austin the service done by the mere conception of a scientific reconstruction of jurisprudence as possible and necessary was such as infinitely to outweigh any shortcomings in the execution. The first step, and there is danger of forgetting how much it involved, was to make people familiar with the notion that such a thing was to be done at all: it had to be shown by example, even if in haste. This was the duty of those who first cleared the ground; but without any disparagement of their efforts, those who come after have their duty of seeing that nothing is omitted which is needful for securing permanent and fruitful results.

The fundamental ideas on which the whole structure rests must not be narrowed or artificially separated from their historical origin in the processes of growth now beginning to be understood. Doubtless the temptation is great to keep in the background the relations—complex, undefined, and obscure in detail as they necessarily are—from which the matter to be dealt with has been evolved: to break loose from the thread of historical and philosophical continuity, and to seek for conceptions which shall be sharply defined and easily applicable to existing facts. Such a course is constantly inevitable in practice. It cannot be otherwise when the main object is convenience of dealing with things as they are found. In theory, also, it is often useful to do the like, only with proper limitations. It is allowable to re-arrange the subject-matter irrespective of its original elements, to invent new symbols and adopt new processes of inquiry, but not so as to exclude a continuous and comprehensive treatment.

There is, indeed, a taking show of certainty and independence in relying on these means exclusively, and ignoring the deeper questions and wider analogies lying outside the region of practical application. But to do this is to renounce the proper function of theory. An existing state of things is to be explained, as far as possible, by the conditions which have actually determined it. The leading ideas of a science ought to be expounded not only according to the form they have now assumed, or are tending to assume, but in correspondence with their reason and inner development. Only thus will the conceptions furnished by theory be large enough to adapt themselves to unforeseen facts: only thus can any security be had against doing work which will afterwards have to be undone. With these considerations in mind, it is proposed to examine the opinion as to the nature of law, which seems to be for the present accepted in England, that "laws proper, or properly so called,

are commands; laws which are not commands are laws improper, or improperly so called," and the definition grounded thereon of positive law as a command of a particular kind.

It will be my aim to show that this definition, if exclusively insisted on, errs by elevating what is at most one characteristic of law into its essence; that contrariwise, by losing sight of what is really an essential constituent, it narrows the proper scope of law and tends to an unsatisfactory view of its operation; and that by putting forward the arbitrary and suppressing the necessary aspect of legislation it seriously obscures the organic relation of law to the community.

## II.

"Every law (properly so called) is an express or tacit, a direct or circuitous command:" such is the principle taken up by Austin,\* and pursued by him with rigorous logic into great minuteness of detail. But the most complete statement I have met with of the definition in question is to be found in Sir H. Maine's "Village Communities," in a passage presently to be recurred to (p. 67):—

"A law, they say, is a command of a particular kind. It is addressed by political superiors or sovereigns to political inferiors or subjects; it imposes on those subjects an obligation or *duty*, and threatens a penalty (or *sanction*) in the event of disobedience. The power vested in particular members of the community of drawing down the sanction on neglects or breaches of the duty is called a Right."

In order to exclude occasional and particular commands, Austin adds the qualification that a law obliges generally to acts or forbearances of a class, and distinguishes between law in a wider but still a proper sense and positive law; the mark of positive law being the relation of sovereign to subject, between the party issuing and the party receiving the command. Now this is an eminently practical definition. It is framed to correspond to the aspect under which law generally presents itself to the member of a community well advanced in civilization. The individual, having acquired a sense of independent power, comes to set the State over against himself as an extraneous agency. When a particular course of conduct is proposed to him as a duty, his impulse is to ask: "Who bids me do this? In what capacity? and what will happen if I do otherwise?" The definition of the analytical jurists (to borrow Sir H. Maine's expression) supplies the

\* Lectures on Jurisprudence, I. 356; cp. pp. 87, 88, 181.

answers to these questions. It fixes the working constituents of modern legislation with a precision which ought by no means to be undervalued. The positive contents of the definition are good within proper limits; only the negative and exclusive use of it is to be deprecated. The fault lies in attempting to make it cover the whole ground by regarding enactment as co-extensive with law. It may be said that this is only recognizing an unmistakable tendency of modern society; and it is true that in the whole body of legal and judicial usage the proportion of matter governed by definite enactment to that which is not so tends constantly to increase, and therefore the practical drawbacks to the general use of this analysis tend to decrease. But not even the best possible code administered by the best possible judicature could ever make enactment all-embracing. At most there would be a recurring approximate equilibrium at each periodical revision. Even if the formal identity of law and enactment were to become complete, the theoretical objections to a narrowed conception of the general nature of law would remain unchanged.

Let us turn, then, to the negative results of this definition. Nothing which is not a command can be allowed to claim the title of law. Human institutions, which are commonly so spoken and thought of, but which have not the definite form of enactment, are treated as closely analogous indeed to laws proper, but yet sharply distinguished from them. A rule set by the opinion of an undeterminate body of men is not properly law, but positive morality; and the wider application of the term which every student of science employs almost every hour is treated with something like contempt as a figurative usage resting on a slender analogy, to which it is a "gross and scarcely credible error"\* to attach any real meaning—a flagrant metaphor, from which nothing better is to be expected than a deluge of muddy speculation.† Now, this way of handling the matter does an amount of violence to the ordinary course of language, which can be justified only by some very clear advantage. Instead of this we find considerable difficulties.

Of these difficulties, the first and gravest is in the treatment of custom.‡ According to the theory in question, no usage

\* Austin I. 214.

† *Ib.*, p. 90.

‡ No serious objection arises from the anomalous cases of laws which are declaratory, repealing, or of imperfect obligation. According to the definition now being considered, a declaratory law is only the completion of an originally imperfect command. A repealing law either restores or takes away some right or duty, and is, therefore, a substantial command. Bentham avoids all formal difficulty by expressly including the revocation of a command in his definition. A law of imperfect obligation either rests on

or institution grounded on custom can have the nature of law without being reinforced by the command of the political sovereign. Hence the proposition that a custom is only positive morality until it is clothed with legal sanction by the supreme power, that is, adopted by an express enactment of the Legislature or a judicial decision. The action of the competent political superior elevates the customary rule into a law proper, or rather makes a law on the suggestion of the custom. It matters not whether the command involved in every judicial sentence be for this purpose regarded as immediate and singular, or as derived from a general command of the sovereign to the judicature to cause reasonable customs to be observed as law.

Now follow two conclusions of a somewhat startling character. In the first place, it is essential to the doctrine of command and sanction in general to regard every application of law as the infliction of a penalty for disobedience; and so the power which judicially enforces an existing custom stands convicted of imposing a retrospective penalty. For by its sentence that which *ex hypothesi* was no more than positive morality the moment before the sentence was pronounced is armed with the sanction of law, and that sanction is applied to the state of circumstances existing when the cause of dispute arose. Thus the persons concerned are treated as having been legally bound to observe a law not yet in being,\* and every judicial declaration of Common Law involves the same absurdity as the old fiction of making statutes relate back to the first day of the Session. The second conclusion is that a custom acquires or fails to acquire the true character of law, not by any inherent quality, but by external circumstances. No amount of unbroken observance can establish the existence of a law: the custom must wait till the lawgiver confirms it on the occasion of a systematic scheme of legislation, or the judge on the occasion of a breach. I say on the occasion of a breach, for where the validity of the custom is undisputed, and only its application to a given state of facts is questioned, the recognition of it by the court as the ground of decision between the parties cannot be deemed to invest it with any new legal sanction as against outsiders. Therefore we have this result. A custom which is affirmed by the judi-

an implied general sanction, or is a mere opinion of the legislature promulgated on the chance that it will be made a maxim of positive morality by general respect for the authority it proceeds from. There is, therefore, no need to make any special stay at the exception of these kinds of laws, on which Austin perhaps lays more stress than he was bound to do.

\* Accordingly, Austin (II. 673) puts this forward as an objection to judiciary law: "A rule of judiciary law is always (strictly speaking) an *ex post facto* law."

cature after being disputed, or which is affirmed by the legislature lest it should be disputed, becomes law. But a custom so universal as never to be called in question or thought to need any special affirmation remains positive morality. It does not matter how important or how completely within the province of jurisprudence are the relations of life it governs. A rule so certain, so general, and of such obvious application that no doubts arise about it, must be held for that very reason disqualified to rank as law.

Now let us suppose that an explorer full of the defining spirit of Bentham comes one day upon a society of men living in an orderly manner, supporting themselves by peaceful industry, civilized enough to have well-marked differences of occupation and family relations defined to the point of artificial nicety, and yet with little or none of the outward apparatus of government. The course of their life is marked by great uniformity; there is little room for individual choice either in habitual occupations or in the transfer and distribution of property. Such differences as arise are speedily settled, and a positive breach of any established usage is unheard of. The traveller, if he is faithful to his teachers, must say to himself: Surely this people enjoys a most complete system of law, and the means of enforcing it must be of rare power. He goes on then to make inquiries in detail. He finds, may be, an elder willing to give him information. He asks for the book of the laws which are so scrupulously observed. The reply is that there is not nor ever has been any such book. The traditions which govern the community have never been written down or put into a formal shape; their origin is neither known nor sought for, but the custom determined by them is never known to be transgressed. If it is asked, who tells the members of the community what the custom is in case they do not agree? It is answered: The council of elders. Whence is the authority of the council? From immemorial tradition. What follows if any one disobeys the council? Nobody knows, for such a thing never happened. But suppose it did so happen? It cannot be supposed: it is impossible to think of such an event at all, much more to tell what would be the consequences. Probably it would be deemed a token of the end of the world; but nothing certain can be said about it. Our traveller, then, has found that the society practices constant obedience to commands (if any) issued nobody knows when, and by nobody knows whom; that it is compelled to such obedience by a sanction (if any) wholly unascertained; the persons who are the political superiors (if any), namely the elders in council, having no definite force at their command, and no authority save such as is derived from the custom of which it is their business to be the mouthpiece. Not one of

the conditions required by the conception of law which the inquirer brought with him is satisfied; yet it is impossible to say that in such a society there is no law without giving an entirely wrong impression. The case would suffice for the purpose of illustration if it were imaginary; but it is far from being so. The foregoing description is little else than a paraphrase of that given by Sir Henry Maine of the typical and immemorial condition of an Indian village.

Perhaps some comfort may be found in doubting whether such law shall be called positive; but that law does somehow exist under these conditions must be admitted. Our supposed traveller, therefore, must needs report (as Sir H. Maine in substance points out) that the law of the tribe he has visited is thus and thus.

This suggests an observation which, though in this place premature, one cannot well help making. Is there not something more than a slender analogy between our supposed explorer and the discoverer of a law, improperly so called as Bentham and Austin will have it, in physical science? They both come face to face with an aggregate of particular facts; they both observe uniformities to prevail amongst them; they both seek general expressions for those uniformities, and ultimately succeed in generalizing and formulating them. The facts in both cases remain as they were before. The same forces work to produce the same effects; only the expression found for them is new. Earth and water were made of the same stuff as they are now before chemical formulæ were thought of; and the immemorial custom of a tribe had no less the nature of law before a stranger first put it into definite words to make it intelligible to himself and his countrymen.

It will make this more clear to proceed a step farther. A foreign power becomes the sovereign of the population thus governed by customary law, and establishes its own courts of justice, which however are instructed to administer not the law of the conquering nation, but the law of the country as they find it. In this way the native customs become matter for regular judicial interpretation; a definite and authentic form is given to them, and they acquire a sharpness and fixity foreign to their original character. The organic process of growth of the native law is arrested. All this again is actually taking place in India, and Sir Henry Maine, in the extremely interesting passage already referred to, goes on to describe the manner of it in detail. It cannot be doubted that there is a change of judicial conditions, and a very important one. There is a transition from a vague system to a defined system of government; but can it be fairly spoken of as a transition from a state of no law to a state of law? Indeed it may be doubted whether in such a case we ever arrive at a complete



construction of all the elements required to make positive law by Bentham's and Austin's definition. The advent of the new power has set up a sovereign and a sanction which were not to be found before; but it is not very obvious where the all-important command is. It is at least a peculiar use of language to say that since the establishment of British dominion it is by virtue of a command of the British Government that the inhabitants of an Indian village go on doing as their forefathers did centuries before the name of England was heard in India. But this, it may be replied, is the case of a *quasi* command, which may consist in a mere passive abstention from forbidding. To leave things as they are when one has the power of altering them is a manner of commanding that the old state of things shall continue. The foreign government has in this way brought the primitive usages of the natives within the sphere of true positive law by adopting that which it might have abrogated. The general reasons against this view will be given presently; in a case of this kind there is also a special one. It is not true that a power in such a position as that of the English Government in India could abrogate the native customary law if it chose. Its adoption was a matter not of choice but of necessity. But in that case, it may be objected, the foreign power is not really sovereign; it is not the ultimate political superior to whose command everything is to be referred. Where then, we have to ask, is the true sovereignty and fountain of law? It must be in the organized government of the conquering people taken jointly with unorganized general opinions of the subject people. But the indefinite element thus added makes the total combination too indeterminate to fulfil the conditions of true political supremacy required by Bentham's school. A constituted governing body, *plus* an indeterminate multitude, is no more competent to make positive law than an indeterminate multitude alone. Therefore, if one is to hold fast to the conception of law as command, and follow it into its consequences, the last result is this: that in British India, or in any other part of the world where a dominant race is strong enough to govern, but not strong enough to abolish institutions it found existing, there is so far as concerns those institutions no real positive law at all.

### III.

Thus far of custom considered as actively contributing to the production of law. But custom can take away from as well as add to the body of law existing at a given time. It is notorious that expressly enacted laws may and often do become obsolete without any express declaration that they have ceased to take effect, and this notwithstanding that the

cases for which they were provided do not cease to occur. The enactment is not carried out, and at length its very existence, perhaps, becomes unknown even to the greater part of those whose business it is to be specially acquainted with the law. Now one who consistently adheres to the theory of command is bound to maintain that this is on principle not to be justified. A command once addressed to subjects can be revoked only by the supreme power which issued it. The legal obligation must remain until it is removed by the legislature, or at least until the judicature has distinctly refused to enforce it. And those who in the meantime disobey the law, or connive at the disobedience of others, are strictly guilty of an offence. According to this view it depends wholly on the vigilance of the legislature, or rather of its advisers, whether particular enactments which it has long been manifestly impracticable to execute are or are not the law of the land.

A very cursory examination of our own recent Acts for the revision of the Statute Law will furnish instances which, if it be true that a statute has the force of law until expressly repealed, lead to surprising results. Take the following as specimens:—

At Midsummer 1856 it was an offence (on this hypothesis) for a Welshman to be armed contrary to the statute of Henry IV. Likewise the “outlandish people calling themselves Egyptians,” were at the same date liable to forfeit all their goods on coming within the realm, and further to imprisonment if they did not avoid the realm within fifteen days after commandment.\*

Again, up to the year 1863 the greater part of the male population of England must have been liable to considerable penalties under the various statutes of Henry VIII., “ordained against shooting in cross-bows,” “for the maintaining artillery, and the debarring of unlawful games,” which made careful provision for the compulsory practice of archery, and imposed severe restrictions on the use of cross-bows and hand-guns.

Many more like instances might be given, but these may suffice. It is needless to dwell further on this topic, for all the reasons which make for the power of custom to create positive law are equally valid to show its power to repeal.

#### IV.

The foregoing consideration of custom in its various effects shows the doctrine of Command as leading to formidable ano-

\* 4 Hen. IV. c. 29; 22 Hen. VIII. c. 10; repealed by 19 & 20 Vict. c. 64 (21 July, 1856).

malies. There is, however, a seeming way of escape from them. Admitting that custom need not wait for an express command uttered through the legislature or judicature to acquire the force of law, it may yet be said that its force is really derived from a tacit command of the sovereign; for if the authority which by its expressed will might abrogate or supersede the custom forbears to do so, this forbearance is to be taken as an assent sufficiently signifying a will that the custom shall be observed. That is, to refrain from unmaking what is made is the same thing as to make it. In this fashion one might construe almost any sort of action or inaction, expression or non-expression of opinion, into a command. But at best this kind of implied and circuitous command is very far from coming up to the mark of precise definition originally aimed at. The publication of it cannot be referred to any certain time, the contents and the sanction are not manifested by any assignable act. Practically it has no effect on the operation of the so-called positive morality to aid which it is invoked. It adds nothing, and takes away nothing.

If we once admit that the sovereign has nothing to do with making the custom into law beyond a general silent assent, then it is surely the better way to refer the validity of the custom at once to the assent of those who made it; for after all the existence and power of the sovereign depend directly or indirectly (except in the anomalous case of a government supported by foreign arms) on the assent of the nation; and when the nation, or some part of it, makes a rule to itself by a gradual and indefinite consent, it seems hardly needful to suppose that such consent becomes operative by a feigned transmission through the sovereign. If, indeed, we say with Hobbes that the sovereign is the person of the Commonwealth for all purposes, and wholly embodies our artificial man whose reason and command make law, then this doctrine of implied command falls in well enough as part of a severely consistent scheme. Otherwise it has no real meaning.\* Granted that

\* Hobbes' view as to the nature of law, though very near to that of Bentham and Austin, is in truth to be distinguished from it. For the sovereign power, as conceived by Hobbes, is far more than a political superior. Individual faculties are not only subject to it, but absorbed in it. "The sovereign, which is the person of the Commonwealth, is he that judgeth," and the command of the sovereign is the concentrated voice of the nation. Compare what Savigny says (*Syst. des h. R.R.*, s. 13) in illustration of the proposition, "Das Gesetz ist das Organ des Volksrechts," on the character of the legislator as representative of the nation. "If we doubted this, we must think of the lawgiver as set outside the nation; whereas he is set in the centre, concentrating in himself its thought, its desires, and its wants, and so to be looked on as the true representative of the national mind. Moreover, it is quite wrong to consider this position of the lawgiver as depending on the particular constitution of the legislative power in this or that form of government. Whether a law is enacted by a

the Commonwealth retains any vital existence independent of the form of government for the time being, then the doctrine becomes a mere fiction dragged in to give a show of formal completeness to a theory inadequate in substance.

## V.

Another department to which the theory of command cannot be extended without danger of the whole view of it being narrowed is that of international law. According to the strict requirements of the analytical jurists, there is in truth no such thing, and the name of it is an absurdity. What is called international law is only usage "imposed upon nations or sovereigns by opinions current amongst nations," and analogous at most to positive morality amongst individuals. Yet almost in the same breath with a sweeping refusal to recognise any proper law of nations Austin makes an anomalous admission which is in one way very instructive. It shows how the bare idea of command, when his definition is once adopted, tends to swallow up all else in spite of the qualifications with which it is surrounded. Notwithstanding the mutual independence of nations and the consequent absence of that political relation of superior to subject which is included in the definition, Austin says that the imperative command of one sovereign state to another is law, though not positive law. So that if we are not to be allowed to give the name of law to the Declaration of Paris, for instance, we may console ourselves if we choose by giving it to an ultimatum addressed, say, by Monaco to Russia. Surely we cannot rest satisfied with a view in which an isolated and possibly trivial transaction partakes, though in a qualified manner, of the nature of law, while a compact deliberately framed to guide the conduct of the principal nations of Europe—not to speak of the rules never embodied in formal acts, but recognised as binding both in the intercourse of States and in their municipal jurisprudence—is wholly excluded from it. As Sir H. Maine says in the case already mentioned of the customary law of India, such an inversion of language hardly requires to be formally protested against. Perhaps, indeed, one might on a pinch bring express international agreements within the above description of law not positive by regarding them as mutual commands. Thus we might say that every one of the forty-six Powers who have become parties to the Declaration of Paris commands and is commanded by the other forty-five to

prince, or by a senate, or by an elective assembly, or the consent of several authorities is required, the relation of the legislator to the body of national law is in nowise changed."

observe it. Nay, one might even go farther by means of the doctrine of *quasi* commands. For one might represent the rules which nations practically agree in observing, and which have been incidentally defined with tolerable uniformity by their several tribunals, as resting on reciprocal *quasi* commands implied in the course of usage by which the rules have been established. But the objections to a non-natural use of the term command with respect to the intercourse of persons have been already stated: the same or analogous objections hold good with respect to the intercourse of nations.

It must be admitted, indeed, that international law as at present existing is very incomplete. In a general way it is customary law on a larger scale, and that in an almost primitive stage, and accordingly it presents all the corresponding defects in an exaggerated form. As in the one case the common mind of individuals has to be discovered by induction from their several acts, so in the other the common mind of nations has to be sought in the acts of their several governments. These furnish two kinds of evidence, which may be called external and internal. The external evidence consists in the affirmation or assumption by independent nations of principles binding on them with a common force, whether in express conventions, or in the tenor of their dealings with one another. The internal evidence consists in the recognition of the same extra-municipal principles as generally binding which occurs in the course of the development and administration of municipal law. However, the testimony to be gathered from such a wide field naturally leaves much to be desired. Neither the substance nor the limits of international law are sufficiently certain; and the uncertainty is aggravated by the absence of any common jurisdiction to serve as an organ for expressing the collective mind of civilized nations in a definite form. It is almost impossible to draw a fixed line between matters about which there is such general agreement that they are to be justly reckoned to belong to international law, and those which remain in the discretion of individual nations, and may be said to belong to international morality. Hence the temptation, a strong one no doubt, to ignore any such distinction. The analytical jurists deny the existence of a true legal element, while many writers on international law give descriptions of its sphere which cover the whole range of moral principles.\* Nevertheless there is such a distinction. We

\* Thus Kent (Comm. i. 3) says that the law of nations "consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relations and conduct of nations; of a collection of usages and customs, the growth of civilization and commerce; and of a code of conventional or positive law." The

must be equally careful not to deny because it is hard to define, and not to affirm because it is hard to doubt. The contrast between piracy and the slave trade is an instance in point. Piracy was once a perfectly respectable profession. During some period of early civilization it must have passed through the stage of being vaguely disreputable. It is now universally treated as a crime against the law of nations. And doubtless the refusal of any particular nation so to treat it would be an offence against all. It is not so with the slave trade. That is in itself immoral; many States have in their sovereign capacity bound themselves by treaties to prohibit it, and have made the exercise of it unlawful for their subjects. But it is not at present a crime by the universal law of nations. The weight of the moral opinion of nations is against it, but there is no such established consent as to make it positively unlawful. If the war of secession against the United States had been successful, and the Southern States had proceeded to revive the slave trade, that act would have given a shock to international morality, but would not have constituted any offence against international law. It may, perhaps, seem absurd or over curious to trouble oneself at all with the question whether the nature of law shall or shall not be ascribed to relations which are admitted to be in fact so vague and unformed. But the object is to show, not that international law as it exists is complete, or anything like complete, but that it affords rudiments which are capable of being developed into something more comprehensive. No one denies that a system of positive international law is desirable. The question of what is the best way to obtain one must be decided according to the view we take of the attempts hitherto made. If we insist on the notions of command, sanction, and political superior, we are led to disparage what little has been done, and to see no hope of real improvement, except in a gigantic league of States under some sort of federal power armed with a federal executive, which is equivalent to an indefinite postponement of any practical solution. On the other hand, if we recognise sound and fruitful elements in what has been so far accomplished, and if we perceive the growth of a true law of nations, though yet in its infancy, we may see the way to a continuous progress which will not require a new starting point. The materials are already at hand; there remains the

general principles here mentioned are to international law what the rudiments of morality are to municipal law; they are pre-supposed by it, and for that very reason cannot rightly be called part of it. Again, while from time to time the more obvious consequences of these are embodied in the law, the remoter consequences are outside and in advance of it in both cases. What is a refinement of morality in the present may be law in the future, and in a still further off future may come to be regarded as axiomatic.

work of giving them new form and consistency, and building them up into a completer structure.\*

## VI.

So far only the contents of positive law have been considered. It has been pointed out that the treatment of command as the essence of law confines it within an unduly narrow boundary. There is yet something to be said of the consequences of this method with regard to the operation of law generally.

Every law being viewed as a command backed by a sanction, right is the capacity of having the sanction applied. It is known that the sovereign will visit with a certain evil whoever disobeys the law. The person who on the disturbance of a given state of things, or the non-performance of a given act, can require the minister of the law to inflict or specifically threaten such evil,† is said to have a right to the maintenance of the state of things disturbed, or the performance of the act omitted. Or it may be put thus:—The State has an absolute power of compelling its subjects to obey the law, which power may be exercised by individual members of the State within certain limits. The right of the individual is so much of this power as he is qualified to exercise.

In this way we get an essentially negative conception of law and right. The marks by which law is to be known are displayed only when it is broken. Right is nothing else than a possibility of repelling wrong. All law is alike penal in its real nature. "Every law is at once imperative and punitive; it is only imperative by being punitive."‡ The usual divisions of law as public and private, absolute and auxiliary, become subordinate if not unmeaning. Austin, indeed, goes so far as to call the very name of public law detestable—a curious instance of the tendency in analytical minds, when they find the usage of a general name not precisely defined, to deny summarily that there is any ground for the classification on which its use depends. The method acts as a general solvent,

\* This matter, which could here be merely touched upon, has been well handled by Mr. Seeböhm in his essay on International Reform. There is one passage in particular, where he upholds the possibility of a true international law (p. 120), which should be given here at length, if space permitted it.

† As a rule, the sanction takes actual effect only in criminal and penal process. In other cases no evil is necessarily inflicted on the losing party. In obeying the sentence of the court he only does what he ought to have done before, or something as nearly equivalent to it as may be, and the true sanction lies in the means of compulsion which can be applied if obedience is refused.

‡ Poste's *Gaius*, p. 6. The chapter of "Preliminary Definitions" gives a clear and concise summary of all this doctrine.

reducing distinctions hitherto supposed elementary to a common insignificance. If its merits can be supported on other grounds, this result must be accepted as a grand simplification; if not, it is hardly too much to call it a deplorable confusion.

Another consequence is that law is made to appear rather as an abnormal restraint than as part of the normal development of society; our attention is fixed on what seems the arbitrary determination of the lawgiver instead of being directed beyond it to the causes which make the action of the lawgiver a necessary constituent in the life of the nation.\* Every act of legislation assumes the shape of an isolated exercise of sovereign will, and the systematic unity which is the real informing spirit of the body of law finds no recognition. It is said, indeed, that the objection now taken proceeds from a confusion of thought which substitutes the causes of law for its sources, the reason of the law for the law itself. But this is in effect begging the question; for no one seeks to go back through remote and more remote causes to the beginning of all things; doubtless there must be a starting point somewhere in this as in every branch of science, and the very thing we have to determine is where we ought to fix it. The immediate source of an Act of Parliament, in the form in which it commonly comes to the notice of private persons, is the Queen's printer. But it is neither usual nor accurate to say that the Queen's printer, and not Parliament, made the Act. The instance is not so extravagant as it may seem; an Oriental doctor imbued with the literal authority of the Vedas or the Koran would see nothing absurd in it.

Moreover, the definition of Bentham's school has a wide bearing beyond the field of jurisprudence proper. When transferred to the theory of legislation, it binds its supporters to the doctrine of the least possible action on the part of the State—a doctrine of which the practical importance will not be denied either by its friends or by its enemies. All law being in its essence penal, all legislation is compulsion. Compulsion is *primâ facie* a bad thing; therefore so is legislation; and the unremitting efforts of the community should be directed to prevent the ruling power from giving them too much of it. Law is an evil to be endured only because the

\* When Austin (s. 30 *ad fin.*) suggests as a *reductio ad absurdum* of the necessary character of law, that "if any private man conceive and describe a law which hits the circumstances in which the society is placed, that project of his is parcel of the law of the land," he forgets that the disposition of the Legislature is not the least important of the circumstances in question; and so you cannot say the law hits the circumstances unless the Legislature adopts it. The best possible law must mean the best actually to be had, and what that is can be discovered only by experiment.



evils of anarchy would be greater,\* and the State itself is a grievous though unavoidable burden on individual freedom. Everything the State does is to be presumed an encroachment till it can be shown absolutely needful for the prevention of wrong. Every miscarriage in a public enterprise is to be taken as a kind of judgment of the laws of nature on the State for meddling with matters that do not concern it. This is not the place to go into the reasons for and against this view. The arguments for confining State action to external and internal protection cannot be disposed of in a paragraph. Still, authority is not wanting for those who seek in the State a fuller image of humanity than a Janus-faced man-at-arms pointing a rifle at the enemy without and a truncheon at the malefactor within. And such as do reject the attempt to restrain the collective activity of a nation within rigidly defined limits cannot acquiesce in a conception of which such limitation is a necessary consequence. A narrow view of the nature of legislation in general is likely to hinder progress by fostering the excessive fear of over-legislation.

## VII.

If the foregoing observations are not wholly misconceived, it appears that the analytical jurists have not succeeded in giving us a sufficient or final conception of the nature of law. Perhaps there may after all be something worth taking up in the common usage of speech which they set at nought as capricious, and in the analogies which they reject as leading to nothing but confusion. They say that the improper and merely metaphorical employment, as they consider it, of the word *law* is suggested by the uniformity of conduct consequent on a law proper. This uniformity they regard as an incidental circumstance giving rise to a slender analogy; and if they do not positively condemn the use of figures of speech founded on it, they will not endure the supposition of there being any true connection in thought. But what if in their hurry to get a definition they have rejected the real essence of the thing? "All things that are have some operation not violent or casual," said Hooker in the opening of the Ecclesiastical Polity, which Austin calls a fustian description. It may yet be seen that Hooker was the nearer of the two to the root of the matter, though his exposition, as was then indeed unavoidable, left much to be desired; and that Austin's criticism on the style, in which I trust few readers agree, is not more ill-founded than his disregard of the thought. The limits of this essay allow me barely to indicate

\* This is repeatedly said in express terms by Bentham.

the manner in which this thought may be developed. For the present the following suggestions must be taken for what they are. They do not profess to be definitions, and I do not commit myself to maintain that they are accurate in expression.

The phenomena presented by man and societies of men, as well as all others which we have opportunities of observing, are due to the operation of continuous and persistent forces, the apparent discontinuity and irregularity of many events being caused only by our ignorance. What we call a law of nature is an expression of the uniform manner in which some particular portion or combination of the physical forces of the universe produces its effects. May we not say likewise that a law in the stricter sense expresses the regular effect of some portion of the social forces at work amongst some definite part of mankind? True it is that the process of expression may in this case coincide with the organic process; wherever the body politic is of such an advanced type as to have a special legislative organ, the matter and the form of law are to a great extent inseparable. Our social life is a chemistry, so to speak, in which the new compounds make their own formulæ. But this distinction, which I am far from wishing to ignore, is not enough to destroy the wider resemblance. Positive law is the culminating point of a series of uniformities ascending from stage to stage in speciality and complexity. We find certain uniformities pervading all functions of the material universe, in animate and inanimate forms alike; others confined to vital processes; some again extending to all intelligent action of individuals; others extending to such action of individuals as members of society generally; and others confined to particular societies. When a society, as a whole, voluntarily recognises this last kind of special uniformity within itself, we have positive law.

Law in the widest sense is a condition, or assemblage of conditions, under which the evolution of things proceeds; law in the special sense is a condition, or assemblage of conditions, under which the evolution of a society proceeds, and the determination of which is part of the collective consciousness of that society.

FREDERICK POLLOCK.

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#### IV.—MUNICIPAL REFORM IN NEW YORK, AND THE CUMULATIVE VOTE.

**I**T will be remembered that at a great meeting of the citizens of New York, in the month of September last, a Committee of Seventy was appointed, to what then appeared, and was, in fact, the great and next to hopeless mission of rescuing the city of New York from what a correspondent there justly describes as "the most wicked cabal that ever misgoverned a people." "The Committee," we read, "went to work in good earnest, but, thanks to the legislation brought about by those who had plundered the city, it was very hard to reach the robbers. It seemed as if New York had been bound hand and foot and given over to conspirators. But the power of public opinion, operating with the inherent weakness of a bad cause, allowed entering wedges to be forced into the corrupt mass. The first of these wedges was the Foley injunction. There were fight and resistance, but the mayor at length submitted the accounts asked for to the aldermen and supervisors for investigation by a committee of citizens and aldermen. After that, the shameful voucher robbery led to quarrels in the Ring, and the appointment, as a result, of Mr. Green as Comptroller. A further step was the application by the Attorney-General, in the name of the people of the State, for the recovery of the stolen millions, and the punishment of the thieves."

The Committee then directed their attention to passing a charter for the future government of the city to be submitted to the State Legislature. For this purpose a Sub-Committee of Fifteen was selected, and by them a draft of the new charter was prepared upon the basis of proportional representation, as the only effectual means of ensuring in the municipal body the presence of representatives of all the upright and public-spirited citizens. The charter thus framed by the Sub-Committee, and approved by the Seventy, was brought before the State Legislature, and on the 25th January last it came on for consideration before the "Senate Committee on Cities," in the Senate Chamber. Among the members of the Seventy who attended to support the charter, are several names well known in this country—James M. Brown, Vice-Chairman; Governor Salomon, Hon. S. B. Ruggles, Judge Emott, Simon Sterne, Jackson Schultz, John Wheeler, Joseph Blumenthal, B. B. Sherman, James M. Halstead, Robert Hoe, Frederick Schack, Major Bundy, Lewis Ballard, Albert Klanroth, Henry N. Beers, Colonel N. G. Dun, J. J. O'Donnohoe,

Robert Nooney, Thomas B. McClellan, and others. There was a full attendance of the committees of both houses.

Governor Salomon, after explaining the steps which had been taken to detect the frauds and eject and punish the wrong-doers, proceeded:—

“The Committee on Legislation of the Committee of Seventy found that one of the greatest evils in New York arose from the undue influence of political parties on purely municipal and business affairs. When, as in the metropolis, the dominant party had such a large majority, it was no wonder that through the influence of the party caucus, such results should have been reached as we have witnessed. All the members of the Committee agreed that party spirit ought not to be allowed to control the municipal or business affairs of New York. *Proportional representation* was felt to be the true principle which should be introduced in the conduct of affairs—a principle already favourably known and beneficially operating in many parts of this country and Europe. The principle of proportional representation is very simply explained and its wisdom readily shown. Suppose one hundred men combine together for any particular purpose, and find it necessary to appoint a sub-committee: further, suppose the hundred are divided so that forty-nine think one way and fifty-one another, as to the appointees to be chosen. If the judgment of the fifty-one prevails in the appointment of the sub-committee, then forty-nine men have no representation, when every principle of justice suggests that they should have a representation representing their numerical strength. In the city of New York the Democratic majority is so large and unvarying, that the Republicans have practically no representation.

“This principle of proportional or minority representation obtains in the present charter—forty-five aldermen are elected, nine being chosen from each one of the Senatorial districts. Suppose in each district there are 18,000 voters, then every 2000 is entitled to an alderman to represent them. We propose to give the principle a fair trial, and feel that it will result in securing for the city a better board of aldermen than it ever had before, since honest men, by uniting their strength, will show a numerical force which will entitle them to representation. The principle is not a new one. It already is found in operation in the school laws of England, and in Parliament. Its workings are to be seen in this country in the election for the Assembly in Illinois, and in that for borough officers in Pennsylvania. In our own State, the Court of Appeal illustrates it; while only a few days ago it was in Wisconsin proposed to amend the Constitution so that this principle of proportional representation might obtain in the election of members of the Wisconsin Assembly.

"The principle has this advantage beside those already named, that it will tend to operate as a check or restraint on parties, or factions of parties, in their selection of candidates. As matters now stand, the choice is either to support your party candidate, or to go over to the opposite party. Adopt this principle and voters have a remedy inside their own party. If one or two bad men are nominated for aldermen in New York, the combination of good men can secure the election of the candidates of their choice. Hence the principle will operate as a check, and tend to the nomination of men better than some of those put up in past time.

"Another good effect of this principle is to be noted. A large portion of the voting population of New York habitually stay away from the polls, because their party is in a hopeless minority. They feel that going to the polls with them means only a protest and nothing more. With this proposed principle of proportional representation in the charter, these men will be brought to take an active part in politics, since if they combine they can secure the election of the man of their choice."

Governor Salomon then explained that the executive power of the city was to be vested in the mayor, to be elected annually, and in several departments, most of which would consist of commissions of five members, the chairman of each being appointed by the mayor, and the other members elected by the Common Council, also on the principle of proportional representation. The majority would be in power still, but there would be always the minorities present to watch their actions, and see that their proceedings are for the public welfare. In this manner would be constituted the Department of Public Works, the Bureau of Docks, the Bureau of Parks, the Department of Public Safety, the Bureau of Charities, the Bureau of Correction, and the Finance Department. He closed with an eloquent appeal to the Legislature to adopt the charter, and promised to submit, further, a Registry Law for the protection of the Ballot.

Mr. Simon Sterne then addressed the Senate Committee. He devoted himself to enforcing the claims of proportional representation. It was a subject to which he had for years given much thought and study. He little expected, when considering the subject ten years ago, that he would live to see in it the great question of New York Government. Referring to the Committee of Seventy, the speaker said that they had had the most positive and negative expression of approval bestowed upon them. Positive in the money freely bestowed by the leading men in the city to carry on its operations, and in the numbers that crowded to the mass meetings; and negative in the hatred incurred by the Committee from every place-man

and place-hunter. They had the confidence of good men, and the cordial hatred of the bad ones. New York had vindicated the right to self-government by her action on the 7th of November last. In July, an infamous cabal owned the press, the judiciary, and the other powers of the city. A corrupt Legislature kept constantly increasing the powers of the cabal, and tax levies came down loaded from the manipulations of the committee rooms.

He referred to the Erie Railroad, which had been seized by force of a numerical majority. Suppose every 2,000,000 dols. worth of stock could have been entitled to a director in that company, would the giant frauds in connection with that corporation have been perpetrated? Mr. Burt, on behalf of the English stockholders, had said to the manager of the Erie, "Give us one director, and we will withdraw all our suits." But the majority, knowing the power of one pair of sharp eyes to ferret out fraud, denied the application. An objection made to the principle in question was, that it was too complex. But it was anything but complex. The theory of complexity was started by interested parties opposed to the principle, because of its practical effects on their operations. It was also asserted that the principle was not democratic, but the charge was false.

After referring to the operation of a system of proportional representation in the late section of our School Boards, quoting an article in the *Times*, ending with the remark that "those who fight against it fight against light," and to its operation also in Illinois and Pennsylvania, Mr. Sterne concluded by citing an article in the *American Law Review* (January, 1872. Boston: Little, Brown, & Co., pp. 255-287). Describing the present state of things, it says—

"A political contest is a struggle not for a fair share of the representation, but for the whole. The outvoted electors are reduced to political slavery. They have no voice whatever in political affairs. Their rights of representation are taken from them and are appropriated by their conquerors. It is a war without quarter, and it is a contest in which the sacrifices of the victors are hardly less serious than the losses of the defeated party. Everything has to be yielded for the sake of victory, and as eligibility becomes necessarily the prime quality in a candidate, it naturally follows that men of mark give place to men of no mark, and the representative assembly comes to be composed for the most part of inferior men, mere standard-bearers in party warfare, hardly better known or more acceptable to the men who voted for them than to their opponents.

"These evils—the disfranchisement of minorities and the consequent tyranny of majorities; the tyranny of political

managers over their followers, and the subsequent helplessness and indifference of the electors; the tyranny of these same managers over public men, and the consequent withdrawal from public life of men who are seeking an honourable and independent career,—these evils are co-extensive with representative institutions, and are mainly attributed, by those publicists who have undertaken to trace their causes, to the natural working of an objectional electoral machinery. The scheme of majority voting, as almost everywhere practised, is not only vicious in principle, since it excludes from representation a large fraction of the electors, but it is so crude and defective in its operations that it needs, as we have said, a special force of trained engineers to make it work at all. It is natural that these men should make it work to suit themselves. The principle of proportion will operate to produce a higher class of nominees. As it is, the Democratic party have no fear whom they put up. But the minority ought at least to be entitled to have watchmen in the departments, if they can obtain nothing more. As matters now stand, the only way to accomplish anything is to be in the majority."

The advocates of exclusive majority representation raised the objection that the introduction of proportional representation was contrary to the constitution. The Committee of Seventy, though it embraced some of the ablest lawyers in the city and State, did not think proper to rely on their own deliberate view of this point, but to be furnished with an authoritative conclusion, laid the case before Theodore W. Dwight, Esq., Professor of Law in Columbia College, a gentleman whose opinions on this class of questions would be ranked second to that of no lawyer in the State. The opinion sustains in the clearest manner the constitutionality of the method of proportional representation, on grounds which must command the attention of the Legislature as well as of the public.

Professor Dwight starts with the well-established legal principle that the Legislature, being the direct and sole representative of the people, possesses all legislative power, except as limited by the constitution itself. As a part of that power, it possesses the right to regulate elections—a right exercised at every session, and required by one of the most urgent and constant needs of representative government. On this power the limitation imposed by the constitution is, with reference to municipal officers, that such officers must be elected by the people of the municipality, or of some district thereof, or appointed by some of the local authorities thereof. Proportional representation may be sanctioned by the Legislature, therefore, if it be a mode of elec-

tion by the people of the municipality or of some district thereof. That it is such a mode is a conclusion sustained by comparing it with the universally accepted notion of a popular election. That notion requires that all the electors of a district may take part in the election; that the voice and power of each elector shall be equal to that of every other; and that in the result the successful candidates shall represent the majority, rather than the minority, of the electors. With all these conditions of a popular election, an election by the mode known as proportional representation clearly complies. It is applicable to a district; it does not impair the equality of the electors; it secures in the strictest manner the power of the majority relative to that of the minority.

In the meantime, and while this action was taking place at Albany, the Representative Reform Association of London forwarded to the Personal Representation Society, in New York, an address, inviting their co-operation in this work of municipal reform. This was signed by a committee appointed to co-operate for the purpose, consisting of Mr. J. S. Mill, Mr. Morrison, M.P., Mr. Hughes, M.P., Mr. Auberon Herbert, M.P., Mr. Henry Fawcett, M.P., Mr. Hare, Mr. W. Baily, Mr. Frederic Hill, Mr. R. M. Latham, Mr. Beales, Mr. Mottershead, and others. It says:—

“The object for which we are associated, that of perfecting representative institutions, has not only no party aspect, but is far wider than any merely national object can be. It is the common want and aspiration of every free people; and its progress and attainment promise more than anything else to hasten the time to which your President has pointed, ‘when the millions of men now maintained to settle the disputes of nations by the sword shall be restored to pursuits of industry.’ A paper recently communicated by the Secretary for Foreign Affairs to General Schenck, at the request of the Department of State at Washington, shows that the press of nearly every nation, possessing representative government, teems with appeals for a constitution, in which the wisdom, knowledge, and judgment—not of majorities only, but of every one of its members—may find its chosen expression. The last and not the least grateful tidings of progress which have reached us tell of a powerful movement in this direction in Athens—the ancient seat and home of democracy.

“It is in your country, and in ours, which have been ripening for ages in the atmosphere of public freedom, that its earlier and more perfect fruits may be expected, and are, in fact, found. We need not refer to the Bill reported by a Committee of your Senate, in 1869, to amend the representation of the people in Congress—to the new constitution



of the State of Illinois--or to the principle which has been adopted in the election of our Educational Boards, as evidences of the advances which have been made simultaneously in both countries towards the establishment of better modes of election. Your countrymen have taken the lead in practical improvement. Early in this year, the most complete method of popular election yet devised, was thoroughly tested by experiment, in the nomination of the Board of Overseers of the Harvard University, the results of which, set out in the proceedings of the American Social Science Association, are before you.

"At this time there appears to be pressing need of political action in framing municipal institutions for the two greatest cities of the English-speaking race. London and New York require each a Local Government, that may be safely trusted to deal with subjects affecting largely the moral and material welfare of the vast multitudes of their inhabitants. In New York you have made great efforts to purify the administration of the internal affairs of the city. In this country committees and commissions have from time to time been appointed, and have reported on the necessity of great changes, but without any practical result. We have numerous boards or vestries, none of which possess sufficient authority or influence to attract as candidates those whose aid would be most valuable in the business of Local Government. Moreover, in the formation of these bodies, as well as in the exercise of their powers, special classes and interests are able to acquire an inordinate weight, wholly disproportioned to their numbers, and prejudicial to the general well-being.

"We invite your co-operation with us in promoting the establishment in both cities of municipal governments, in which every citizen of intelligence, probity, and public spirit may be sure that it depends on himself, and others of like character and views, whether they shall be represented by persons to whom their important duties may be confided; and that no arrangements for organizing party majorities shall be able to deprive them of this right. We lay before you the heads of a plan, which has been submitted to a Committee of our House of Commons for the government of London, and desire to consult with you on any modification of which it is susceptible, to adapt it to the circumstances of either city. We look forward to the great moral support which our common efforts may derive, from bringing together the gathered experience of populous communities in the old and in the new country, to frame and perfect a method of selecting governing bodies which shall, as far as possible, be free from sinister influences, and become hereafter models for the other great cities of the world. The free communication of ideas between our two

societies will be a source of mutual strength, and a preservative from error, in the work of reformation."

Within the last few days the tidings have been received in England that the new charter, with the provision for proportional representation, has passed the Assembly of the State of New York, by a vote of 89 against 27, and no doubt is entertained that it will pass the Senate.

This is unquestionably a great step towards obtaining a truly representative body, in which the honesty and intelligence of the constituents may be certain of being present to detect and oppose malversation if any be attempted. It is, however, to be regretted that the reformers have not been able to get further than the cumulative vote. Although infinitely better and more just than the old system, its infirmities are not unknown to many of those who adopt it. The *New York Times*, of the 10th February last, says—

"In the district comprising the First, Fourth, and Sixth Wards, the minority is in the proportion of twenty to one hundred, and this minority, for the first time in the memory of man, will be enabled to be represented. Each independent citizen in that orderly district will approach the polls on the morning of election with the privilege of depositing nine votes for aldermen. He may give them all to his favourite pugilist, Billy O'Mulligan, or he may divide them as he chooses among various democratic candidates up to the number of five. This surely is not difficult even for a Sixth Ward 'rough' to understand.

"If he happens to be manipulated and guided by some patriotic leader, like Mr. William M. Tweed, or Mr. Fields, he will not pour out all his votes on his favourite O'Mulligan, but will choose, say, three others. He will not dare to divide among the whole five his nine votes, because his shrewd leaders will tell him that the cunning Republicans will concentrate on one or two, and thus beat him. Yet it will undoubtedly happen that, having this liberty of voting for his favourites, he will put an unequal vote on particular candidates, and thus give the minority additional chances. A large majority could seldom be so perfectly managed as to divide their votes equally amongst the largest possible number of candidates. The chances would be that only three out of the five candidates for alderman would get the large majority of the democratic vote.

"The small and intelligent minority of these wards, who, for a generation, had voted like a forlorn hope, and never once achieved the slightest success, or been once represented in city or State, would now have their chance. Being small, and being intelligent, they could more easily combine. They would undoubtedly determine to divide their votes equally, or nearly so, between two candidates. In the numerical proportions we have supposed, of one hundred to twenty, the majority could, if they were sufficiently organized, carry in certainly four candidates, but the chances would be immensely in favour of the minority securing two out of the five,

so that they would enjoy even more than their share of representation—that is, one-sixth of the voters would have two-fifths of the Government.

“This, though an evil, would be counterbalanced in the Wards like the Ninth and Fourteenth, where the voters were more evenly balanced, and chances might easily give the majority more than their proportion of representation. The objections which such democratic organs as the *Argus* copy and repeat to this system, are not so much to the cumulative vote, which is simple enough for a child to understand, as to such complicated systems as the ‘Geneva vote,’ and ‘Hare’s system.’ These last, though they have come much nearer the ideal end of suffrage, are too complicated and strange to our habits ever to be adopted by the people generally. The real objection to the cumulative vote is the same that lies against the whole suffrage by majorities—that is, that caucuses and cliques can rule it. But this would certainly be less of an evil under the proposed plan than under the old, and would be counterbalanced by the representation of a minority. Under the cumulative plan, the majority would be more individual in their preferences, and less liable to be led by demagogues and caucuses than now.”

The able article in the *American Law Review*, cited by Mr. Sterne, thus concludes its investigation of the subject. “We proposed to discover and point out, if we could do so, the most feasible and hopeful path of electoral reform. This we have done. We have set aside the crude and tentative schemes of the limited vote and the cumulative vote, not only because of their crudeness, but because, while they propose to redress, in the name of justice, the tyranny of majorities, they leave untouched and even aggravate that party tyranny which, in breaking down the public spirit of the electors, is the real root of our political evils. Between the two more comprehensive and philosophical schemes, that of the Free List, and that known by the name of Mr. Hare, there is, as we have endeavoured to show, but little to choose. But there is also, as we have endeavoured to make clear, the best reason to believe, both from the nature of things, and from the teachings of experience, that either of them would tend directly to establish better conditions of public life, and to elevate and purify the whole political atmosphere. And if we are asked how these things can be, how it is possible that a mere arithmetical device, an ingenious, but still purely mechanical, improvement in the machinery of politics can, in reason, effect a moral reform?—the answer again is at hand: it is to be found in the nature and origin of the political evils from which we suffer. They do not spring from moral causes. . . . If we grow indifferent and neglectful, it is because the barbarous and pernicious machinery with which we have to work obstructs and breaks us down, thwarting our best impulses, and convert-

ing us into blind and unwilling slaves. If we give up political duty, it is not for lack of public virtue, but from disgust and disappointment. We know that it does not make any difference whether we go to caucuses or not. We know that it makes very little difference whether we go to the polls or not. But remove the artificial obstructions, that the present political machinery, with the abuses it has produced and fostered, has set up—substitute for it a more rational method of voting, which shall establish justice, encourage individuality, and make independence possible, and public duties and the public service will again be seen to be, what they always in fact are, the most honourable work that can be done, and they will not be long without a following. It is not now those public virtues that are lacking; what we need is a fair field for their exercise.'

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## V. — CRIMINAL IRRESPONSIBILITY OF THE INSANE.

THAT every murderer is presumably a madman is a comfortable doctrine which men are naturally much inclined to accept. To admit that a horrible crime has been deliberately committed by a human being, is indirectly to reflect on ourselves, especially if the criminal, as a refined and educated person, represents human nature at its best. Our self-complacency receives a shock, and we are easily persuaded to believe in the existence of insanity, which, by disallowing to the criminal the possession of a nature such as ours, relieves us from an inference unflattering to ourselves. Pity and mercy towards a fellow creature do something to strengthen the tendency, and the result is that public opinion, which on a subject like this should be based on the surest ground, is commonly formed without consideration of the necessities of criminal justice, which ought exclusively to govern the question.

\*The mind has first of all to be disabused of the idea, which is unfortunately the whole rationale of punishment to many persons, that criminals are punished because they deserve it. The proposition is one of those which, though never expressed, are tacitly recognised in the conclusions arrived at. To express it is to confute it. The criminal law undertakes no such divine office, as any one may discover for himself by running over in his own mind the lists of offences of which the law does and does not take cognizance. Perhaps the offence of

ingratitude is more generally and more justly reprobated by the world than any other. Yet the law has no punishment for it; while it punishes severely the taking of a loaf of bread by a man in the pangs of hunger, an offence which the world would pronounce most venial. The law, therefore, clearly punishes on very different grounds from desert. It has undertaken the duty of preserving public order, and it punishes such acts as endanger order to prevent their occurring again, or, as it is commonly expressed, for the sake of the deterrent effect of the punishment.

To ensure that the deterrent effect of punishment shall be complete, the law has to provide as nearly as possible that punishment shall follow the commission of crime with certainty. It necessarily does harm to the cause of order that a crime should be unpunished. In the Eltham case, for example, it was clear that a murder had been committed, but the fact has not been brought home to any one. The public sense of security is therefore diminished, and crime is encouraged by the evident uncertainty of punishment. But take the common case in which it is quite clear who did the deed, but the defence of insanity is relied on to exempt the perpetrator from punishment for it. The deed done has outwardly all the appearance of a criminal act committed by a person in his senses. The fact of the crime has made a certain impression on the public mind, and it is for the criminal law to see that the effect of that impression is corrected. If the perpetrator is punished, society feels no less secure than before. But if no retribution follows the act, it goes out to the world that a man may do these things without being punished for it. If the punishment of the criminal is not the corrective employed, it is for the insane man or his friends to negative the impression produced by his act, by showing in a way satisfactory to the public that he is insane. When the cause of order has been injured by the commission of what is to all appearance an atrocious crime, and the doer of the act has been discovered, the injury must be repaired either by punishing the criminal, or by showing that he is outside the pale of ordinary responsible persons.

Nine people out of ten probably justify the exemption of the insane on the ground that they do not deserve punishment. The ground on which the criminal law puts their exemption from punishment is, that the execution of it does not exercise a deterrent effect. Take away the deterrent effect of punishment, and it becomes simply vengeance. The punishment of a madman does not affect the insane, because they are incapable of being influenced by it; nor the sane, because they have no sympathy with him. The power of deterrent effect is in fact proportioned to the strength of the

sympathy which the person to be affected feels for the person punished. The punishment of a man like Mr. Watson affects very little those classes commonly represented in the criminal dock. It affects men of his own stamp, and points the moral that learning and refinement do not justify a man in relaxing his guard over the violent passions, made perhaps more difficult to control by habits of seclusion. On the other hand, to hang a fellow who, reeling out of a public-house, stabs a policeman in a drunken fury, has very little effect on the man who has his club and keeps his brougham. The sympathy in question may be defined as the expectation of the same circumstances concurring in the case of the person to be affected by the example. There is no such sympathy at all, when the concurrence of the circumstances cannot possibly be contemplated. To execute a madman for the sake of example to the sane would be as useless, and therefore as cruel, as to hang a dog who has killed a sheep as a warning to sheep-stealers. To execute him to deter the insane would be as inhuman as the exhibition of the dead bodies of vermin on a barn-door is ridiculous.

On this ground the plea of insanity is admitted, with the condition superadded that the fact be satisfactorily proved, as otherwise the absence of punishment for an apparent crime would be dangerous to the public peace. The test of insanity which English judges are in the habit of submitting to the jury is, whether the accused knew the act he was doing was wrong. This is a test which every one can appreciate, and to acquit a man who did not know right from wrong cannot rob the law of any of its terrors. But some persons believe the test to be insufficient, as it takes no account of the state of mind in which the ideas of right and wrong are undisturbed, but the will is unable to control the actions. If such a mental state could be satisfactorily proved to exist in an accused person, there is no doubt that he ought to be exempt from punishment. Many eminent doctors assert that it does exist, and blame the law for not thinking so too. But it does not follow that, because the law retains the old test, it disbelieves the existence of such a mental derangement. It is enough for the law to disregard it on the ground that it cannot be satisfactorily proved.

A general inability to control the actions by the will might, if it ever exists, be easily proved. But the state of mind which it is proposed to include in the legal definition of insanity is an inability to refrain from doing a particular act, and that act the crime which is the subject of the accusation. The only available evidence is, therefore, the opinion of a doctor, invariably contradicted by the opinion of another doctor, and the fact of the crime itself. A man is charged

with poisoning, and his defence is that he has a propensity to poison over which he has no control; or he is indicted for stabbing his father, and he is acquitted on the ground that he had an uncontrollable impulse to stab his father, although he knew it was wrong. The plea irresistibly reminds us of the warning Artemus Ward gave to his next neighbour:—"Young man, look out; I have not the slightest control over my elbows." If such a ground of exemption were admitted, what criminal might not hope to escape punishment? How could the public confidence in the administration of justice be maintained, when a defence is admitted which no one understands, and which has the peculiar advantage of requiring no evidence to support it? It is of the essence of the plea of insanity that the ground of exemption should be generally recognised, and capable of satisfactory proof, and it is out of the question for the law to admit as an answer to a criminal prosecution a state of mind which has exactly the opposite qualities.

The question of insanity is, of course, partly a medical question; but when it means criminal irresponsibility, the doctors are the very worst tribunal to decide it. When a doctor says that a person is mad, he means that the patient would be the better for treatment as an insane person. Even if the specific question of responsibility for an act is put, the answer probably depends on exactly the same considerations. The doctor is accustomed to look on the subject submitted to him as a patient, and it is impossible to alter in a moment the habit of a lifetime. Yet the idea that the doctor is most likely to be right is gaining ground dangerously. When a criminal has been sentenced to death, there is now practically a right of appeal to two doctors on the question of insanity. Under 27 & 28 Vict. c. 54 his friends have only to make it appear to a Secretary of State that there is good reason to believe that the convict is insane, and the Secretary has no option but to appoint two doctors, and if they certify that the convict is insane, to send him to Broadmoor. The Secretary of State would not, we presume, be justified in determining that there is good reason to believe that the convict is mad, when the defence has been set up at the trial, and the jury distinctly negative insanity by their verdict. But the accused has only to say nothing about it till he is convicted, and appeal on that point to the Home Secretary and the doctors, if he thinks they are likely to deal more mercifully with him. We do not know whether Mr. Bruce acted under the powers of the statute in the case of Christiana Edmunds, but, at all events, Sir William Gull and Dr. Orchard were allowed to reverse the verdict of the jury. Whether the doctors were right, and the jurymen wrong in that case, it is unimportant to inquire, because the probabilities are that they determined

two entirely distinct questions. But it is of the utmost importance to observe that not only does the new tribunal displace the old-fashioned trial of criminal issues in open court, but it takes away from the jury the jurisdiction over an issue which, according to the view the English law takes of it, they are peculiarly fitted to deal with.

But is this view, that the fact of insanity is no exemption unless satisfactorily proved, consistent with the leniency which the law of England professes to use towards an accused man? Has it not always been an axiom with us that it is better that ten guilty men should escape than that one innocent man should suffer? The axiom would never have been accepted merely out of pity for an innocent man's sufferings, unless the balance of advantages were in its favour. The ground of its acceptance is that if an innocent man is hung, and the real criminal is afterwards discovered, the sense of insecurity in the administration of justice felt by all classes would be much more disadvantageous to society than the encouragement given to crime by the escape of the ten guilty men. But this reasoning does not apply when the question of insanity is involved, and not the question of innocence. Suppose a madman commits a murder, but his plea of insanity is not accepted, and he is hung for the crime, the general belief will be that he is a sane man, and therefore his execution, however unjust to himself, is as useful to the cause of order as the execution of a sane man. The question of insanity can be once for all decided at the trial, and there is no likelihood of anything occurring after the execution of the sentence to prove to demonstration that the convict was mad. When a man has been executed for a crime, and his innocence is afterwards clearly established, the life which has been taken is worse than wasted. But when an insane man, who has committed a murder, and whom the world believes to be sane, is either from the question of insanity not being raised, or being wrongly determined at the trial, convicted and executed, his life may well be considered as sacrificed to the general advantage.

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## VI.—ON A SYSTEMATIC REVISION OF THE STATUTE BOOK.

**T**HERE are few subjects of greater interest to the student of our Constitutional History than the growth of the Statute Book. The early struggles of the Norman barons for freedom; the establishment of a Parliament, at once inde-



pendent and representative; the attempts of the feudal lords to repress sub-infeudation on the part of their retainers; the efforts of the Church to acquire land in perpetuity; the development of commerce from a simple system of barter; the reformation of the Church; the prerogative of the Crown; the personal liberty of the subject—these and a host of other subjects of national importance cannot be fairly discussed without continual reference to the Book of Statutes. And more than this, the very fact that the constitution itself is the development of centuries, every portion of which has been won on a battle-field of no ordinary struggle, whilst the statutes now in force have been from time to time supplied by the incoherent efforts of every class of legislator, lawyer and layman alike, has been one of the best guerdons of England's freedom and England's greatness. The result as a whole may not be so satisfactory to the philosopher as any of the codes framed either by Roman or French casuists; but there is inherent in our system a practical utility which more than compensates for its informality. Meanwhile, no one can be blind to the inconvenience caused by the enormous bulk and heterogeneous character of our Statute Book. Even three centuries ago this was so manifest, that King Edward VI. wrote:—

“I have showed my opinion heretofore what statutes I think most necessary to be enacted this session; nevertheless, I could wish, that beside them hereafter, when time shall serve, the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them, which thing shall much help to advance the profit of the Commonwealth.”

Much has been done, more is being done, in the way of repealing obsolete and useless statutes, and before long we may hope to be exempt from the dangers of those pitfalls of the Statute Book which Mr. Holland has so graphically described that I am tempted to transcribe the passage:—\*

“A scene occurred the other day,” he writes in July, 1869, “in the Court of Common Pleas, which ought to be impossible in a civilized country. . . . An action was brought by one Susan Varley against the publisher of the *Daily Telegraph*, for penalties. The plaintiff's case was that the *Telegraph* had inserted certain advertisements, by which inquiry was made for goods which had been stolen, and in which the owners undertook that if the goods were returned no proceedings should be taken against the thieves, such advertisements

\* Essays upon the Form of the Law, p. 153.

being illegal, as tending to the compounding of felonies. The jury was sworn, the judge was all attention, and the plaintiff's counsel told his story with all due elaboration. Witnesses were called . . . to prove that the copies of the *Daily Telegraph* produced . . . were really copies of the periodical which emanates from 135, Fleet Street, and that the proper persons had been sued for the delinquencies of that journal. The witnesses were duly cross-examined, the regulation jokes were bandied about, and a 'laugh' was of course raised, when inquiries were made as to the real existence and the habits of the plaintiff; 'did she,' for instance, 'live up two pair of stairs?' The case looked very black for our lively contemporary when the counsel for the defendant rose and made an objection to the evidence. The judge did not think much of this. The learned counsel had, however, a further objection which certainly seemed to go to the root of the matter. He submitted that 'the statute upon which the action was founded had been repealed by the 7 & 8 Geo. IV. c. 27.' . . . Everybody seems to have been taken aback. The counsel for the plaintiff, who had so far steered their case triumphantly, must have been especially nonplussed. The leader must have turned sharply round on his junior, and some elementary work on criminal law must have been in instant demand. . . . The plaintiff's counsel, Mr. Robinson, said that 'his attention had not been before drawn to the 7 & 8 Geo. IV. c. 27, and that he had not been aware of its contents.' The judge observed that 'this was no discredit to the learned serjeant, for Lord Coke himself said that he did know all the statute law, though, he added, that he should be ashamed to say that he did not know all the common law. He (Mr. Keating) must say he did not know the statute of Geo. IV.' And even the defendant's counsel, Mr. Giffard, the lucky discoverer of the awkward fact, was kind enough to say that 'he would not say how long he had known it.' Then Mr. Serjeant Robinson added, that he 'was informed that this matter had been thoroughly investigated, and that the provision upon which the action was founded had not been repealed.' Mr. Justice Keating remarked, that 'the statute of Geo. IV. stated in the preamble that it was expedient that certain Acts, and parts of Acts, enumerating among others the one sued on, should be repealed, in order that the provisions contained in them might be amended and consolidated into one Act. Now the question was, had they been consolidated into one Act? It certainly looked like a provisional repeal. He thought that the case was clear enough upon the facts, and that the question of law should be further looked into.' After some more discussion, the judge was inclined to direct a formal verdict for the plaintiff, but the defendant's counsel pointed out that 'even if his lordship's impression were well founded, that the enactment still existed in another statute, that would not entitle the plaintiff to recover, for he expressly founded his action upon the statute named in the declaration; and no judge, he apprehended, would amend in such a case.' Eventually a formal verdict was entered for the defendant, with leave to the plaintiff's counsel to move the full court to vary the verdict in accordance with what might be held to be the true state of the law.

“ . . . The court was moved accordingly, but refused to amend the declaration.”

Now, I will not attempt to discuss the questions, whether we may expect to have a complete and systematic code of law incorporating all the statutes—to say nothing of the judge-made laws of the past—and whether such a codification would be a desirable consummation, though I may be permitted to express grave doubts respecting the utility of either proposal, but I will venture to point out a system of reform which might, I think, be adopted with great advantage by our legislators.

I pass by the inconvenience resulting from the mixture of general, fiscal, temporary, English, Scotch, Irish, colonial, and private enactments in our general Statutes. This subject has already received a considerable share of attention, and the remedy will no doubt be as speedily, as it may easily be applied. Indeed, it may be considered a necessary sequence to the present labours of the Statute Law Commissioners.

A more important reform is still urgently needed. Every lawyer knows the difficulty of wading through a mass of repealed and partially repealed Statutes in order to arrive at a clear perception of the actual law upon any point under discussion. The frequent publication of new editions of approved text-books to some extent meets the difficulty, but in many cases even this assistance cannot be had; and whenever it is desired to determine the state of the law a few years back, without text-books of the actual date in question, the task becomes exceedingly laborious. I may mention as a familiar instance, the law relating to mortmain, the whole of which might readily be gathered up into one short statute, containing a dozen or twenty sections, but for which it is now necessary to study as many separate and conflicting Acts. In fact, hardly a single important statute is passed without a schedule containing a long series of Acts and sections of Acts only partially repealed. So inveterate has this custom become, that the purchaser of the revised edition of the Statutes issued by the direction of the Commissioners must needs go through the volumes only just published, pencil in hand, striking out sections and portions of sections of Acts repealed since their issue. Of this the August and September parts of the Statutes, printed for the Incorporated Council of Law Reporting, containing the Universities Test and the Promissory Oaths Acts, supply abundant proof. I will only mention two. Under the former Act, so much of the 6th section of the Act of Uniformity is now repealed as is unrepealed, together with sections 13 and 16, except so far as it relates to the colleges of Westminster, Winchester, and

Eton, or any governor thereof; and under the latter, section 1 of the Act of Elizabeth, relating to the swearing of undersheriffs and others, is repealed from the words, "for and concerning the supremacie" to the words "other corporal othe," together with so much of section 3 as relates to the "othe of supremacie." The result can only be, that with future volumes of the series of Revised Statutes must be supplied a long catalogue of minute *errata*, with careful notes, and who that is in the habit of noting up such memoranda does not know the labour that this will entail? Add to this, that it is impossible, without the most attentive consideration of every portion of an Act, to incorporate with it another without in some minute detail either providing what is inconsistent with the original enactment, or re-enacting the original provisions.

In proof of this I need only refer to the numerous Acts during late years passed for the relief of Trustees, and containing directions as to the investment of trust funds, and I may be forgiven for quoting at length the preamble to the Debenture Stock Act, which immediately follows the Universities Test Act already cited. It runs as follows:—

"Whereas by divers Acts of Parliament, and more particularly by the Companies Act, 1863, and the Acts amending the same, companies authorized to issue debenture stock are empowered to raise by means of such stock all moneys which they may for the time being be authorized to raise on mortgage or bond; And whereas doubts are entertained whether it is lawful for trustees, who may be authorized to invest trust funds in the mortgages or bonds of companies to invest such funds in debenture stock; Be it enacted, &c."

Why, in the name of reason, should not the framers of the Bill have prepared a short summary of all the Acts relating to the investment of trust funds, and consolidated them into one for general practical use? The student of no other subject, so far as I am aware, has so needless, so puzzling a difficulty besetting his path. The surgeon is not obliged in the daily discharge of his professional duties constantly to use works written before Harvey's discovery of the circulation of the blood, nor is the temper of the young classical scholar tried by lexicons and histories of old date, only adapted to modern learning by long and conflicting supplements. It is the lawyer alone, boastful though he is of logical clearness and acumen, that submits to so unphilosophical, so confusing a system as that which we have described.

Briefly, to summarize the reforms which are specially needed in addition to those projected by the Statute Law Commissioners, I venture to propose—

(1.) That no mere portion of a Statute should in future be repealed, but that in case of a reform being required the whole Statute should be remodelled to meet the special exigencies of the case and re-enacted. If it is objected that the bulk of the annual issue of the Statutes would be enormously increased by the adoption of such a system, I think it would be found, on examination, that if the issue was simply confined to enactments of a *really* public nature, this difficulty would not arise. Even in the present entangled state of the law, it is utterly surprising how the existing Statute Law has been condensed into Chitty's four volumes of compendium.

(2.) That at the expiration of each session of Parliament, the Commissioners\* should direct their attention to such Bills as have passed into law, with a view to advising the law officers of the Crown thereon, so that in the ensuing session other measures should be brought forward to consolidate and render easily intelligible the Statutes affected thereby. This would be, in fact, to supersede the labours of the numerous class of aspirants, who are only too pleased to find in a crude and hastily-framed Bill, receiving the royal sanction, a justification for adding to the already numerous and costly series of the text-books of English law. In making this proposal, I am only claiming for the framers of our Statutes the privilege so readily conceded to writers upon every conceivable subject when second and succeeding editions of their works afford them an opportunity of correcting the errors which their own researches or the criticisms of the learned have exposed. The importance of pursuing the same course with the Statutes will be evident to any one who reflects upon the hasty manner in which, session after session, important Bills are pressed through the Committees of our Houses of Parliament, and how immediately afterwards all the ingenuity of our profession is engaged in discovering their weak points. The danger is year by year increasing, and the necessity for a remedy grows more and more imperious.

ROBERT W. GRIFFITH.

## VII.—SANITARY LEGISLATION—THE PUBLIC HEALTH BILL, 1872.

THERE is on the Col de Bonhomme a cairn of stones, said to mark the place where a great lady and her *suite* perished in a *tourmente* of snow on this bleak Swiss mountain. Every one who passes by the way adds to the heap a stone.

\* The Commission, it is understood, is now dissolved, having completed its functions since this article was written.

And so year by year is added, by the Legislature, a Sanitary Act, to the incongruous mass of law under which true sanitary efficiency lies buried. But one could hardly have expected such an addition of trouble and difficulty as is threatened by Mr. Stansfeld's Public Health Bill, 1872. We are, it is true, obliged, before we can know the law, to wade through the Public Health Act, 1848, the Local Government Act, 1858, the two Acts amending those of 1861 and 1863, the Nuisances Removal Acts, the Lodging Houses Acts, the Baths and Washhouses Acts, the Burial Acts, the Sewage Utilization, and Sanitary Acts of every session amended, altered, extended, and rendered inexplicable by every year's legislation since 1865 ; but why is there now another stone to be thrown on the already overpowering burden we are called on to bear? What man is there so wise as to be able to define the powers of Local Boards of Health, of Local Boards, of Sewer Authorities, of Improvement Commissioners, of Nuisance Authorities, and of Highway Boards? Who is there able, be the lawyer, doctor, officer of health, town councillor or guardian, to wage war against the prevalence of disease, beset as he must be by conflicting authorities, conflicting areas, conflicting powers? Drainage areas, allotted without reference to drainage, and watershed areas without reference to water supply or their protection from pollution. Legislation, without means of enforcement; authorities, without desire of action; and when desiring, unable to accomplish the objects for which they were constituted; the dense parts of town populations left in such physical foulness and neglect as to engender not only physical evil, but, as a consequence, the most grievous mental and moral darkness and depravity; the rural populations poisoning the beauty of the country by persistent ignorance of, or opposition to, the primary rules of health and safety. All this is known and acknowledged, and Mr. Stansfeld's Bill is the only remedy. It is too sad a picture. Any amount of time may be expended or wasted on party struggles, and yet no leisure can be found by the representatives of the people to gather up the disgracefully scattered fragments of legislation, called sanitary law, into some approach to order and efficiency. It appears to be useless for the wisest judges on the Bench to denounce the present condition of the Statute Book on this momentous subject; for a whole nation to be awakened to the necessity of setting its house in order, by what appeared a providential call to action, when the highest in the land was struck suddenly down and brought into close contact with death. Nay, although for months and years the work of consolidation and simplification had been undertaken and well accomplished by a Royal Commission, specially appointed for the purpose, there is no time

to be found in the House of Commons, spite of the promises of the Queen's Speech, to settle for us some simple code of action to save a nation's wealth, a nation's strength, from misery, disease, and death. Are there pressing demands on the time of the Legislature? Are there great laws to be passed, and great debates to be held on the various modes by which, and the persons by whom, we should be governed? It may be so; but while the hours are passing, there are other voices than those of party in the air. Mothers wailing for their children, and refusing to be comforted, for they are not. When 50 per cent. of the population disappear before attaining five years of age, surely time should be found to strive for the first necessities of life, pure air and pure water, for these little ones, rather than convulse the nation by struggles as to the colour of the door of the school in which the remaining few are to be taught. To detect a weakness, to amend a blot, to patch up defects, has been tried and tried again; and in this year of grace, 1872, we are no better off than when, in 1855, we had given to us the Nuisances Removal Act of that year. It is true we have had accorded to authorities, year after year, greater powers, until it may seem they are now too many in their minutiae of detail, but the active power still is wanting to set in motion and to keep in action effective sanitary measures. When, in 1866, by the 49th section of the Sanitary Act of that year, compulsory sanitary action was first attempted, by lodging in the Secretary of State for the Home Department a power to do works upon default of a local authority, it was thought that at last something would be effected, but experience has bitterly exposed the fallacy of thus trusting to centralized power. It is shown that local sanitary measures cannot be carried out by a central government, however potential, and demonstrated conclusively, by its failure, that local measures must be intrusted to local authorities; and that the very foundation of sanitary reform was in reforming the minds of those to be benefitted; giving to them the benefit of the acts sought to be accomplished for their good and on their behalf. Teaching here to be effective must be by "Deeds, not Words."

The Public Health Bill is the first action of the Local Government Board—a Board constituted last session by Act of Parliament, partially carrying out a recommendation of the Royal Sanitary Commission, to consolidate under one Minister the various functions discharged by the Poor Law Board, the Local Government Act Office, the Privy Council, and the Board of Trade, so far as they regarded public health and relief to the poor. This was certainly a step in the right direction, and it was hoped that this would be followed by a

similar consolidation of local authorities, all having the same powers, administering the same law, although varied by the characteristics of their several districts. These districts, whether large or small, to be so arranged as to provide that in no corner of the land should there be a parish, or even a dwelling, without the supervision of a competent sanitary authority. It is true, that this presented some difficulties, but they were difficulties of a kind easily surmountable, had long ago been pointed out to Government, and were well known to Government sanitary officials intrusted with the carrying out of the details of sanitary Acts as one of the chief obstacles to efficient sanitary action—where four or five sanitary authorities found their districts meeting in the centre of a populous town; where towns were under the control of four or five conflicting authorities; where the limits of ancient boroughs, and even recently constituted districts, had outgrown themselves, and the outskirts of large towns beyond their boundaries were left without sanitary government or control—little can it matter, to take every preventive measure to avoid disease, if in the very suburbs of a town ever so jealously guarded, in these suburbs every invitation which foulness and neglect can provide is offered for the access of epidemic visitation.

Nay, much wider is the influence of laws which teach us that neglect at a port such as Southampton may mean the invasion by cholera of the whole nation; that neglect in London of measures to repress small-pox may entail on Dublin the loss of hundreds of lives and more than thousands of money. There is no member of a community who can thus suffer, but the whole body politic suffers with him. The proposed legislation of Mr. Stansfeld leaves this evil untouched, because, according to his own statement, it could only be remedied by something like a boundary commission. At present, it may be said that, practically, sanitary law is administered by three bodies—local boards, improvement commissioners, and sewer authorities. To the former, the whole body of sanitary law applies within the district allotted to them; the second body are governed by the several local Acts under which they are incorporated; and the third, who are the vestries of the several parishes, or new vestries created for special drainage districts, carved out of parishes, are governed and act under a selection from the public health and sewer utilization statutes. These statutes constitute every vestry, where there is no local board, a sewer authority. It would be instructive to have a return of how many had executed any works since their constitution—and the amount of money expended for the purposes for which they were constituted. It is universally admitted that vestries as sewer authorities are failures. Now, boards of guardians are to take their



place, and are to be constituted rural authorities in contradistinction to town councils, boards of health, and improvement commissioners, who are to be urban authorities, with the same powers they now possess—that is, without having any control over medical relief, and in that respect differing from the new rural authority, who, to make them equal, are not to exercise some of the most important powers of local boards. Experience seemed to say that boards of guardians having been tried and found wanting as exercising the powers of the Nuisances Removal Acts, either by themselves or by committees of their various bodies, it would be hopeless to expect better action, if they have extended powers. However, the Public Health Bill makes this difference in its provisions from previous experiments. The board of guardians, as a whole, has been found to be useless and a sham, so the new rural authority is to be the board of guardians shorn of its town members; that is, those members of its body who are returned by that portion of the district which is an urban authority. These may be the best or worst of the body of guardians; let the readers of this paper judge. This is the rural authority recommended by the Royal Sanitary Commission, with one most important alteration. It was said by the Commissioners in their report that efficiency could only be hoped for by making the election only once in three years, one-third going out annually; that the stability of the board thus secured, better action might be hoped for. It is a heavy blow, and sore discouragement to the Commissioners that this safeguard is in the Bill utterly ignored, and annual elections will, by the present scheme, render continued or sustained action impossible. It is to be feared that the works proposed by one set of men will not have been proceeded with before another body comes into office again to consider, and, probably, to reject them. The Bill further creates port authorities, riparian authorities, and joint sanitary boards, whose objects and functions are sufficiently expressed by their names. But why this needless multiplication and complexity of authorities? Is there more than our public health to conserve? Are the conditions of health and disease so diverse in town and country, in ports or in rivers, in several or united districts, as to demand differing agencies and diverse laws?

Has not all this arisen from the primary want of a settled basis of action? Is it not the absence of a sound elementary system of great general principles? May not all this difficulty have arisen from too much rather than too little law? Does not the dwelling on detail, and the diffusiveness of minute directions lead to the necessary consequences of inapplicability and therefore weakness and division? The mere expression of some minute powers makes the absence of others

the more conspicuous, and points to the urgent necessity of a simple law, carried out by means of a simple and uniform agency, over districts selected and apportioned according to sanitary exigencies rather than political requirements. If any measure is to be really effective, the metropolis, spite of the difficulties of local government, must be included, and all friends of the people will urge on the government no longer to neglect an inquiry into its sanitary needs. It is the supreme of folly to apply remedies to the ends of the circulatory system while its great heart is left to generate, and at length pour out unwholesome floods of neglected and diseased population.

The whole spirit of the proposed Bill is the government of the country as to sanitary matters by inspectors sent out from the central board—a system which shuts the stable-door after the horse is stolen; for the inspector arrives on the spot, not to prevent the occurrence of disease, but to report on its origin, causes, and extent, and to suggest means for its repression, either when it has well nigh spent its violence, or has done much of its deadly mission.

The difficulties besetting sanitary action are twofold; first, the apathy and indifference of local authorities; and secondly, the natural impatience of taxation of the mass of ratepayers, and their doubt as to the benefits to be conferred on them in return for moneys by them contributed. For this there are many and serious causes, of which the space at disposal forbids at present, however, any consideration of the means which should be enforced to remedy them. There must be some immediate controlling power, and some provision for appeal equally to and from the governing body and the governed. Inspectors of the Local Government Board can ill discharge all these functions. What is required appears to be a representative body for an aggregate of sanitary districts, such as those of a county, each local board choosing from its own members one representative, joined to an equal number of magistrates chosen at quarter sessions. Here would be a board of the highest value, controlling on the spot defaulting local authorities; uniting them when necessary for conjoined works; doing justice in all appeals from the individual inhabitant who complained of the action or inaction of his own board; and further, by appointing committees of its own body to act with committees of other controlling authorities, at once solving the difficulty where watershed areas or great river bases extended beyond the limits of one united authority. This, too, solves a problem otherwise never approached, namely, the appointment of high-class men as solicitors, engineers, and medical officers of health, devoting their time exclusively to the discharge of the duties of their various

offices, paid by salary without fees, and acting over the whole area of the controlling united or intermediate authority, with such deputies as the extent of the duties might require.

The Public Health Bill has but a dim forecast of these difficulties, and but a shadowy way of meeting them. By the 25th and following sections, it constitutes a united district when it so pleases; and by the 74th section, upon default of a sanitary authority to perform any duty, or to do any act or thing which is prescribed by the sanitary Acts, then the Local Government Board may make an order for its performance, or may delegate the powers of the defaulting sanitary authority to a body of persons chosen by itself. For these provisions it is easy to foresee failure; they failed to remedy the difficulties when in the hands of the Secretary of State under the powers of the 49th section of the Sanitary Act, 1866; and it does not appear how they can be more successfully wielded by the President of the Local Government Board. They have, moreover, the vice running through all parts of the Bill—such an exercise of central controlling power as effectually to swamp local agency and effort.

If one thing more than another be needed in carrying on efficiently any local effort, it is the securing of high-class officers, upon whom the responsibility is thrown of the due conduct of business. In sanitary matters, the medical officer of health should be the moving point, on whose skill in detecting causes of disease the whole system should turn. Such an officer should be not only highly qualified, but placed in such a position as would enable him to devote his whole time to the duties of his office, without any partiality in, or fear of professional injury from, their fearless discharge. The Public Health Bill provides that in every urban district there shall be one medical officer of health, and that in the rural districts the Poor Law medical officer shall discharge these duties with due remuneration for his services. The advocates of the rights of these most meritorious public servants, whose value to the community is so much undervalued, have most earnestly striven for the recognition of their services and were most anxious that these appointments should be secured to them. A very short time allowed for consideration has sufficed to convince these friends, equally with the Poor Law medical officers themselves, that instead of being a boon, these appointments would be to them an evil and a snare. And they have not hesitated frankly and boldly to announce that they cannot in their present positions discharge these duties. Their present office is dependent on those, whose sanitary shortcomings they would have to denounce, and as has been more than once officially announced, although now it seems convenient to ignore the fact, their ser-

vices as officers of health would be most required at the very time when their whole time, as in visitations of epidemics, should be devoted to the treatment of disease. As deputies, to give information of outbreaks of disease, to suggest where there are sanitary deficiencies, and generally to aid the officer of health in their districts, their services would not only be valuable, but indispensable; to do as suggested by the Bill would be to continue, in an extended form, the present incomplete and inefficient system, or want of system. There must, in short, be removed from this office, if its duties are to be anything more than a name and sham, the possibility of any jealousy on the part of other members of the medical profession; and the very first requisite is the adoption of the principle that the medical officers of sanitary districts are not to engage in private practice. The question of relative expense of the two systems, that of rule by inspectors from the central office, as opposed to local rule by high-class officers of health, *en rapport*, with a small body of high-class *medical* inspectors and the chief medical officer of the Local Government Board; or another most important question, namely, the payment of a portion of the salaries of these officers, and the expenses of registration of sickness out of the Consolidated Fund, there is now neither time nor space to discuss. But it may be said that the benefit is imperial, seeing that to stamp out disease demands more than local effort, and the benefits accruing are participated in by every member of the community. As to other provisions, attention should be paid to the clauses for the protection of water which are, whilst minute, most faulty; and while leading to confusion by a number of minute provisions, can only do harm by the omission of specification of large numbers of substances of a deleterious character. One example of defective provision will be sufficient, that relating to chlorine. See section 33, sub-section 6.

The regulations as to gas supply will evoke a storm of opposition from a large and influential body of companies, whose rights are entirely ignored. At the present time, while there are many companies or persons authorized by Act of Parliament to supply gas, there are also companies and persons who have expended very large sums of money for the same purpose, without statutory authority, being constituted under the Joint-Stock Companies Acts. The rights of these companies are entirely destroyed by the Bill; and the sanitary authority may, if the Bill becomes law in its present shape, entirely ignore their presence, however well they supply gas in the district, and erect rival works of their own out of the public rates—thus bringing ruin on a section of the ratepayers with the use of their own moneys. Neither are statutory companies left untouched, for while the Bill gives powers to authorities to acquire gas-works from these companies by

agreement, it also, in default of agreement, allows sanitary authorities to establish gas-works beyond the limits of the special Acts of the companies, within the districts of local boards. The Bill provides for the appointment of analysts, but affords no security for them being duly qualified for the office, thus perpetuating what has been often before complained of—the filling of important offices by persons totally incompetent to the adequate discharge of the duties. Throughout the Bill there is no guarantee for the fulfilment of obligations. The sewers and drains are to be restituted, water is to be pure, privies are to be emptied, streets are to be cleansed—what is the penalty for non-observance? In many cases, none; in one, the ratepayer is to be protected by fining the sanitary authority, which is to pay the fine out of the ratepayers' money! Who is to enforce the discharge of these duties? To that there is no answer in the Public Health Bill, 1872.

Still there are some valuable provisions—the morsel of bread to redeem the stone from utter worthlessness. Thus, by the 43rd section there is power given to the sanitary authority to construct subsidiary drains, and to declare them private improvements—a power long desired by local boards, its absence leading to much difficulty and expense. There is extended power to close houses unfit for human habitation, although it would have been infinitely better to have framed provisions to secure the building, in the first instance, of all houses in such a condition as to fulfil the conditions necessary for preserving health. There are extended powers as to providing hospitals and medical relief in times of epidemic visitation accorded to boards of guardians—very necessary; but again entailing a conflict of authority between these bodies and urban sanitary authorities, who are entirely distinct from boards of guardians. And last of all, there is a recognition of what has been necessarily for years pressed on the attention of successive Governments—the hardship of insisting on the repayment within any number of years, of the whole sum expended in permanent works, while the *corpus* of the property remained in the hands of the local authority. By the 78th section of the Bill, it is provided that where lands are bought for purposes of sewage utilization, the lands themselves may be mortgaged, subject only to the condition that the moneys so raised by mortgage be applied to some sanitary object. This provision might be extended with advantage to all undertakings of a permanent character, such as water-works, gas-works, town-halls, &c., &c.; and the sanitary object to which the money is to be applied should be the diminution, by the amount of the money so raised, of the principal money expended on the purchase or construction of the works.

W. H. MICHAEL.

## VIII.—THE ADULTERATION BILL.

THOUGH the general presumption is in favour of the competition of the market, there are cases in which the consumer is not the best judge of the commodity supplied, and in which the rule of *caveat emptor*, therefore, becomes a mere mockery. It is upon this principle that in the department of law or medicine the State protects the public by forbidding persons, who have not satisfied certain requirements, to practise those arts. In the matter of food, it is true, it can scarcely be said that the capacity of its consumers to judge of its quality stands on the same footing as with regard to medicine; but when questions of wholesomeness are imputed, it must be admitted that, even respecting tastes and inclinations in the matter of food, there may be an appeal from the persons who feel them, and if once the question of public health is involved, a *prima facie* case in favour of legislative interference is made out. We have made these preliminary remarks before coming to the discussion of the proposed Bill against adulteration of food, because there may be persons who hold that such a subject is not a fitting matter for legislation at all; and, indeed, if the sale of food is merely regarded as a sale of ordinary goods, it must be allowed that the Common Law is based upon true principles, and that there is no necessity to make any addition to the list of misdemeanours; but because we contend that legislation is necessary to prevent the adulteration of food, there is no occasion for us to advocate similar legislation in order to prevent shoddy being sold for cloth. We desire to see adulteration of food made penal not because it is a fraud upon purchasers, but because it is an act generally injurious to the health of consumers, as to which they cannot themselves be the best judges. The evil is great and increasing, and individuals unaided by law are powerless to cope with it. Assuming, then, that legislation of this kind is expedient, we come to the question whether the Bill now laid before the House is more calculated to produce the desired effect than the Act now in force, viz., 23 & 24 Vict. c. 84.

It is scarcely necessary to premise that the latter Act has done but little to check the sale of adulterated food, and has, consequently, wholly failed to raise the tone of commercial morality with regard to it; and the reason of its failure obviously is, that no facilities are furnished for making its provision effective. It imposes a penalty of 5*l.* on persons convicted for the first time of selling food which to their knowledge contains ingredients injurious to health; and on a second offence it empowers the justices to publish the offender's name,

while it also gives power to certain bodies to appoint public analysts; there its provisions stop. Mr. Muntz's Bill is a great improvement on this imperfect measure. It distinguishes between the offence of selling adulterated food and that of adulterating it, by inflicting a much more severe penalty on the latter; it makes penal the mere act of selling as pure, food which is adulterated, apart from the consideration whether the foreign ingredients are injurious or not, thus avoiding the difficult questions which might be raised as to the injurious character of certain ingredients; it re-enacts the clauses giving power to appoint analysts, whose certificate is to be sufficient evidence of the fact of adulteration; and also provides that they shall inspect articles of food presented to them for a moderate fee. The punishment which it empowers the justices to inflict are much severer, and the facilities for prosecution are much greater, than those afforded by the present Act.

So far the measure deserves support; but we must submit that it falls short at least in these two respects, namely, that it is purely permissive with regard to the appointment of analysts, and that it follows the present Act in requiring knowledge of the fact of adulteration to be proved before conviction can be obtained.

The experience of the Public Health Acts suffices to show that a mere power of appointing officers to be exercised at option is likely never to be exercised at all—the whole working of this measure depends upon the analyst, and if they are to exist, the bodies who have the appointment of them must be compellable to exercise their power. With regard to the question of the knowledge of the fact of adulteration, it would be no hardship to throw the burden of disproving it on the party accused, whereas the difficulty which the prosecutor would have in establishing it, would again imperil the usefulness of the Act. On this point we would draw Mr. Muntz's attention to the section in the Pharmacy Act which relates to the sale of adulterated medicines, and also to the sections relating to adulteration in the proposed Licensing Act, in the hope that he may strengthen his measure by adopting some of their terms. Subject to the remarks we have made, the Bill is in the right direction, and we wish it success. If in each union there were a skilled officer appointed by the quarter sessions or some such independent body, whose duty it was to inspect articles of food submitted to him for a small fee; if his certificate were deemed sufficient evidence of the fact of adulteration; and if the knowledge of that fact on the part of the tradesman were presumed from the fact of his offering the article for sale, unless he could prove the contrary; and if conviction were certainly followed by the penalties provided in Mr. Muntz's

Bill, then we might hope to see the poorest purchaser protecting himself from the malpractices of hucksters. If a system of co-operation could be generally established among the poorer classes, adulteration would be practically exterminated; but until that time comes, some such stringent law as this appears to us to be an imperative necessity.

### IX.—THE TICHBORNE CASE.

THIS case, which has without doubt occupied a greater amount of public attention than any within memory, has special claims upon our space. We need hardly say that our remarks will be limited to the proceedings which have already taken place. We do not presume to offer any opinion as to what will or may be the ultimate result to the person universally known as the "Claimant," nor is it our intention to comment upon the extraordinary fact that it has taken upwards of 100 days—many of which were wasted—to decide one of the simplest issues ever submitted to a jury.

Never has there been so severe a strain upon, and test applied to, our judicial machinery, from the police who kept the doors (and who by the way did their extremely difficult task admirably) to the Lord Chief Justice himself; and we cannot say (whatever allowances may fairly be made under the circumstances of the case), that upon the whole the result is, in our judgment, satisfactory.

Of some of the learned gentlemen engaged in the case little or nothing is known. Whatever is known may readily be said to be to their credit and honour; and of one, probably the youngest man engaged in the case, unhappily nothing more can be known in this life.

Two of the leaders, the Attorney-General (subject, however, to some observation) and Mr. Hawkins, Q.C., have increased their well-earned reputations, in their respective ways. Of Serjeant Ballantine it may be said that he opened a hopeless case. Sir George Honeyman and Mr. Giffard have had but little public opportunity to show what men they are, they stand now, in the esteem and respect of their fellows as they stood before, as well-instructed, careful, and sound lawyers. Mr. Hawkins was so successful in his cross-examination of Baigent, an acute and difficult witness, that our function is a simple one—it is to congratulate him, and pass on.



It is said that the Attorney-General, in the course of this case, lost and regained a reputation—a showy, plausible, and somewhat epigrammatic criticism, which means, if it means anything, that the cross-examination of the Claimant was a failure, that the opening speech for the defence was a success. Every one who attends our Courts must be aware that the efficiency of cross-examination depends to a very great extent upon the manner of the counsel who cross-examines. The late Mr. Edward James was a masterly cross-examiner, his quiet, firm, and determined manner, and powerful presence had great effect both with the witness and the audience. Mr. Serjeant Ballantine and Mr. Serjeant Parry are both able cross-examiners. The Attorney-General is not, his polished manner and silvery diction, admirable for some purposes, so far from aiding him in this particular province of his calling, tell against him. But, apart from manner, the cross-examination was admirable, laying as it did the foundation of a speech which, for minute industry, mastery of his case, and clear statement, lighted here and there by some passage of pathetic tenderness, was a great forensic achievement.

Whatever force or power of manner was wanting in the cross-examination—however much it may have failed to the view at the moment—its ultimate effect was as fatal as if it had been enforced and aided by the most scathing and severe manner possible. That wherein Sir John Coleridge failed signally, and wherein Serjeant Ballantine excelled, was temper—that supreme essential to the advocate. There is nothing, perhaps, more exasperating than to find your opponent calm and cool, and oneself drifting into heat and anger. It was the Serjeant's coolness and perfect *sang-froid* that, exciting every now and then a laugh from the audience, aroused the Attorney-General's anger. Hence one or two as unseemly exhibitions as well could be, over which the Chief Justice either did not, or could not, exercise any control whatever.

Some while ago, the amenities passing between counsel in the Irish Court of Queen's Bench, excited public attention. But the *Irish Law Times* was able to retaliate to some purpose, and characterising the "scenes" in our Common Pleas as almost unprecedented, restored the balance of forensic impropriety to this country.

It has been remarked that whatever may be the practice and position of Mr. Serjeant Ballantine at the Bar, the Serjeant is not a "successful" man. In the attributes which are supposed to be the absolute conditions of forensic success, the Serjeant is wholly wanting. His position and reputation are unique. Possessing no university or scho-

lastic reputation, never having been known as a learned lawyer, without family or social *prestige*, without political or parliamentary influence, and without either eloquence, or even any approach to it, he is what he is—one of the most successful advocates, perhaps, in his own way, the most successful advocate, in England. After thirty-eight years' practice, the Serjeant cannot attain, nay, cannot even expect, professional promotion, supposing him to care for or desire it. Yet he possesses the gift or gifts that to an advocate stand in lieu and instead of all other, without which all other gifts are vain, and with which all others can be dispensed with. It has been said that "genius is patience." It may be said that the genius of the advocate consists in tact and temper, and these qualifications, at once the substitute and equivalent for many others, the Serjeant possesses.

It is either the fault or the misfortune of Sir William Bovill that since his elevation to the Bench he has been a party to the most severe conflicts between the Bench and the Bar within our memory. Our readers may remember the *fracas* between the late Mr. Edward James and the Chief Justice, at Manchester; as painful a scene, in our opinion, as ever happened in a court of law.

Since then there have been others, culminating however in the scathing criticism of Serjeant Ballantine upon the judge's manner to, and cross-examination of a witness, during the progress of this case, which concludes, as we sincerely hope, a series (to use a phrase common in transpontine dramas) of "terrific combats," at once dangerous to the discipline that must be observed at the Bar, and fatal to the dignity and influence of the Bench. But it is with regret that we notice, that while the jury have not only entirely escaped from anything like comment upon the manner in which they have discharged their duty, but, on the contrary, have won golden opinions for their patience, courage, and devotion to it, while the Bar has, upon the whole, passed muster with the public critics, the one constituent part of the tribunal upon which ridicule—that most severe of all forms of censure—has been cast, is the judge. The phrase, "Oh, I am so ill" of the judge—whether such were the exact words or not is immaterial—at the time ran a close race in popularity with the "Would you be surprised to hear" of the Attorney-General. It is a little unpleasant to read, among a string of sarcastic eulogies, that the Lord Chief Justice will no longer exhibit "his wonted impartiality," which marked his lordship "as the one judge in England competent to conduct such a case." It has been said that Cervantes laughed away the chivalry of Spain. Men may deserve blame—may be blamed and be forgiven. But to be ridiculed, and to be ridiculous,

is fatal. The severest public censure that a public man can render himself obnoxious to, is the public laughter. It is not by any means pleasant to see from *Vanity Fair*, downwards to the ridiculous ephemeral broad sheets sold in our streets, the Chief Justice in every attitude, and with every attribute, save that of dignity. It may be said that censures of this kind are contemptible; *per se* they might be, but they catch the eye, and are meant both at once to meet and form public opinion, and never would be published at all were they not to a great extent sure of finding a ready response in public opinion. At a time in our history, when every institution is on its trial, when the fact that a thing is, has altogether ceased to be any reason for its continuing to be, it would indeed be a day of rebuke and humiliation, if anything that the Chief Justice has said or done could impair the dignity of that one institution of the country, the judicial Bench, in which its people have ever put absolute trust—an institution that has certainly escaped calumny, never, at all events for long years, deserved censure, and has almost escaped criticism.

Last, and not least, “the jury” have won the respect and approbation of their countrymen. They are not responsible for the length of the trial. They stopped it when they could, and it would not have been wise to have stopped it at an earlier stage. But it is with feelings of surprise, nay of amazement, that we hear that they and the counsel in the case (all, or which, plaintiff or defendant?) have since the termination of their labours dined together—we presume, to celebrate the event! “If London were in ashes,” Sydney Smith remarked, “some place would be found among the ruins where the disaster could be celebrated by a banquet.” We hardly know whether this latter event is more improbable than the former is undesirable, and we hope to hear the report contradicted, for we are bound to say, although after such a time, both counsel and jury might claim to be old friends, an entertainment given under such circumstances, although lawful, is certainly not expedient.

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## LEGAL GOSSIP.

WE are glad to learn that at last there is some chance of the Bar acting with the view of watching pending and impending legislation. The Northern Circuit have appointed a committee to watch legislation so far as it affects the interests of that circuit; and as we wholly fail to see why the interests of that circuit are to be isolated, we hope the result will be joint action by the circuits at large. We shall watch the action of this committee with great interest, and we hope that the members of the Bar at present in the House will take cognizance of the fact, that the Bar, as a profession, will watch their votes with some interest.

Some of our contemporaries seem to have curious notions of the law of libel, if we may judge from the remarks they have made *à propos* of the Twiss case. A scoundrel, for quite obvious purposes, makes a statutory declaration against Sir Travers Twiss, and fills it with disgraceful charges against Lady Twiss—disgraceful, whether true or false. He then publishes it. An action for libel is brought, and the defendant seeks to prove that what he has asserted is true. There can be no doubt we believe among those who know anything of the law of libel, that the truth here would have had no effect whatever in exonerating him, while in all probability it would have had and ought to have had the effect of increasing the punishment inflicted in case the libel was proved. Besides which it has repeatedly been decided that the publication of the truth concerning a person's remote history is libellous when the statements have been such as to tend to the person's injury. Thus reformed convicts have recovered damages against libellers who have published to the world their former offences. The courts have properly held that it is monstrous to rake up acts for which the offenders have paid the penalty of the law. In the same way it ought to be held a libel, and to deserve severe punishment, to publish to the world of a woman that years ago she was living an improper life. Common sense and the law ought alike to state that if even a common prostitute marries, she should be protected after the lapse of a reasonable period of good conduct, if not immediately, from any raking up of her antecedents. If she is married, what business is her previous life to anybody except her husband?

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The Attorney-General is reported to have said in the House of Commons, with reference to the scandalous declaration made by the defendant in the case of Sir Travers

Twiss *versus* Alexander Chaffers, that "It was the duty of the magistrate to take the declaration, and no magistrate had a right to assume a jurisdiction which did not belong to him, and refuse a declaration which might be material and important." This statement is hardly consistent with the facts of the case. Alexander Chaffers made a declaration before Mr. Vaughan, one of the magistrates at the Bow Street Police Court, that Lady Travers Twiss had been guilty of improper conduct previous to her marriage. The declaration had no reference to any legal proceeding, nor to the confirmation of a written instrument in any legal matter. It was made simply to give additional force to an *ex parte* statement to the Lord Chamberlain, reflecting upon the honour of Sir Travers Twiss.

The declaration in itself was informal, as the wording did not follow the schedule of the Act under which only it could have been received. The statute 5 & 6 Will. IV., c. 62, was passed, *inter alia*, for the express purpose of the *more (sic)* entire suppression of voluntary and extra-judicial oaths and affidavits; and in action 13, "the practice of receiving oaths and affidavits voluntarily taken in matters not the subject of judicial inquiry" was condemned, and the statute directed that no justice of the peace should administer or allow to be received any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice has not jurisdiction or cognizance by some statute in force at the time being. In the other sections, 2, 3, 4, 8, 9, 10, 12, 15, 16 and 17, the statute directs in what special cases declarations may be taken. Section 18, however, is that relied on by the Attorney-General and those who erroneously say that a magistrate is compellable to take *any* declaration. It is as follows:—

"And whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments, or allegations, or proof of debts, or of the execution of deeds or other matters, be it therefore further enacted, that it shall and may be lawful for any justice of the peace, notary, public, or other officer now by law authorized to administer an oath, to take and receive any declaration of any person voluntarily making the same before him, in the form to the schedule to this Act annexed; and if any declaration so made shall be false or untrue in any *material particular*, the person wilfully making such false declaration shall be deemed guilty of a misdemeanour." We confess that these words convey to us that it is necessary and proper to take declarations relating to instruments, &c., and other matters, but *ejusdem generis*. We are aware that in *Reg. v. Boynes*, 1 Carington and Kirwan, 65, Erskine expressed an opinion that "the 18th section of statute 5 & 6 Will. IV. c. 62, is not

confined to cases of voluntary declarations with respect to the confirmation of written instruments of allegations, or proof of debts, or the execution of deeds, or other matters mentioned in the preamble, which might perhaps mean matters *ejusdem generis*, but it extends to declarations generally." But the later decision of Byles J., *Reg. v. Cox*, 9 Cox, C.C., 301, that the preamble of the section 5 & 6 Will. IV. c. 62, s. 18, must be read with the enacting part over-rides this. Why should the Legislature have taken the trouble in the previous sections to declare what declarations may be taken by justices, if it was intended that the magistrates should have the power and be compellable to take any declaration whatever? Should the Attorney-General's view be correct, there would be practically no limitation, and the Mansion House regulation would be incorrect. In fact, there would be no necessity that the person taking the declaration should have any knowledge of law, and solemn declarations might be made quite as well before the first constable one meets in the street as before the magistrate.

The Attorney-General, in his anxiety to defend the action of the magistrate, no doubt overlooked this. It would have been far better to have admitted the real state of things and the actual *fons et origo mali*. The metropolitan police courts have had no increase in their staff of clerks since the beginning of the century. While the police have been quadrupled, two clerks only are still assigned to each court; one clerk must, as a rule, be fully employed taking notes in the court itself, while the other clerk has, no doubt, more than sufficient work in filling up summonses, commitments, and similar records. Practically, therefore, the clerks seldom see a declaration. The usher of the court takes the declarant's shilling, and asks if the statement is true, and if the signature attached is that of the declarant. The usher hands it up, amidst a pile of others, to the magistrate, who may be possibly engaged in an important case, on which all his faculties are concentrated. What wonder, then, that Mr. Chaffers's, or any other declaration of a similar nature, is passed and signed without observation. Some qualified person ought to take the responsibility of signing, or refusing any declaration. In fairness to the gentlemen who already are overworked at the metropolitan police courts in a pestilential atmosphere, they should be acquitted of a responsibility which, with their present staff, they cannot pretend to undertake. We may, perhaps, add that in the City of London courts, where there is less work, four clerks are considered by the Corporation a fair allowance.

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*De minimis non curat lex.* So at least thinks Mr. Bass.

M.P., or rather he thinks that law *ought* not to trouble itself about trifles. He has accordingly brought in a funny little Bill, in which he proposes to abolish all legal means of recovering debts under 40s. The best explanation we can impute to Mr. Bass is, that he wishes by Act of Parliament to enforce ready-money payments for everything below that amount. As we hold this to be, though desirable, utterly impracticable, we should certainly not put a premium on dishonesty, or deny the legal remedy to the poor suitor that we give to the rich.

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We have no objection to the change adopted by the Government in regard to the payment of the Attorney- and Solicitor-Generals. It is, no doubt, in every way more satisfactory that they should be paid a fixed salary with professional fees when they are asked to do anything than that they should receive pay for complimentary briefs and fees for doing nothing. Many of the fees hitherto paid are to be handed over to the Exchequer. Our only fear is, that the change is made rather with a view to the Treasury than to the better administration of justice; and looking to the fact that the office of judge of our highest court had to go begging because the salary was so low, we are inclined to be very jealous of every attempt to save by cutting down legal fees or judicial salaries. Hitherto the public service has been as it ought to be the road to the highest pay, and the public service has therefore attracted the best men. Of late years we have been and are now perhaps a little in danger of drifting into the American system, where a man like Mr. D. D. Field, who is reported to be making 40,000*l.* a year, appears as counsel before a judge making 400*l.*

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A correspondent has called our attention to a subject which has often forced itself on the attention of the Bar. We mean the presence of women in court during the discussion of nasty questions. The case of Partington, which came on before Lord Penzance a few days ago, was one of peculiar dirtiness. The charges, the evidence, everything about the case was filthy; and yet there were women present in the court during the whole of the proceedings; women, too, who were well dressed, and who evidently regarded themselves as ladies. They were present from choice, and had nothing whatever to do with the case. Every one has heard of the priest who cleared his confessional by announcing that on Monday he would receive the thieves, on Tuesday the adulterers, and so on. But occasionally women will remain in court even after an indication that all the ladies have left it. Surely in such cases the judge would have the sympathy of the whole of the respectable portion of the community if he either ordered the

women out of court, or administered to them a stinging reproof. This would only be following the practice with which every one is familiar on circuit when trials containing matter unfit for women's ears has to be heard. It is bad enough that our sensational newspapers should publish all the details of such a trial as the Twiss case, but it is still worse when the opportunities are afforded of hearing the originals without expurgation.

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A new question in international law is raised by a suggestion of Lord Kimberley. He has been sorely tried in regard to the Fiji Islands. The islanders wish to be under the English Government. The king has petitioned for this object in vain. The white inhabitants, who number, thinks Earl Belmore, about 3000, have the same desire. But the English Government, either because it is losing something of the imperial spirit which will through all time constitute the greatest glory of our island, or because it is afraid of a slight addition to its expenditure, is unwilling to annex the territory thus offered. Earl Kimberley, however, in a letter to the Earl of Belmore, the Governor of New South Wales, suggests that the colony itself should do the annexation. There are several circumstances which will make the colony hesitate in taking such a step, but in spite of these we hope it will act on the suggestion. It would be well to let England see that the colonies possess some of the old spirit under which the early settlers in the West Indies and Hindostan acted; and that rather than have disorder and chaos let loose as they will have if this Fiji business is not soon settled, they are prepared to take the reins in their own hands. But the points raised in international, or rather in inter-territorial law, will be curious. We shall have the dependency of a colony. Will the governor be appointed by the Home Government, or by the Colonial Government? To whom will he be responsible? Where the imperial and colonial laws conflict, which is the dependency to obey? The truth is, that the relations between the colonies and the mother country in regard to their respective authorities promise before long to become seriously complicated, and call imperatively for the attention of our statesmen.

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In our February number, speaking of the Temple improvements, we by the merest chance referred to the new clock tower attached to the Inner Temple Library. The necessity for providing increased accommodation for the students frequenting the library of the Inner Temple last year came under the consideration of the benchers, and under the direction of Mr. John Locke, M.P., the treasurer, a plan was prepared by which a very considerable addition of floor



space and shelf room would be obtained, and as the carrying out of this plan involved the removal of the old staircase, by which the library was formerly approached from Tanfield Court, advantage was taken of the opportunity to remove the entrance to the library, to the more public and conveniently accessible situation on the Terrace, and to complete the block of buildings adjoining the New Hall, by the erection at the east end of the tower, which would harmonize with the great oriel window at the west end. The style and proportions were necessarily determined by those of the building of which it forms part, and although the architect, if free to choose, would probably not have adopted that particular style of Perpendicular Gothic, any other would have been discordant with the existing buildings, the general lines and character of which it was essential should be preserved. And as executed, the whole harmonizes well, and the tower forms an appropriate termination to the old front of the library, and provides a place for a clock which had been long required. The design prepared by Mr. Arthur Cates, the surveyor to the society, having been approved, and the tender of Messrs. Trollope & Sons accepted, the work was carried out by that firm with great rapidity, and was completed at the end of last year. The clock was made by Messrs. B. & J. Moore, of Clerkenwell Close. The four dials are each six feet in diameter, and are illuminated at night. The clock strikes the hours on a bell of 8 cwt., cast by Messrs. Mears and Stainbank, of Whitechapel. The entire height of the tower from the Terrace to the vane is 116 feet, and the total cost, including the additions to the library, will exceed 5000*l*.

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Mr. Fitzjames Stephen, Q.C., will return in May next from India, where he has held the responsible position of Adviser-in-Chief to the late Governor-General, and will go the Midland Circuit, where many opportunities have of late years presented themselves for promotion. No doubt a man who is competent to receive the onerous post of Adviser-in-Chief, is justified in anticipating a judicial position "at home" of a more comfortable nature than the climate of Calcutta affords.

We have received a letter from a Bar student, which is too long to insert, but which takes up one or two points of importance. One of these is the absurd method of classification of the students who pass the examination for the Bar. Supposing thirty men succeed in getting through; perhaps four will be "placed." The names of the rest are given alphabetically. A man, therefore, who has all but succeeded in carrying off a certificate of honour makes no better figure than

one who has all but succeeded in being plucked. There should, at least, be two classes appointed. Our correspondent goes into this subject at length, but the mere statement of the fact ought to be sufficient to show the absurdity of the practice. Another point to which he calls attention is the fact that the examiners in the examination for qualification for call to the Bar are the lecturers. But he does not state the whole of the anomaly. The examiners for the exhibitions on the subject of the lectures are *not* the lecturers. Of course, in the first case, as the object is to discover whether those who present themselves for examination are qualified, and to select those who are best qualified, it does not matter very much whether the lecturers are the examiners or not, although in determining who is best qualified, a man, however well he may be up, will stand little chance unless he has attended the lectures. But while in this case the bias of the examiners is likely to have an unfair influence, it is clear that to the lecturers themselves ought to be left the task of deciding who are the best up in the subjects of their lectures.

Our weekly contemporary, the *Spectator*, has curious notions on the law of libel. The writer of the following was clearly made acquainted with that law before the advent of Sir Alexander Cockburn. To the present Lord Chief Justice of the Queen's Bench belongs the credit and glory of having remade the law of libel, so far as it regards the public discussion of the acts of public men. With such cases as *Seymour v. Butterworth*, and *Campbell v. Spottiswoode* before him, the reader will probably be surprised at the following remarks from our contemporary:—"Then the law of libel is of itself bad, too lenient, and too deficient in necessary distinctions. It is necessary to speak out upon this subject very plainly. Our ordinary law of libel has been weakened and injured by the growth of a new and great power which has reason, just reason, to dread its operation. The public is not in the least aware of the way in which the written law of libel, and more especially the civil law, presses upon journalists; of the absurd rigidity of some of its provisions; of the impossibility of avoiding offence; of the absolute reliance we are compelled to place upon the common sense of juries, the fair feeling of politicians, the reluctance of the legal profession to press artificial cases. We say, gravely, that the law, if worked as it was once, would still make journalism impossible; that we doubt if a number of the *Times* ever comes out upon some sentence of which a libel suit could not be founded; that our own carefully expurgated columns occasionally contain material for a dozen suits at once. We can point to a number of the *Spectator* on which

eleven suits could be brought, though there was not only no intention to libel, but no man not specially familiar with the law would dream of imagining that a libel had been published."

The Council of Legal Education report to the treasurers and masters of the bench of the several Inns of Court that a meeting of the Council, convened by the chairman, Lord Westbury, was held at Lincoln's Inn, on the 22nd instant, and that at that meeting a committee, consisting of eight members of the Council, was appointed for the purpose of considering and reporting upon a comprehensive system of legal education, scientific and practical, for students for the Bar, and upon the subjects to be proposed for the compulsory examination to which such students are hereafter to be subjected.

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A committee of steamship owners trading to the East, and another committee of merchants, shipping goods by their steamers, has each had lately under consideration a new form of bill of lading, intended to be adopted by both parties, and called "The Eastern Trade Bill of Lading." It seems that these several committees, having come to an agreement as to the form of the proposed document, now desire that it shall be adopted by the underwriters, who insure the goods shipped under it; and to this end, copies of the bill in question have been, or are being, submitted by the merchants concerned to their underwriters, with a request that this document shall in future be attached to the policy, and form, in some sense, a part of the contract of insurance. In its simplest form, a bill of lading contains three things: (1.) A receipt for the goods shipped; (2.) An undertaking to deliver them at the destined port; and (3.) A stipulation fixing the rate and the time of payment of the freight. Nothing more is necessary; though, to judge by the common forms of the document, much more is, and has long been, deemed desirable. If it contained nothing more, the rights and liabilities of the parties would be quite sufficiently defined by the law applicable to common carriers, which has effect wherever British jurisdiction extends, whether the carrier works by land or by sea. But, as everybody knows, the law is, and long has been, largely superseded by special stipulations on the face of the bill of lading. The underwriters have no desire to interfere in what does not concern them. The contract of affreightment does not, in itself, concern them; and if, by its being attached to or imported into the policy, they become concerned in it, all they desire is to have the purpose of this step clearly defined. It matters little to an underwriter what are the particulars of the risk he takes, provided

its contents are clearly stated, and he gets an adequate premium. What the shipper chooses to relieve the shipowner of, and saddle upon the underwriter, the shipper must ultimately pay for. What he saves in freight, he will, in the end, pay for in insurance. The settlement of the bill of lading is the proper business of the shipowners and the shippers. And if, in attaching it to the policy, they will say precisely what they mean, they will find no difficulty in arranging the terms on which their programme may be completed. The exemptions claimed by and allowed to the shipowner, in the bill of lading referred to, and the risks mentioned are numerous and various, and are obviously not such as can be transferred, *en masse*, to the underwriter. The bill of lading and the policy should be brought more clearly into harmony; and then the policy should be made as complete a protection of the shipper as the underwriter is willing to make it, and as the shipper is willing to pay for.

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We are glad to hear that the Council of the India House have granted a pension to Mrs. Norman, the wife of the Chief Justice, who was murdered some time ago in India. The sum, however, is too small. The information was conveyed in the following note:—"The circumstances under which officiating Chief Justice Norman met with his death having been brought to the notice of the Committee, they recommend that, in consideration of his having been murdered, and of his services of nine and a half years on the Bench in India, his widow be granted a pension of 500*l.* per annum, to commence from the date of his death."

A request has been addressed to the Home Secretary by a branch of the British Medical Association, that it may please him to take into immediate consideration the barbarous and unsatisfactory state of the law in reference to the impannelling an ignorant class of jurors to try the plea of pregnancy in bar of execution, and the unsatisfactory test which the law imposes.

On Wednesday, the 24th inst., there will be a meeting of the Senate of the University of London, for the purpose of electing examiners in the Law Department. There are two on Law and Principles of Legislation, with 100*l.*, at present held by Professor Bryce, D.C.L., and Mr. T. Erskine Holland; and one in Equity and Real Property Law, value 50*l.*, held by Mr. H. Cousins-Hardy. The examiners are re-eligible, and have offered themselves for re-election.

It is anticipated that Dr. Deane, Q.C., will succeed to the posts held by Sir Travers Twiss, should the vacated appoint-

ments be filled up, although rumour says they will not. But if they are not to be filled up, who is to be the medium of divorce intervention?

Lord Westbury has been selected as arbitrator to the European Life Assurance Company.

At a meeting of the members of the Incorporated Law Society of Liverpool, on the 22nd ult., the two gold medals, founded by Mr. Timpron Martin and Mr. John Atkinson, of Liverpool, were presented by Mr. Lowndes, the president of the society, to Mr. J. W. Winstanley, the son of Mr. James Winckworth Winstanley, the district registrar at Liverpool of the Chancery Court of Lancashire. The president, in presenting the medals, congratulated Mr. Winstanley on his success in carrying off both prizes, and expressed his pleasure at the presence of both Mr. Martin and Mr. Atkinson. He also alluded to the fact that whilst Mr. Atkinson's medal was open to articled clerks from Preston as well as from Liverpool, hitherto the medal had not been wrested from Liverpool; and, although he did not wish to be ungenerous, he did hope that the day would not be very far distant when Preston would produce a candidate who would secure it. The president then alluded to the advantages which the articled clerks of Liverpool had recently acquired in the shape of law lectures, from which he anticipated that a keener competition would be brought about for those medals in the future.

The editor of the "Revised Statutes," writes to say:—"That the third volume, carrying the work down to the union with Ireland (A.D. 1800), is nearly through the press, and may be expected to appear within two or three weeks from the present date. The time of publication of the successive volumes is necessarily dependent on the progress of expurgation, which is carried on by Bills periodically presented to Parliament, for repealing the obsolete Acts. Meanwhile, the cost of the revised edition to the public is not affected by the time of publication; and it is my interest, as it is also my duty, to expedite the work as much as possible."

Mr. Serjeant Payne, who for more than fifty years has been an officer of the corporation for the City of London, died, after a brief illness, on the 21st ult., at his residence, in Brunswick Square. Mr. Payne had been a hard worker from his youth, having entered the service of the Corporation of London more than half a century since. He was appointed Coroner of London and Southwark in 1829, was called to the Bar at Gray's Inn in 1843, elected High Steward of Southwark and Judge of the Borough Court of Record in 1850, and created Serjeant-at-Law in 1868, when he became a member of Serjeant's Inn. Mr. Payne was a magistrate of the counties of Middlesex and Westminster, a Commissioner of Taxes for London, Middlesex,

and Surrey, and a Governor of St. Bartholomew's Hospital. The deceased has left an only son, Mr. William John Payne, Barrister-at-Law, Recorder of Buckingham, and for the last twenty-five years acting Coroner for London and Southwark.

The Council of Legal Education have issued rules for the general examination of students for the Bar, to be held in the Hall of Lincoln's-inn, in next Trinity Term. Each student proposing to submit himself for examination will be required to enter his name at the treasurer's office of the Inn of Court to which he belongs on or before the 8th of May next, and to state in writing whether his object is to compete for a studentship, an exhibition, or other honourable distinction, or whether he is merely desirous of obtaining a certificate preliminary to a call to the Bar. The examinations by printed questions will be held as follows:—On the 18th of May, on Constitutional Law and Legal History, at 10 a.m., and on Equity at 2 p.m.; on the 20th of May, on Common Law, at 10 a.m., and on the Law of Real Property, at 2 p.m.; and on the 21st of May, on Jurisprudence, Civil and International Law, at 10 a.m. At 2 o'clock p.m., on the 21st, a paper will also be given to the students, including questions bearing on all the foregoing subjects of examination. The oral examination will be conducted in the same order, during the same hours, and on the same subjects as those already marked out for the examination by printed questions, except that on the afternoon of the 21st there will be no oral examination. The oral examination of each student will be conducted apart from the other students, and the character of that examination will vary as the student is a candidate for honours, the studentship, or the exhibition, or desires simply to obtain a certificate of having passed the general examination. The oral examination and printed questions will be founded on the books mentioned in a list appended to the rules, regard being had to the particular object with which the student presents himself for examination. In determining the question whether a student has passed the examination in such a manner as to entitle him to be called to the Bar, the examiners will principally have regard to the general knowledge of law and jurisprudence which he has displayed. A student may present himself at any number of examinations until he shall have obtained a certificate. Any student who shall obtain a certificate may present himself a second time for examination as a candidate for the studentship or exhibition, but only at the general examination immediately succeeding that at which he shall have obtained such certificate; provided that, if any student so presenting himself shall not succeed in obtaining the studentship or exhibition, his name shall not appear in the list. Students who have kept more

than 11 terms will not be admitted to an examination for the studentship.

The *Upper Canada Law Journal*, in remarking on the conflicting opinions of the Bench, says:—"Many men, many minds—many judges, many judgments. In Illinois, the judges in one Supreme Court held that the maxim of independence, 'all men are created equal,' does not extend to women, and that by virtue thereof, or of anything else, they have no right of suffrage. In the same State, another Supreme Court decides that this maxim does apply to vagrant children, so that a statute providing for the rescue of such 'little wanderers,' and the committal of them to a reformatory school is unconstitutional, and a 'tyrannical and oppressive' infringement upon the liberties of the citizen. In effect, therefore, juvenile vagrancy receives judicial sanction, and the State is powerless to protect and save destitute minors and orphans! We thought '*Salus populi suprema lex.*'"

#### IRELAND.

Two of the commissioners appointed by your Majesty's Royal Commission "to inquire into and report upon the total amount of the sums received by the Honourable Society of King's Inn, Dublin, upon the admission of attorneys and solicitors, as deposits for chambers, and in what manner the same or any part thereof has been applied and disposed of, and whether any and what portion of the amount remains unappropriated to the purposes for which it was received, and whether the Incorporated Society of Attorneys and Solicitors of Ireland are in possession of suitable buildings for the accommodation of that branch of the profession of which they are the governing body," have heard counsel on behalf of the benchers of the Honourable Society of King's Inns, and also on the part of the Incorporated Society of Attorneys and Solicitors—have taken evidence on the several matters referred to them, and have visited the buildings now occupied by the said Incorporated Society at the Four Courts, Dublin, and they report as follows:—

1. We find that from the year 1792 until 1866—when by Act of Parliament the separation in the government of the two branches of the legal profession in Ireland took place—there was paid to the benchers of the King's Inns, by persons on admission to the profession of attorney or solicitor, the sum of 55,293*l.* as "deposits for chambers."

2. We find that no portion of this sum was applied by the benchers in the erection of chambers.

3. We are of opinion that the buildings at present occupied

by the Incorporated Society of Attorneys and Solicitors at the Four Courts are insufficient and inadequate for their accommodation.

In addition to these answers to the specific questions put to us, your Majesty directs us to report our opinion on the several matters submitted for our consideration.

In order to do this in a satisfactory manner, it will be necessary to go briefly into an historical retrospect of the subject.

It is not necessary, however, to carry that retrospect further back than the year 1793, when the rules were made under which the sums referred to in your Majesty's commission were levied.

In that year the benchers who at that time, and afterwards until the year 1866, acted as the governing body of both branches of the legal profession in Ireland, made rules in reference to the payments to be made to them in the following terms:—

“32. Payments to be made to, and for the use of the society—

		STUDENTS, in order to be admitted.		
Pay	{	Fine . . . . .	£5	6 8
		Stamps . . . . .	10	0 0
		Library . . . . .	5	13 9
			—————	£21 0 5
BARRISTERS.				
Pay	{	Fine . . . . .	£5	6 8
		Stamps . . . . .	10	0 0
		Deposit for chambers . . . . .	22	15 0
			—————	£38 1 8

“The deposit for chambers to be allowed when the gentleman shall purchase from the society chambers; or ground to build chambers on.

		BENCHERS.		
		Fine . . . . .	£11	7 6
ATTORNEYS, at going apprentices.				
Pay	{	Fine . . . . .	£2	13 4
		Being sworn . . . . .	1	6 8
		Deposit for chambers . . . . .	11	7 6
			—————	£15 7 6

“The deposit to be allowed as above.”

These payments continued to be made both by barristers and attorneys and solicitors until the year 1866.

It appears that at the time these rules were made, the benchers had been lately deprived, by Act of Parliament, of the land they had previously held, which now constitutes the site of the Four Courts, and which was taken from them for the purpose of erecting on it the present Courts of Law and



Equity, and after this expropriation of their land the Society of the King's Inns had no place of meeting, or any building for the accommodation of either branch of the profession.

In the year 1798 the benchers acquired some land at Constitution Hill or Henrietta Street, in the city of Dublin, and proceeded to erect upon this land, in the year 1800, and subsequently, a common hall, lecture and retiring rooms, and a library, and other buildings, the advantages of which were enjoyed in common by barristers and attorneys.

These buildings are stated to us to have cost the society, including the purchase of the site, 81,374*l.* 0*s.* 10*d.*, and are still subject to an annual rent, including taxes, of 798*l.* 2*s.* 10*d.*

While these buildings were in course of erection no remonstrance seems to have been made, either by barristers or attorneys, on account of the neglect of the benchers to build chambers; but in the year 1826, after the completion of the common hall and library at Henrietta Street, the attorneys appear to have bestirred themselves, in order to induce the benchers to build chambers for their use.

The benchers took the matter into their consideration, and a report of a standing committee of the benchers, dated February 14, 1826, has been given in evidence before us, in which it is stated that it would be just and expedient to erect two buildings, consisting of six sets of chambers each, at Constitution Hill or Henrietta Street—one half for barristers, and one half for attorneys.

This plan appears to have been afterwards abandoned at the suggestion of the attorneys and solicitors, and in January, 1831, a proposition was made by them that, instead of building chambers at the King's Inns at Henrietta Street, the benchers should erect, on some ground which it was in their power to acquire, at the back of the Four Courts, a solicitors' hall and arbitration chambers.

The benchers appear to have met this proposal with a hearty assent, and, after negotiation, extending over some three or four years, the site was acquired and buildings erected on it, which, besides those now occupied by the Incorporated Society, include a coffee-room, open to the public, two rooms used by the benchers, and a considerable amount of space now apparently unoccupied. These buildings, including the purchase of the site, are stated to have cost the benchers 28,436*l.* 16*s.* 8*d.*, and were completed in May, 1841. The benchers also expended in building a Benchers' Building and Law Library for the Bar, at the Four Courts, 14,706*l.* 0*s.* 4*d.*, making their whole expenditure of this kind at King's Inns and the Four Courts, 125,716*l.* 17*s.* 10*d.*

In the year 1866, the connection of the benchers with the profession of attorneys, as its governing body, was ended by

Act of Parliament, and all fees payable to the benchers on admission to that profession ceased. The rights, however, of all solicitors and attorneys admitted before that date as members of the Society of King's Inns were unaffected by that statute, and they still continue entitled to all the advantages of such membership.

The Act of 1866 transferred the government of the attorneys and solicitors to the Incorporated Society of Attorneys and Solicitors, and that body, alleging that it represents the profession of attorneys and solicitors, lays claim to the contributions as deposits for chambers of the members of that profession towards the funds of the Society of King's Inns.

It appears by the original rule under which this sum was exacted that it was included under the general heading as a payment made "to and for the use of the society," and the benchers of the King's Inns state that no separate account of the application of this fund has been kept.

A sum amounting to 52,290*l.* was received, from 1792 up to Michaelmas, 1866, from barristers under a rule expressed in the same terms as that affecting the attorneys, and has been treated by the benchers in a similar way—that is, as part of their general income.

The expenditure of the benchers up to the present time, in the acquisition of land and the erection of buildings on it, amounts, as has been already stated, to a sum of 125,716*l.* 17*s.* 10*d.*

All attorneys and solicitors who paid money as deposits for chambers, are members of the Society of King's Inns, and as such are, equally with barristers, of right entitled to the use of these buildings, with the exception of the Law Library at the Four Courts.

It was contended before your Majesty's Commissioners, by the counsel who represented the Incorporated Society of Attorneys and Solicitors, that the aggregate of these fees was in the nature of a trust fund, of which the benchers were trustees for the whole body of the attorneys and solicitors, and which they were bound to expend on the specific object for which, as was alleged, it was subscribed, and that the Incorporated Society of Attorneys and Solicitors now represent the interest of the *cestuis que trust*.

Your Majesty's Commissioners have not been able to come to this conclusion on the evidence which has been brought before them, for the following reasons:—

1. Because if this be the true nature of the relations between the benchers on the one side, and the attorneys and solicitors on the other, the benchers would have been under an obligation, out of the sum of their contributions, to provide

chambers for every attorney and solicitor in Ireland; and the fund is manifestly inadequate for this purpose.

2. This payment was only one out of many made "to and for the use of the society," and the terms of the condition attached to this particular fee appear to your Majesty's Commissioners to give only a personal right to each attorney to obtain from the benchers credit for the amount of his contribution to the fund, upon certain conditions. The words are "the deposit for chambers to be allowed when the gentleman shall purchase from the society chambers, or the ground to build chambers on." These conditions have never been fulfilled, and an attempt to fulfil them on the part of the benchers was abandoned at the desire of the attorneys and solicitors themselves, and the conditions under which the credit was to have been allowed having never arisen, it appears to your Majesty's Commissioners that the right to exact that credit cannot be asserted now.

3. Assuming that your Majesty's Commissioners are correct in their conclusion that the right, if any, which was acquired by the attorneys and solicitors against the benchers, under the wording of the rule in question, was a right in every case personal to the individual who originally made the payment, it follows that no claim can now be made in respect of contributions paid between 1792 and 1866, by those attorneys and solicitors who are now dead. And it besides appears that the Incorporated Society of Attorneys and Solicitors do not represent even a majority of those contributors who are now in existence. Only 429 out of 1159 attorneys and solicitors now on the roll belong to the Incorporated Society.

Your Majesty's Commissioners are of opinion that the true solution of the question which has arisen, as to the character of these contributions, is to be found in a consideration of the condition of the Society of King's Inns at the time this rule was made.

The society had then lost, by the operation of an Act of Parliament, the lauded property which it had previously held. It was not possessed of any buildings, or land upon which it might erect buildings, for the use of the members.

There can be no doubt that, at the time these rules were framed, the benchers contemplated the erection ultimately of chambers on the model of the English Inns of Court, but there was at the time a necessity for other buildings for the general and corporate use of the society, which was of a more pressing character, and the benchers appear to have applied to the attainment of these objects the revenue received "for the use of the society" generally, until these general ends were accomplished.

They appear to have adopted this course with the tacit

approval of the attorneys and solicitors, for no move was made by that portion of the profession with respect to the contributions as deposits for chambers until after the year 1826, when the common hall, library, and other buildings for the general use of the legal body—of which the benchers were the rulers—were nearly completed.

The benchers on that occasion showed no indisposition to carry into effect their original plan, of building chambers on their property at Henrietta Street, and, as already stated, it was abandoned at the suggestion of the attorneys and solicitors, who seemed to prefer the erection of buildings which would benefit the whole body, rather than that of chambers which could only accommodate a limited number of their profession.

We are therefore of opinion that the benchers have substantially—by the erection of the several buildings already referred to—performed what was incumbent on them towards the attorney branch of the profession.

The attorneys who contributed to this fund have of right all benefits from the general buildings erected by the benchers which barristers enjoy, with the single exception of the Law Library at the Four Courts; and they have, besides, a large amount of accommodation provided for their exclusive use.

Those who have come into the profession since 1866 have in our opinion no claim whatever on the benchers: and for the reasons already given, we do not think that the Incorporated Society of Attorneys and Solicitors has in its corporate capacity any rights against the Society of King's Inns.

We have already stated in a previous part of our report that we consider the buildings occupied by the Incorporated Society insufficient for the convenient discharge of their business.

We have inspected the unoccupied parts of the buildings at the Four Courts, which are the property of the benchers, and we think that a large portion of the accommodation they require might be provided by allowing the Incorporated Society to become tenants of these parts of the building. We were informed by those who represented the benchers before us that no objection was entertained by that body to this arrangement.

All which we humbly submit to your Majesty's most gracious consideration.

MONCK.

W. R. LE FANU.

Dublin, 5th day of February, 1872.

The *Irish Law Times* comments on the report as follows:—  
 “The practical question to which we wish to direct attention is whether the funds at the disposal of the benchers might not be more profitably managed for the benefit of both branches of the profession. The existing Law Library is one of the buildings referred to in this report, as provided by the benchers out of the funds at their disposal. Anything more miserably inadequate for the uses of the profession could hardly be imagined, more especially in the particular of accommodation for the purpose of conference between barristers and solicitors. The passage which is now dignified by the title of an ante-room, is grossly insufficient, and at a busy hour of the day during term the lobby and staircase are crowded with groups, discussing law points under most unfavourable circumstances. It is admitted by this report that the accommodation afforded to solicitors is inadequate. The legal profession should be satisfied in the first instance whether there are or are not any public funds calculated to supply these wants. If not, they may then proceed to the task of themselves supplying them.”

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The Bill of Sir Colman O’Loghlen and Mr. Maguire, to repeal an Act passed in the Parliament of Ireland in 1541, requiring the attendance at one of the Inns of Court in England, as a necessary qualification for admission to the Irish Bar, recites the quaint, and in some passages obscure, language of the 33 Hen. VIII. Sess. 2, c. 3, s. 3 (Ir.), and then goes on to declare:—It is expedient to repeal the above provision so as not to render attendance at an English Inn of Court compulsory on a student for the Irish Bar, or a necessary qualification for his admission thereto. Be it enacted by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:—The provision of the Act passed in the Parliament of Ireland in the 33rd year of the reign of King Henry VIII., above recited is, and the same is hereby repealed; and after the passing of this Act it shall not be necessary to qualify a person to be admitted to the Irish Bar that such person shall have kept terms in England, or be a member of any Inn or Court in England.

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The second annual festival, in aid of the Solicitors’ Benevolent Association of Ireland, was held on the 3rd of February, in the large Dining Hall of the King’s Inn, which presented a very brilliant appearance on the occasion. The Right Hon. the Lord Chief Justice of Ireland presided, and was supported by five other judges

of the Superior Courts, besides the Lord Mayor, a large number of Queen's Counsel, members of the Bar, and solicitors and guests. Mr. Justice Barry, who on rising was received with warm and prolonged applause, proposed—"The Attorneys and Solicitors of Ireland." He said, that while regretting that the duty of proposing this toast had not fallen on some abler person, he would still venture to say that no one to whom the duty might have been assigned could bring to its performance more real sincerity than he did. There were many reasons, personal to himself, why he should perform that duty with heartfelt pleasure; but he put these considerations aside, and, on the broadest grounds, asked the assembly to agree with him when he said that the attorneys and solicitors of Ireland were deserving of the approbation, and justly merited the confidence and respect, of the community. Of course they knew that from very early times down to the days of the Sampson Brasses and the Dodgson and Fogg's Dickens, what Canning called the roguish lawyer, had been the subject of humorous criticism and satirical representation in poems, novels, and on the stage. They knew further that, on the recommendation of a London alderman, the Minister of Finance, in his necessity, imposed upon the attorneys in this country a tax, the most ungenerous and the most unjust that ever was inflicted upon an honourable body of men. Of course, he alluded to the certificate duty; and when he spoke of it as ungenerous and unjust, he did not refer to it merely as a financial burden, although it might press heavily upon the young and struggling practitioner, but rather as a source of humiliation that they alone, of all the learned professions, should be selected for such a tax. He trusted that the members of the profession would not relax their exertions—which he, when he had the opportunity, cordially co-operated in—to rid themselves of the odious burden; but he warned them that they would have a serious difficulty before them—the difficulty of inducing any Chancellor of the Exchequer to part with a tax so easily collected, and against which no popular clamour was raised. But whatever might be the sayings and the writings of wits and humorists, whatever might be the injustice of the legislation to which he had referred, he might say that no candid man whose opinion was of value could hesitate to admit that in intelligence, in integrity, in honour, in manfulness, and in the discharge of the complicated, difficult, and responsible duties which they had intrusted to them, the body of attorneys and solicitors of Ireland could not be surpassed by any body of professional men. On a recent interesting occasion, he thought the majority there present heard a saying repeated by one of their most distinguished men, that in the career of a man's life—at every stage of it, from the cradle to the grave, he was presided over by an attorney, and the saying, originated perhaps in jest, summarizes in a few words the important position which the profession of attorneys filled in this country. The attorney had to conduct cases of importance to the State; he had to defend the accused man who was charged at the risk of his life and liberty; he had to conduct the case of the poor man, asserting a right or a claim, or resisting the aggression of the rich; he had to defend the rich from the poor, and he, as the Lord Mayor remarked, was the general

depository of family secrets—important trusts which were never betrayed. They spoke of the honour of the Bench and of the Bar, but he believed it would as likely enter the head of a litigant to attempt to bribe either of those as the solicitor who watched over his opponent's interests. The profession had recently seceded from the society which held its meetings within that hall. He did not for one moment censure the attorneys for having done so ; far from it. But while he did not censure, he deeply regretted. He wished that an arrangement had been made which would still have kept all branches in the legal profession under a joint management, and, as it were, under the same roof. However, that was past and gone. A change had taken place, and he gladly owned that the experiment had been successful. The attorneys of Ireland, acting through their incorporated society, had introduced a system of legal education which would ensure the proficiency of future members of the body, and would consort with that vocation which the young men had before them.

Mr. W. Lane Joynt, Crown and Treasury Solicitor, responded to the toast, and said :—We have, as a profession, much to be thankful for. It is not long since one of the masters of English wit and of English eloquence—one whose voice, my Lord Chief Justice, was often heard with delight in that house where the echoes of your own are not yet forgotten—embodied the public idea of our profession in the well-known lines :—

“ Did some rich man tyrannically use you—  
The parson of the parish—or the attorney ! ”

That picture has vanished like a dissolving view, and we stand on a higher and a better platform, and the attorney of to-day is as different socially and mentally from the original of fifty years ago. The right hon. gentleman who has proposed the toast expressed the regret he felt at our leaving the parental care of the Benchers. I, for one, say, and I say it on the part of the profession, we share no such regret. The Act of 1866 was the Act of Emancipation. It is the charter of our liberties. It opened a fairer, greater, more educated, and a more useful course in professional life to us, and above all, will do so to our children. It was, in fact, the fresh start on the journey to that promised land of self-reliance and independence. And if we pursue that course manfully—if we train up our young men carefully, and with a due regard to learning and to the study and practice of the law, that will be the real way to place all the members of the two branches of the legal profession on a fair level, and the result will be that the public—the noblest, most generous, fairest of all patrons—will only reward that division of labour and that merit which conduces to its own interest and the common weal. While, however, I say this, I am grateful to the right hon. gentleman for his kind and generous language towards our profession. It is difficult to estimate the advances of our profession for the past quarter of a century. I shall not condescend to use the language of exaggeration, but I ask any man in this room to recollect what our profession was five-and-twenty years ago. It was open then to many of the idle, the ignorant, the

stupid. Now the case is different. We insist that the solicitors and attorneys of Ireland shall have the education of gentlemen, and have a better title to that distinction than given by Act of Parliament. And while that goes on unceasingly—and that it will go on unceasingly I have no doubt—we will more surely break down the barriers that divide the two branches of the profession than by any other process whatever. The claims of any profession cannot rest on its own selfish interests. The arrangements which surround and protect it must be for the common good of society, and I, for one, ask no privileges which do not rest on that broad foundation. And in the future we have greater hope. Already one who is destined to a great name in the legal history of the country has taken up the cause of improved education in England. Sir Roundell Palmer is a household word there with lawyers, with politicians, and with all who value the highest professional attainments, and the purest and most blameless life. Why should we not assist him? His proposals are valuable to the people of these countries, and calculated to promote the study and knowledge of law. The profession which gave the elegant pen of Roscoe and the faultless lyrics of Procter to the world is not an ignoble or an ignorant profession. The profession which matured the genius of Scott and sharpened the pen of Dickens, will yet produce, under fair and fuller development, minds that will adorn its ranks and serve the country. They will strive, not to deepen or widen the trades unionism of a profession, but to extend the knowledge of the history and the laws of our country; to inspire respect for their justice and impartiality—respect for the rights of property—for a stable Government—respect for regulated freedom, and devotion to that constitution and monarchy under which we live and enjoy so many unexampled blessings.

The Lord Chief Justice gave—"The Solicitors' Benevolent Association, and may prosperity attend it." Having referred to the pleasant evening which they had spent, he wished to follow up some remarks made concerning the body of attorneys. Whatever might have been said by novelist or satirist, history recorded that they had contributed even to the Bench some of the most eminent men that ever sat there, and they could hold up their heads with pride when they thought of Sir Walter Scott and of Benjamin Disraeli. He recollected to have read in the Life of Scott that he recorded of himself the great advantages derived in his subsequent career by having been articled to an attorney. When in that position he met strange characters, and he noted them all. He was despatched into the country to take instructions, and he met with the fine old heroes, or, as some said, the fine old rebels of 1745, having actually held converse with the terrible old Highlander who had fought a broadside duel with Rob Roy. All the characters he met with were reproduced in his writings, and there too was to be found the description of how Lawyer Pleydell passed his leisure hours—a sketch the correctness of which they could all appreciate. Their profession have produced men of eminence and men of worth, and in their prosperity they did not forget the duty of benevolence. He had to report to them that their excellent society was in a



prosperous condition. They had a large fund at their bankers, which was highly creditable. He learned that the association started with the surplus of a fund raised for a memorial to the late Richard Meade, one of the most eminent men of their profession. They could not possibly have selected a better channel. Their association relieves with delicacy and secresy those who might confide their misfortunes to the ears of gentlemen, who would hear them with kindness and compassion, and find them relief in a way that could not hurt their feelings. That was a duty philanthropic and becoming of them as Christians, and he should add that the objects of their bounty were either the widows and orphans of deceased friends and brother professional men, or those who had been struck down through ill health or some misfortune not occasioned by misconduct. Regarding what had been said on the subject of a higher and a better class education for the members of their profession, he would be allowed to say that nothing was more deserving of their attention. Such, if carried out, would not only elevate the profession more and more, but would create for its members a source of happiness and self-respect.

#### SCOTLAND.

THE Court of Session adjourned for the spring vacation on Wednesday, the 20th of March.

The circuit arrangements are as follows:—South—The Lord Justice Clerk and Lord Jerviswoode. Ayr, April 2; Dumfries, April 5; and Jedburgh, April 9. North—Lords Cowan and Neaves. Perth, April 19; Dundee, April 23; Aberdeen, April 26; Ayr, May 1. West—Lords Deas and Ardmillan. Stirling, April 10; Inverary, April 17; and Glasgow, April 22. There is no rule against crossing circuits at the Scotch Bar, and as a rule it is expected that the more important circuit towns should be so visited as not to clash. There has been some slight dissatisfaction expressed at the present arrangements, because the important towns of Glasgow, Dundee, and Aberdeen are all to be so visited within the same week, to the inconvenience of several counsel. We understand that the calendars are generally heavier than usual. The "Home" trials are at present proceeding in Edinburgh, before the Lord President, and the other judges who are not to go circuit.

Mr. Robert Kerr, Advocate, has been appointed to a District Judgeship in Jamaica, at a salary of 800*l*. Mr. Kerr is of seven years' standing at the Scotch Bar, and from what we know of his learning and judgment we have no hesitation in saying that the appointment is an excellent one.

Mr. Clark, Sheriff-Substitute at Glasgow, is, we are glad to learn, so far recovered from his recent illness, as to be able to resume the discharge of his laborious duties. Mr. Clark is

the author of an excellent work on the "Law of Partnership," and a judge in every way well suited for the Sheriff Court; but we fear that the impure atmosphere and heavy labours of the Glasgow Sheriff Court are in his case a combination dangerous to his health.

A novel and important question was recently raised before the High Court of Justiciary. Mr. M., a gentleman of position and influence, and possessed of considerable landed property in a Highland county, was, about nineteen years ago, confined in an asylum as insane. The evidence of insanity was the usual medical certificate, "in soul and conscience." Mr. M. was detained in the asylum for a very considerable period, but ultimately was liberated as convalescent; but he, believing himself to have been always quite sane, raised an action against Dr. B., the granter of one of the medical certificates, for damages in respect of his certificate being false, &c. The case was tried several years ago by the Lord President and a jury, and resulted in a verdict for the defender. Mr. M. was however not satisfied; the wrongs that he had suffered still remained fresh in his memory. Accordingly, he began to turn his attention to the study of criminal law, with the view of prosecuting the doctor for conspiracy. He lodged "*information*" with the Lord Advocate, requesting that a public prosecution should take place, in name of his Lordship, but the Lord Advocate, *on consideration*, declined to prosecute. Thereupon he was asked to concur with Mr. M. in a private prosecution, but this also he declined to do. Mr. M., however, was not to be baulked, and he accordingly presented to the Justiciary Court a Bill, charging the doctor with conspiracy; and himself appeared to argue the question that the Court should order the doctor to compeer and answer to the charge. The Court requested him to obtain the consent of the Lord-Advocate; but on being informed that this had been refused, ordered the case to be argued by counsel. At the hearing, the Solicitor-General appeared, and argued that no prosecution of a criminal nature could take place in Scotland, except in the name of the Lord-Advocate, or with his consent, and that he could give or refuse that consent at his pleasure, being responsible only in his place in Parliament. Practically, it came to this, that no criminal prosecution could take place in Scotland except at the Lord-Advocate's pleasure. The history of the Scotch law on this point seems to be, that prior to the Statute 1587, c. 76, the Lord-Advocate could *not* prosecute for any crimes but such as were committed against the State—speaking generally—treason, and the like. Till that time, our law following the Roman law, allowed every citizen to prosecute for any offence that he considered detrimental to the public interest. Since

the passing of that statute, the private complainer cannot prosecute without qualifying a substantial and peculiar interest in the issue of the trial; and the Lord-Advocate may prosecute any crime *ad vindictiam publicane*. Does it, therefore, follow that where the private complainer has a substantial and peculiar interest, he cannot prosecute for that interest unless the Lord-Advocate concurs with him? and further, is it law that the concurrence, if absolutely necessary, may be given or withheld at the pleasure of a great public officer, who is responsible only to Parliament? That is the question that has been before the court, but has not yet been decided. We, of course, in the present position of the question, give no opinion.

The Annual Dinner of the Scottish Law Society took place on Saturday, 23rd March; Lord Giffard in the chair. There was a large attendance of members of the Junior Bar.

The Scottish Law Amendment Society has at last been able to get a quorum to approve of Mr. Dodson's resolutions on private legislation.

The classes in the Faculty of Law in the University of Edinburgh were closed for the session, on Friday, the 22nd of March.

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## BOOK NOTICES.

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

Parish Registers. A Plea for their Preservation. By T. P. Taswell Langmeid, B.C.L., Oxon, &c. London: Samuel Palmer Strand, W.C. 1872.

IN this very interesting pamphlet Mr. Taswell Langmeid demonstrates that the old parish registers of England are national records of the greatest importance to every one, poor as well as rich; that their present condition is disgraceful, their custody being the reverse of *safe* custody, and conducing directly to their slow, but sure decay; also, that under the present system, the administration of justice is often impeded, the perpetration of fraud encouraged, and the facility of making searches minimized and clogged. And having regard to these facts, the author hopes that some measure calculated to remedy these so urgent evils may shortly receive the attention of the Legislature. The author must be gratified to know that on the 19th ult. Lord Romilly, with a view precisely to this remedy, moved for a return from the rector, vicar, curate, officiating minister, or incumbent in the charge of each parish, chapelry, or ecclesiastical district in England and Wales, of all registers, records, books, documents, or other instruments relating to baptisms, marriages, and burials, in his possession on December 31, 1871, stating their nature, the dates from which and to which they extend, their state and condition, and how and where they were preserved. Also a return from each of the same persons to December 31, 1871, whether the parchment copies of baptisms, marriages, or burials, required by the Act 52 Geo. III, c. 146, have been annually sent to the diocesan registrars, the number of times when such copies have not been sent, and the reasons for not sending them. This motion, which was agreed to, will, we imagine, lead to the result at which the pamphlet points; and certainly it is high time that the parochial registers were in safer custody, both for preservation, and for integrity, than they are at present.

Draft Outlines of an International Code. By David Dudley Field. New York: Baker, Voorhis & Co. 1872.

MR. FIELD, it may be remembered, at the Manchester meeting of the Social Science Association, in September, 1866, proposed the appointment of a committee to prepare and report to the Association, the "Outlines of an International Code," and that upon his propo-

sition a committee, comprising Mr. Field, was appointed for that purpose. The object of the committee was to subsequently frame from the draft outlines a complete code for presentation to the various Governments of the world, in the hope of its acceptance and confirmation by them. The members of the committee were taken from jurists of various nations; and the distance of their mutual and respective habitats, prevented alike the facility as the frequency of the meetings for revision which were intended. Mr. Field, from a regard to this inconvenience, and with a view to obviating it, has presented in the volume, which is entitled above, a draft of the whole body of international law, as well in its public as in its private aspects, in the hope that each of his colleagues may similarly present their views, and that from a comparison of all of them singly and together, the requisite excellence both of accuracy and of completeness may be attained.

Mr. Field's scheme being of a tentative character, is to be criticised accordingly. Its great merit, however, would almost enable it to bear the most unsparing criticism; for alike in its statement of the old and admitted rules of law, as in its suggestion of those new principles of a greater international comity which the humaner civilization of the present epoch recommends and justifies, it is both accurate and exhaustive, both humanely just and intelligently moderate. The work is also beautifully got up in point of internal and external style, with but three *errata* in 450 large octavo pages of ordinary and minute characters intermixed. The work alike induces and will repay perusal. Possibly in our next edition we may select some portion of the work for a more particular treatment than the lateness of its arrival permits us to bestow on it at present.

**Monumenta Juridica.** The Black Book of the Admiralty, with an Appendix. Edited by Sir Travers Twiss, Q.C., D.C.L., Her Majesty's Advocate-General. Vol. I. London: Longmans. Published by authority of the Lords Commissioners of the Treasury. 1872.

THE public owes a debt of gratitude to the learned civilian, who, irrespective of the multifarious duties with which his avocation burdens him, has found the necessary time, and undergone the necessary labour to enable him to restore the text of the "Black Book of the Admiralty," which has long been missing from the archives of the Admiralty Registry.

This ancient book contains laws and ordinances, the Earliest of which go back as far as the reign of Henry I., and it was at one time of as great authority in the Admiralty Court as the Black and Red Books were in the Court of the Exchequer.

It is probable that no part of the present compilation is more ancient than the reign of Edward III., and that the two first parts of the book, as the editor conjectures, were compiled in the 12th year of that king's reign.

The five first parts of the book are strictly concerned with maritime matters, and, amongst other documents, a very early version of the Laws of Oberon will be found. The editor in the introduc-

tion to the work has entered upon a very interesting investigation as to the origin of these so-called laws, which are otherwise termed Judgments of the Sea. Further matters of Admiralty follow, but the three last parts of the work are connected with the duties of the High Constable Earl Marshal, rather than of the Lord High Admiral. An explanation of this circumstance is suggested in the introduction.

The Appendix is not without interest, as several documents connected with the French Admiralty will be found there; one being the Ordinance of Philippe de Valois, for the invasion in England, in 1338; another being the Ordinance of Charles V., the text of which, with the correct date of 1373, is for the first time published by the learned civilian from a unique MS. in the British Museum.

The text of the work is carefully illustrated by notes, and in the introduction will be found a very complete historical survey of the contents of the work, and an account of the various MSS. which have been collected by the editor.

Discussion on Colonial Questions; being a Report of the Proceedings of a Conference, held at Westminster Palace Hotel, on July 19, 20, and 21, 1871. London: Strahan & Co. 1872.

THE topics treated of in this volume are altogether too numerous and important to be discussed as they deserve in a short book notice. They include the relations between England and the colonies; the question of land transfer (which really has little or nothing to do with the questions properly before the meeting, and seems to have been introduced merely with a view to give Mr. R. R. Torrens an opportunity of giving an account of the South Australian method); imperial and colonial federalism; emigration; coloured labour in British colonies; the waste land question in the colonies; and what we, in opposition to Mr. Abraham, should call its *unsatisfactory* settlement in 1855; the colonies as food stores for Great Britain; and the constitution and administration of the Colonial Office. The introductory address delivered by Mr. Jenkins, the author of "Ginx's Baby," is well worthy of attention, and is indeed the most noteworthy paper in the book. Mr. Jenkins is inclined to think that the condition of the British Empire is that of "a barrel without the hoops." On the whole, the most valuable facts are those which come out in the discussion. As a specimen of happy repartee, we may instance the following:—Mr. Strangways, late Attorney-General of South Australia, said that colonists did not want the scum of London gutters. Whereupon Dr. Guthrie retorted, "the scum of society! What was that? The piece of cream-laid paper he now held in his hand was once scum, and in its raw state came, perhaps, from one of the most filthy dens of wretchedness. But the rags had been sent to the paper manufacturer, and the paper was now clean and pure, and fit for any lady to handle and to write upon."

Mr. McCullagh Torrens, M.P., made one statement which, if true, ought at once to call for the attention of Parliament. Many of our readers are aware that there exists in England an Emigration Com-

mission. By their last report they had cost for the year 9700*l.* Out of this vote—for the purpose of emigration, note—9200*l.* went to the Commissioners for rent of offices, salaries, &c., leaving only 500*l.* to be spent on emigration.

We had marked many other passages for quotation and comment, but on reaching Mr. Chesson's valuable paper—valuable, because he speaks from knowledge—on coloured labour in British colonies, we feel compelled to desist, and simply to recommend our readers to turn to the little volume for themselves. It will amply repay its cost and perusal.

Lord Brougham's Letters to Mr. Forsyth. London : Bradbury Evans & Co., Whitefriars. 1872.

These Letters form an interesting little *brochure*, beautifully got up as to binding and printing, and containing some interesting facts about Brougham. Mr. Forsyth has had several of these letters (none of which have been previously published), lithographed ; and those who are ignorant of how badly it is possible for a lord to write, will gain some new ideas from this source. One of the letters, dated 17th May, 1866, deals with a subject alluded to in our last number. Mr. Forsyth was elected M.P. for Cambridge, but a Committee of the House of Commons declared the election void, on the ground of his holding the office of standing counsel for the Secretary of State in Council for India. Brougham writes (p. 131) "I am quite clear that a declaratory Act should be passed to set this gross error right, and I do hope and trust that it will be done. The absurd decision of the committee is the only thing against it."

And again (p. 125), "But although you cannot for a moment enter the House until it is disposed (because you by voting at any moment when a question is put incur the penalty), I really cannot see how it comes within the Act. I am quite aware of the King's Counsel, and that a patent of precedence is given to avoid it. But that is because the only retainer is from the Crown direct, and it is a salary from the Crown. But I cannot see that in your case it is but a retainer from the Secretary of India."

Most of the letters are interesting, on account of the free expression of opinion on men and questions of the day, *e. g.*, on Berryer, on Thiers, and on Louis Napoleon. Incidentally we learn Brougham's view on his own oratory : "Argumentative declaration was always my forte." We, at any rate, are glad to find that Brougham's predictions as to America were falsified, and we can only conclude that Brougham, the law-reformer, the fearless hater of slavery and advocate of freedom, had passed into his dotage when he uttered them.

Parliamentary Papers. London : P. S. King, Parliament Street. 1872.

*Albert Life*.—Bill for the Appointment of Commissioners for Inquiring into the Causes of Failure of the Albert and European Life Assurance Companies, and the Companies which have merged into such Companies. *Bankruptcy*.—Bill for the Amendment of the

*Law of Bankruptcy in Ireland. Court of Chancery.*—Correspondence respecting the subject matter of the Court of Chancery Funds Bill; Statement of the Balances of the Suitors' Stock and Cash in the Court of Chancery on October 1, 1871. *Debtors.*—Bill for the Abolition of Imprisonment for Debt in Ireland, and for the Punishment of Fraudulent Debtors, and for other purposes relating thereto. *Evidence.*—Bill to Amend the Law of Evidence. *Foreshores.*—Return relative to the Rights and Interests of the Crown in the Shores and Bed of the Sea. *Grand Jury Presentments.*—Bill to Amend the Law relating to the Presentment of Public Money by Grand Juries in Ireland. *Game Laws.*—Return of the number of Convictions under the Game Laws in England and Wales during 1871. *Ireland et al. v. Livingston.*—Opinion of the Judges on the Questions of Law propounded to them. *Judicial Statistics (Scotland).*—Third Report for 1870. *Justices of the Peace.*—Bill to Amend the Qualification required by Persons acting as Justices of the Peace. *Law Officers of the Crown.*—Minute on the subject of Remuneration of future. *Land Transfer.*—Bill to Amend the Law relating to Land Rights and Conveyancing, and to Facilitate the Transfer of Land in Scotland. *King's Inns, Dublin.*—Report of Commissioners in respect to Sums received in the Admission of Attorneys and Solicitors as "Deposits for Chambers," and other matters. *Municipal Corporations.*—Bill to Amend the Law relating to Municipal Corporations in Ireland; Bill to Amend the Law relating to the Disposition of Fines, Fees, and Penalties in certain Corporate Boroughs and other Places. *New Trials.*—Bill to Amend the Practice as to New Trials in Criminal Cases. *Private Bills.*—Return, showing the Number of Private Bills deposited at the Private Bill Office from 1867 to 1871.

## APPOINTMENTS.

THE honour of Knighthood has been conferred on William Robert Grove, Esq., one of the Judges of the Court of Common Pleas; George Jessel, Esq., Solicitor-General; and Oliver Nugent, Esq., President of the Legislative Council of Antigua. Mr. H. T. J. Macnamara has been appointed County Court Judge of Marylebone; Mr. H. J. Roby, a Member of the Schools' Commission; Mr. George Goodall Dainty, Registrar of the County Court of Rugby; Mr. T. H. Slann, Registrar of the Attleborough County Court; Mr. Charles Mills, Solicitor, Clerk to the Magistrates of Huddersfield; Mr. Henry Dixon, Solicitor, Clerk to the Magistrates of Sunderland; Mr. William Reade, Clerk and Registrar to the newly constituted Burial Board at Bournemouth.

**IRELAND.**—During the absence of the Lord Chancellor from Ireland, the Lords Commissioners having the custody of the Great Seal are:—The Right Hon. the Master of the Rolls, the Right Hon. Mr. Justice Fitzgerald, and Mr. Jeremiah Murphy, M.C.; Mr. John FitzHenry Townsend, LL.D., Judge of the High Court of



Admiralty in Ireland, has been appointed a Commissioner of Charitable Donations and Bequests.

**SCOTLAND.**—Mr. John F. M'Lennan, M.A., Advocate, has been appointed Standing Counsel for drawing and revising Scotch Bills; Mr. Joshua M'Lennan, Solicitor, Inverness, Procurator-Fiscal at Portree, for the Skye district of Inverness-shire; Mr. Ewing, the Commissary Clerk, Sheriff-Clerkship of Clackmannan.

**CANADA.**—The following appointments have been made by the Government of Ontario:—The Hon. Edward Blake to be President of the Executive Council; the Hon. Adam Crooks to be Attorney-General; the Hon. Alexander McKenzie to be Secretary and Registrar; the Hon. Archibald McKellar to be Commissioner of Agriculture and Public Works; the Hon. Peter Gow to be Secretary and Registrar; the Hon. Alexander McKenzie to be Treasurer; the Hon. Richard William Scott to be Commissioner of Crown Lands.

**JAMAICA.**—Mr. Robert Kerr, Advocate, has been appointed a District Judge.

## OBITUARY.

### *January.*

21st. HANBURY, Lionel Henry, Esq., Barrister-at-Law.

22nd. BUCKLE, J. C. Watson, Esq., Solicitor, aged 52.

### *February.*

7th. BANNERMAN, Charles, Esq., Barrister-at-Law, aged 43.

13th. HUGHES, William, Esq., Solicitor, aged 68.

19th. ABBS, Cooper, Esq., Solicitor, aged 70.

25th. LAWSON, George, Esq., District Judge of Ceylon, aged 50.

25th. PAYNE, Mr. Serjeant, Judge of the Middlesex Sessions, aged 72.

25th. BOOTH, S. Lister, Esq., Solicitor, aged 72.

28th. NETHERSOLE, Henry, Esq., Solicitor, aged 70.

### *March.*

1st. CLARK, Alfred, Esq., Solicitor, aged 46.

3rd. APLIN, William, Esq., Solicitor, aged 80.

12th. TIMES, Charles, Esq., Solicitor, aged 57.

14th. ROBINSON, J. Septimus, Esq., Solicitor, aged 59.

14th. BRAY, Richard, Esq., Solicitor, aged 74.

15th. McTAGGART, F. Ellis, Esq., County Court Judge, aged 49.

15th. FREELAND, John, Esq., Solicitor, aged 42.

15th. LUDLOW, Henry, Esq., Solicitor, aged 53.

THE  
LAW MAGAZINE AND REVIEW.

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NO. IV.—MAY 1, 1872.

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I.—MALICIOUS WOUNDING.

AT the end of last Hilary Term all the available judges on the Common Law Bench were appointed to sit in the Exchequer as the Court of Criminal Appeal. The question reserved for a sitting of such unusual dignity involved the consideration of legal malice, upon which much of the law both of tort and crime depends. The Lord Chief Justice of England, the Lord Chief Baron, and thirteen puisne judges took their seats on the Bench, and when, upon the conclusion of the arguments in behalf of the prisoner, the whole of the judges rose and left the Court to consider their judgment, an interesting and important discussion was expected by the Bar, who filled the back benches to overflowing. But—

*Parturiunt montes, nascetur ridiculus mus.*

The Lord Chief Justice, on the reassembling of the Court, merely stated that in the opinion of a majority of the judges there was evidence of malice in the case, and the conviction must be affirmed.

It naturally excites some surprise that a court of the calibre of the full Court for the Consideration of Crown Cases Reserved should deliver a judgment as bare of reasons as a decision on *locus standi* by the Court of Referees. The more just observation, however, on the matter would be that the Court was over-weighted by numbers. No doubt it was well that all the judges should take part in settling a question likely to occur over and over again to each of them at the trial of criminal cases. But among fifteen persons there must be on a fundamental point an infinite variety of opinion, which cannot be

expected to crystallize into a much less number of judgments. Yet, how was it possible for the whole fifteen to deliver their judgments seriatim? Under the circumstances the course taken by Lord Chief Justice Cockburn was probably the only practicable course. At the same time, if the question had been raised before a distinct Court of Criminal Appeal, consisting of, say, three judges, ranking above the Common Law Bench, we should have not only had it determined whether the man Ward ought to go to prison, but we should have had, by way of judgment, an interesting and important contribution to the elucidation of rather an obscure subject.

Upon one point the judges were unanimous. The prisoner was indicted for felony by wilfully and maliciously shooting with intent to do grievous bodily harm, but he was convicted of a misdemeanour under the power given by the fifth section of 14 & 15 Vict. c. 19. That section enacts that upon such an indictment the jury may acquit of felony, but convict of unlawful wounding, "as upon an indictment for the misdemeanour of wounding." It was then, as now, an ingredient in the misdemeanour that the wounding should be malicious. On account of the expression "the jury may find guilty of unlawful wounding," it is not uncommon to hear the alternative offence treated as if malice had nothing to do with it. When, however, the whole section is read, it will be clearly seen, as all the judges held, that it does not create a new misdemeanour of unlawful wounding, but refers to the already existing misdemeanour of unlawful and malicious wounding. Whether the decision arrived at by the Court has not the effect of annihilating the word "malicious" is another matter, it being enough for us at present to bear in mind that in theory, at all events, the offence is a malicious wounding.

What, in the next place, is a malicious wounding? Upon this point twelve judges were for the conviction and three in favour of the prisoner, but there is no means of discovering who were the judicial Platos in whose company we are content to be wrong; for, in our opinion, the view of the minority has the more reasonable grounds to recommend it.

In the case before the Court (*Reg. v. Ward*, 41 L.J., M.C., 69), the prosecutor and the prisoner were both on a river for the purpose of shooting wild fowl. The prosecutor was lying on the bottom of the boat with his arms over the sides in order to work the paddles. He was preparing to return home, and made his boat slew round with that object, when he suddenly received a shot in his arm and face, which admissibly proceeded from the prisoner. The prisoner was jealous of persons shooting over that particular piece of water, and had threatened to shoot at birds, notwithstanding some one might be in the way. From the case, as stated with great clearness by Lord

Chief Justice Cockburn, it is evident the prisoner meant to frighten his rival, and that the shot would not have taken effect but for the sudden slewing round of the boat. The jury were told if they thought that this was the fact they were to convict of unlawful and malicious wounding, which conviction was upheld by the majority of the Court.

The point on which the judgment of the Court depended is mainly a bare question of construction. Considerations of general law will only be material to the inquiry, if it appear that there is an ambiguity in the words used, in which case it must be presumed that the Legislature intended that construction which is conformable to the rules of jurisprudence and reason. If there is no ambiguity, the second inquiry may still be useful as a justification of, or reflection on, the law as conveyed by the obvious construction. In our view, the obvious meaning of the words and the reason of the thing concur.

As a preliminary to the consideration of the terms of the statute, in which the offence of malicious wounding now finds expression, it will be necessary to refer briefly to a topic, not otherwise uninteresting—the history of the law on the subject.

The offence of wounding best known to the Common Law was that of mayhem, an injury to any one of the members useful to a man in fighting, which is supposed to have carried with it the penalties of felony. That the definition of the members protected by the warlike policy of our ancestors was liberally construed, is shown by its including the foreteeth; but the punishment for mayhem, which is said to have been anciently an eye for an eye, a tooth for a tooth, was never inflicted for injuries which were supposed only to disfigure a man. Disfigurements were, we suppose, always punishable as assaults, but it was many centuries before the law entirely abandoned the barbarous distinction between the useful and the ornamental in the human person, and began to treat with exceptional rigour a class of offences which, according to modern notions, are of the most aggravated kind.

The first innovation would indicate an extraordinary atrocity in the times. A Statute was passed in the reign of Henry IV. to put a stop to the practice of robbing a man and afterwards cutting out his tongue, or putting out his eyes, to prevent his giving evidence against the robber. The offence, if committed of malice prepense, is declared to be felony. The ear was next protected, though very insufficiently it would seem, by 37 Hen. VIII. c. 6, which enacted that whosoever should maliciously and unlawfully cut off the ear of any of the king's subjects, should forfeit treble damages to his victim, and 10*l.* to the king.

The more extended alteration in the law which took place

in Charles II.'s reign was brought about by an extraordinary political incident. Sir John Coventry had, by a speech in Parliament, made himself obnoxious to the king. He was soon after assaulted in an atrocious manner, and his nose slit. It was notorious that the crime was committed by men in the pay of the court, and to appease the indignation aroused by the outrage a Bill was introduced, which, when it passed into law, was named Coventry's Act. By that Act (22 & 23 Car. II. c. 1) any person who of malice aforethought, and by lying in wait, should disable another with intent to maim or disfigure him was declared guilty of felony without benefit of clergy.

The distinction between maiming and disfiguring being at length abandoned, it was by 9 Geo. I. c. 22 made felony wilfully and maliciously to shoot at any person. Upon the construction of this enactment a case is reported which, though not referred to in *Reg. v. Ward*, bears much more closely on the question at issue than any of the few cases cited during the argument. In *Gastineaux's case* (Leach, 323), it was held that a wounding to be malicious must be such as, if death had ensued, the crime would have been murder, and that a shooting under such provocation, as will reduce murder to manslaughter, was not within the statute. More reliance might be placed on the case as an authority, if it did not decide too much. The crime created by the statute bears no great analogy to murder, because though the Act requires malice as an ingredient, it says nothing of premeditation, or the "malice aforethought," which is a necessary co-efficient of murder. Still the case is most material to the present inquiry, as showing the importance attached in the construction of the older Acts to the word "maliciously," a tendency being exhibited exactly the opposite of the desire to refine away its meaning shown in the construction of the modern statute. There are many cases to be found in the reports, which though they would not now be considered authorities, are of great importance when we come to consider the legal usage of the word "malicious." For instance, upon the construction of the Black Act it has been held (*Shepherd's case*, Leach, 436) that a "malicious wounding of cattle" means a wounding with malice towards the owner.

The next step in the history of the law of malicious wounding is Lord Ellenborough's Act (43 Geo. III. c. 58), which contains in so many words the construction put on the previous statute by *Gastineaux's case*. Wounding with intent to do grievous bodily harm is made felony, provided that the Act would have been murder if death had ensued. A misdemeanour, not unlike the offence under consideration, was for the first time created by 10 Geo. IV. c. 34, s. 29. A

malicious wounding inflicting grievous bodily harm was made punishable by imprisonment and whipping. Lastly, the 14 & 15 Vict. c. 19, s. 4, created the misdemeanour of malicious wounding almost in the same words as the statute now in force.

It will thus be seen that from the days of mayhem, which according to the old authorities was a malicious act, down to the present time malice has always been an ingredient in the offence of wounding. The word appears also to have always had its fullest meaning attributed to it by the law. We must now look more closely at the words of the law as they now stand, which must be considered not as declaratory of the common law, but as creating a new offence.

The 24 & 25 Vict. c. 100, s. 20, provides that "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm on any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour." It seems clear that according to the ordinary rules of language, "to wound maliciously," whatever it may mean besides, means in the first instance to wound with the intention of wounding. If "maliciously" is made to refer to an intentional frightening or other act, the result of which is to wound, the adverb is separated from its verb in a manner which contravenes the first rules of grammar. "To walk quickly" does not mean to walk swinging the arms quickly. "To write easily" does not mean to sit in an easy-chair and write. Neither does "to wound maliciously" mean to wound while maliciously frightening.

Having once made sure of the plain meaning, the Courts ought to enforce it, unless some overpowering consideration stands in the way, for it is a misfortune in itself that the law should not speak plainly. In this instance, it will be said that the plain meaning is not the legal meaning; that is to say, the Legislature used the words in a technical sense. Before, however, it can be presumed that the words of the statute have a technical meaning, a constant and invariable practice of the law so to employ them ought to be shown.

It is clearly not enough to show that the word malice has in law, when taken independently, a sense rather different from ordinary. The legal definition of malice is a wrongful act done intentionally. The word, in ordinary language, generally refers to a particular person, and as it has no such reference in law, it is sometimes said to bear a technical meaning. The real fact is that there is a change of application rather than of meaning. Ordinary language deals with individuals, while the language of the law is concerned with every one in the mass. But the technical meaning to be shown in this instance is no mere use of a word in a peculiar sense,

it is a use at variance with grammatical construction, which strictly ought to be proved not only by reference to the use of the particular word malice and its derivatives, but by showing a general disregard of grammar by the law in its use of adverbs. At all events, it must be shown distinctly that the law is in the habit of describing a certain act as done maliciously when committed with the intention of doing a perfectly distinct act.

We have already seen that, so far as this particular statutory offence is concerned, the law has hitherto inclined towards giving to the word malicious a meaning rather more favourable to the accused than, according to modern notions, it will bear. Among other offences, we believe, there is only one instance of any use which approaches a use of this kind. In an indictment for murder it is alleged that the prisoner "of malice aforethought did kill and murder," but the intention need not go so far as a desire to kill—an intention to do grievous bodily harm being sufficient to support the allegation. But assuming the adverbial phrase "of malice aforethought" to have as close a connection with its verb as an adverb, the precedent does not seem by any means to go far enough. A man has wounded another, and death has resulted. The question is whether the deceased was killed of malice aforethought. The legal presumption arising from the fact of death is in favour of the intent to kill. It is, in nine cases out of ten, impossible for the homicide to show in such a way as to destroy the effect of the presumption against him that he meant to wound, and ended by killing. Can he say that he intended to use only a half-inch of the knife and the blade went in up to the haft? Or, take a more doubtful case. Suppose he threw a stone in anger. He may have intended to give only momentary pain, but he may also have intended to kill, as it is possible to kill by a blow from a stone. It is, therefore, a question for the jury whether the act was not a malicious killing. Lastly, take the case where it is clear he did not mean to kill, but to frighten. Here there is no mere difference in degree, but a difference in kind. It could not seriously be contended that a man who walks in the churchyard in a dark night, dressed in a white sheet, and kills some one with fright, is guilty of murder. There would, in such a case, be no evidence to go to the jury of a malicious killing. Yet to allow a conviction on facts like these would be as reasonable as the conviction for malicious wounding in *Reg. v. Ward*.

It would seem from the interlocutory remarks which fell from some of the learned judges, that the fact of the shot being fired, for whatever purpose, and the probability of the boat, in which the prosecutor was, slewing round in the way which actually happened, were evidence to go to the jury of malice. In that view the case would resolve itself into one of

extreme carelessness amounting to intention. If a man shoots with a pistol at a mark on a paling half an inch thick, which is the only obstacle between him and the highroad where people are constantly passing, and kills some one on the other side of the paling, he will, if he knows the power of his weapon, and the thickness of the board, be guilty of intentional homicide. If a wound were the result instead of death, he would also be guilty of malicious wounding. But the question in such a case would be left to the jury in an entirely different way from the way pursued by the Lord Chief Justice, according to the case before the Court. If the question had been presented as an instance of criminal carelessness amounting to intention, would the jury have found the verdict they did? That is to say, would they have come to the conclusion that if the prosecutor had been killed by the shot, the prisoner would have been guilty of murder, and not manslaughter? Whether there was sufficient evidence of criminal carelessness amounting to intention to go to the jury seems very doubtful, but as the facts were never presented in that light, it was not competent to the Court to found its judgment on that ground.

Whether the construction of the statute for which we contend is a reasonable one remains to be considered. The distinction which our construction assumes the Legislature to make is constantly to be met with in English criminal law. It, in fact, frequently distinguishes crimes according to the extent to which the intention goes. There are distinct crimes of wounding with intent to murder, with intent to maim, and with intent to do grievous bodily harm. Is it not, therefore, reasonable to suppose that the law should draw a distinction between wounding with intent to wound, and wounding with a less dangerous intention? Distinctions in crimes are chiefly useful to allow of distinctions in punishments. The severity of punishment is proportioned to the danger threatened to society. The man who shoots at another, and means to hit him, is surely doing an act more dangerous to society, and deserving a greater punishment, than the man who means to frighten another and by accident hits him.

If the English law were a scientific system, we should have offences against the person divided according to the gravity of the result, with cross-divisions according to the intention of the doer. Murder and manslaughter, where death is the result, would have their corresponding crimes where wounding only is the result. In accordance with the general principles of English law, the man Ward clearly deserved punishment. If he had killed instead of wounding the prosecutor, he would have been guilty of manslaughter, having caused death in doing an unlawful act, that is, frightening



his rival. Whatever had been the result of the case so solemnly heard in the Court of Exchequer, it would have an equally severe comment on the grossly defective state of the English law as a formal system. If the prisoner had escaped, it would not have been for want of his act being substantially recognised by the law as a criminal offence, but from a disregard in the form of the law of the grouping of ideas which occurs to every orderly mind. The prisoner has been punished at the cost of construing a criminal enactment in a way utterly at variance with the rules of language as ordinarily understood, than which there could not be a severer comment on any legal system.

## II.—REMINISCENCES AND OBSERVATIONS OF A LAW CLERK.

“**W**HO are lawyers? — Servants of God, appointed revealers of the oracles of God, who read off to us, from day to day, what is the eternal commandment of God in reference to the mutual claims of his creatures in this world.

“Where do they find that written?—‘In Coke upon Littleton.’

“Who made Coke?—Unknown: the maker of Coke’s wig is discoverable.

“What became of Coke?—Died. And then?—Went to the undertaker, went to the ——. But we must pull up.”

Such is the teaching of Sauerteig, in his “Schwein sche Weltansicht,” or pig philosophy, as interpreted by Thomas Carlyle. To the mind of the inquirer, however, Sauerteig’s conception of the law is, to say the least, uninviting. But it presents that element of profundity, which in German speculations, whether it be in the form of transcendental philosophy, or pig philosophy, one is sure to encounter. To me, however, who at the age of sixteen years had neither read Sauerteig nor the expositor of his abstruse philosophy, the study of law presented itself wrapped up in mystery even still more dark and perplexing. Coke upon Littleton was then as unknown as the Mishna and Gemara of the Hebrews. But the die had been cast, and I was soon to be initiated into the secrets of the law.

Well do I remember the day when, for the first time, I found myself bound down to the service of Mr. D., an attorney, with a wide connection and considerable practice. To describe him with any degree of precision would be difficult. So much, however, may be said, that he was not of that well-known

species whose whole existence is said to be tanned by long maceration, public exposure, tugging and manipulation, to the toughness of Yorkshire leather; and to whose tanned soul, God's universe has become a jangling logic cock-pit. Not at all. Mr. D. was a portly, comfortable-looking man, with much benevolence and kindness in his nature; not quite gone to horsehair and officiality, but one in whom the beaver faculty was strong, and capable of enormous development. This was discernible on the slightest acquaintance with him; and it was therefore with some feeling of disappointment that I first encountered this minor *avatar* of the law. For with me, as with many a young enthusiast, a profound veneration for learning alone had at this time rendered almost impossible any thought of making choice of my profession merely for what appeared to me a sordid motive, namely, its pecuniary rewards. A new mine had been struck; I had entered upon a wide field of interesting study, and this alone was a source of much pleasure to me. Gladly, therefore, and yet with a trembling hand, I signed the document which bound me to a clerkship of toil and labour which I had voluntarily accepted. It was a capital event in my young life, and calculated to impress me profoundly. Entered thus upon a new sphere, every circumstance, however trivial, seemed invested with a peculiar interest and novelty. 'On the walls of a well-arranged office were revealed to me, for the first time, the grave portraits of some of England's venerated lawyers—incarnations as they seemed of learning—casting upon me, an ignorant stripling, calm glances of piteous contempt, such only as eminent lawyers are capable of. But whilst I looked upon the shelves groaning under the weight of ancient tomes and quaint folios, I felt a secret joy, such as one might experience in finding some hidden treasure. Here, at least, was a wealth of books which Dick Tottel himself might have envied. It is evident that at this time I was incapable of sympathy with the learned *pundits* of the law, who discover in this very wealth of books a grave misfortune. A law library of the present day is said to be a calamity, to be met only by a wise system of codification. To Dick Tottel, however, codification would have proved a serious disaster, whilst to myself the law must have appeared stripped of half its dignity and grandeur. Scandalous (we may suppose Dick Tottel to have said to the impudent codifier), scandalous it is to say that the laws of this august realm ought to be reduced to the ridiculous compass of one volume octavo! Has not the search after truth in the field of literature and science produced its teeming millions of books, and has not their increase been admitted by the best authorities to be the only indication of light and progress? The one remarkable phenomenon which accompanied the dark-

ness of the middle ages was a wretched pauperism in this matter of books. But with the light came an increase, and with the printer's art, a flood has burst forth, which must flow, "as my lord the bishop pleasantly expresses it, *in secula seculorum*." The age which produces nothing of its own, but digests and codifies the stock of the past, and collects it in huge reservoirs in the shape of encyclopædias, I have been taught to regard as lapsing into decrepitude and intellectual old age. Is the reverse of this to be regarded true of the history of law? It is, therefore, assuredly paradoxical to say, that when books in this department of learning began to increase, precisely then it was that the darkness became denser. Know all men, therefore, that I, Dick Tottel, of the "signe of the Hande and Starre," refuse to believe that with the influx of books came, *pari passu*, an influx of Gothic darkness and confusion, as some of you impudent codifiers would seem to think. Though jurists may shake their wise heads at what they may call, "the machinations of the printer," I protest, once for all, against the heretical doctrine, that by the help of books alone we have attained to that state of utter barbarism from which, it is said, it is scarcely possible to emerge.

Whether this plea for the present condition of law literature is open to a logical demurrer, I presume not to decide. Meanwhile, the student of two centuries ago can scarcely be said to have had advantages which could be weighed against those of the present day. In books he was a wretched beggar. Less than fifty volumes were then sufficient to answer the necessities of the most bookish lawyer; but now a law library, as Campbell reports, is *multorum camelorum onus*. The printer in those days had scarcely any occupation, except in producing a dreary round of dreary statutes, with the never-failing tenures of Littleton. One printer in such a narrow field was sufficient, for when more than one appeared a quarrel was inevitable, such as Pynson and Redman indulged in, over the dry bones of legal literature in the early part of the 16th century. To the printer and myself, therefore, the *multorum camelorum onus* was rather a matter for thanksgiving than for discontent. It came upon me, however, as wealth suddenly discovered. Though having from a very early age spent much time in the company of books, I was still unaware of this deep mine that lies within the reach of all minds, and yet may be said to be as hidden and secret as the mysteries of Eleusis. Was then all this mighty sum of mental effort unknown, except to the brotherhood of the law? What might they not contain, those dusty volumes, grim relics of antiquity! How was it that such a vast accumulation of learning—exquisite logic it may be, strains of impassioned eloquence,

and curiosities of ancient times, all bound up in calf and vellum—how was it that all this should be sealed up and hidden from the multitude, and even from the eye of many an earnest student?

Unconsciously was I thus reiterating in these ignorant questionings a complaint well founded, regarding the utter seclusion of legal study, the effects of which upon the science itself are scarcely yet ascertained. "It has been the habit of our writers," says Phillimore, "to consider law not as it ought to be considered, as a province of a vast continent, locked in on every side by contiguous territories, but as an island,

'Placed far amid the melancholy main,'

cut off from all communications with other districts, as a sort of Japan in the geography of the mind, where, as among the ancient Romans, the words stranger and enemy are synonymous, all access to which is prohibited, and of which the coasts are guarded by an inexorable exclusion." Not only, however, is the subject itself thus narrowed to the limits of a merely professional art, but (what is a more important fact) by the side of sciences which are ever diffusing themselves among all classes of minds, the law as an intellectual pursuit exhibits an increasing tendency to be alienated from all but a practical profession. The complaint of Sir William Hamilton, that in no country except our own has jurisprudence been cultivated less liberally as a general science, more exclusively as a special practice, is as old as the days of Wolsey. Milton and Edmund Burke reiterated the complaint; and the writers of the present day are even now shedding the most bitter sarcasms upon the shallow state of legal learning. Many have been the plans for the improvement of the study. If, however, it be true that the extensive diffusion of learning is a requisite of its intensive cultivation, no plan which aims at exacting a higher standard of legal knowledge, merely within the narrow circle of minds wedded to the practice of the law, can ultimately serve to stimulate its intensive cultivation. Though the necessity is obvious, therefore, of presenting jurisprudence as a general science, acceptable to all minds earnest enough to undertake any study for its own sake, there are difficulties which at the present day inevitably present themselves in any practical scheme for the improvement of the study. Not the least of these is the absence of institutional books, which Professor Bernard has recently accounted for by the fact, that hitherto we have had no elementary teaching of law, and therefore no demand for such books.\*. The cause mean-

\* Notes on the Academical Study of Law.

while probably lies deeper. How comes it that we have hitherto had no such teaching? It may be, that the elementary principles here spoken of have not yet been reached, at least in that systematic unity which alone could impart to its teaching a scientific character. In other words, it has not been taught, because it has been, and perhaps still is, in the clouds. It must not be supposed in an investigation of this subject, that because the principles spoken of *are elementary*, for that reason they must lie at the surface. First principles, says another professor (viz., the late Professor Ferrier), have their influence, and indeed operate largely and powerfully long before they come to the surface of human thought, and are articulately expounded. Such is the case in the science of language where it is very late in the day before its seminal principles are detected and explained. It is so also with jurisprudence, logic, and, indeed, every science whose elementary principles are inevitably found early in the order of practice, but late in the order of theory. The fact, therefore, that we have hitherto had no scientific teaching of elementary principles is not attributable to the mere accidental neglect of the legal pedagogue. The result of recent investigations too plainly indicates how unprepared we are to teach on this subject at all. "The whole elementary study of jurisprudence," remarks Mr. Phillips, "has been thoroughly perverted and disorganized;" and until we have investigated these principles, and given them a proper logical arrangement, we are unable to communicate them in their essential scientific character.

A library we had, as I have already said, but what was I to read? Here was my first difficulty. Left free to make my own choice—a privilege enjoyed by many a fellow clerk—I commenced a search as interesting and perhaps as laborious as any that was undertaken among the crypts and hieroglyphics of Nineveh or Babylon. Bewildered, and yet persevering, I wandered from volume to volume, coming face to face with corporeal and incorporeal hereditaments, ancient orders holding lands by grand and petit serjeanty; encountering curious learning on turnpike-roads and sewers, window lights and fishery, till buried among the abstruse records of Vesey junr., I alighted on the speeches of Lord Erskine. These I read more than once, lingering over the fiery eloquence, and yet rigorous logic, which characterize the exertations of this most consummate of advocates. I venture to say, however, that no student of law has ever commenced (or ought to commence) his course of study with the speeches of any man, Cicero, Demosthenes, or Erskine, at the head of his curriculum. In this I had rebelled against the whole school of legal pedagogues, ancient and modern. The fault,

reader, was not mine. It is surprising, indeed, that I read at all; for what with serving notices, and copying huge indentures, scarcely any time was left me to acquire sound knowledge, beyond the spelling of such orthographical monsters as *Messuages* and *Hereditaments*.

It was not long, however, before I devoted my attention to the pages of Blackstone. In those days the Commentaries were still the Koran of the lawyer, and the veneration for them was at its height. "Coke upon Littleton" had lost much of its charm and influence; and though the eulogies of writers here and there still attracted the student to its quaint scholastic learning, "Blackstone's Commentaries" always offered to him a safe refuge from its immethodical and perplexing wisdom.

At this period several difficulties presented themselves to me. Am I qualified to enter, with advantage, upon so important a study? This was the question which of all others haunted me, and threatened, even thus at the outset, to arrest all further progress. "If the student in our laws," says Blackstone, in a well-known passage, "hath formed both his sentiments and style by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy by the clear, simple rules of unsophisticated logic; if he can fix his attention and steadily pursue truth through any the most intricate deduction by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims, reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it (though all may easily be done under as able instructors as ever graced any seats of learning), a student thus qualified may enter upon the study of law with incredible advantage and reputation." Was I thus qualified? Though all may easily be done, as Blackstone expresses it, I was conscious that I had not done it, or even any part of it to any degree of proficiency. So numerous are the traditional errors which surround this subject, that the perplexity of the student is almost inevitable. At a time when the profession of the law imposed on the so-called student little or no obligation to fathom the depths of the science, or even to gain a superficial knowledge, no preparation was thought necessary for a task, which in fact was no task at all. A revolution, however, soon succeeded, and a liberal education, such as Blackstone justly demanded, was recommended to the student at the threshold of his pursuit. The reaction, however, served to create an

exaggeration upon this subject, which has exerted considerable influence, and is still likely to embarrass the student.

What, then, is a necessary preparation for the study of law? This question has been variously answered by several writers whose opinions have widely operated. In the view of some, the law is treated with a total disregard to its capacity as an intellectual discipline, and hence a wide field is chosen apart—a gymnasium is provided—where the student is supposed beforehand to prepare himself for his task. The principle upon which this suggestion has proceeded has been thoroughly exaggerated in practice. A preparation was thought necessary wide enough to entitle the student to the credentials of a polyhistor; or he was supposed to possess, at least, the smartness of Juvenal's scholar, who at a moment's notice could tell you all about—

“Nutricem Anchisæ nomen patriamque novercæ  
Anchemoli; dicet quot Acestes vexerit annos  
Quot siculus Phrygibus vini donaverit urnas.”

This was really a serious matter for the young aspirant, and for his sake it becomes necessary to inquire into the grounds upon which so heavy a tax was imposed on him. Finch had urged the connection of law chiefly with the arts of logic, grammar, and other dry speculative systems, and had even discovered that “the sparks of all the sciences in the world were raked up in the ashes of the law.” Such a discovery was disastrous to the tyro. The necessity for a knowledge of law henceforth became tantamount to a necessity for an acquaintance with all the sciences in the world. To have known the law, therefore, was to have known everything, and to have known everything meant nothing more than a knowledge of law. This is perhaps, startling, to the simple reader. Eunomus, adopting the doctrines of this learned Finch, went so far as to argue (and that with considerable gravity and force) that a knowledge of cookery was absolutely necessary for an intelligent appreciation of “Coke upon Littleton.” Being one of the most ancient of sciences, we might well expect its sparks to be raked up in the ashes of the law. But how was this science a necessity? For the benefit of the reader who may not be learned, it becomes necessary to explain that “the sage Littleton deduceth the very name and nature of bringing estates into hotchpotch from a pudding, because (saith he) in a pudding is not commonly put one thing alone, but one thing and other things together.” The curriculum of the student, however, included various other accomplishments besides cookery. A judicious training of the voice and the graces of manner were not to be neglected. Added to this was

physical education, an exercise of the muscles, &c. Such a preparation, followed by a course of instruction like that recommended by M. Camus to the French advocate, might have produced to us a race of legal Centaurs hitherto unknown to history. But these views were destined to create a reaction; and the opinions of Mr. Austin, therefore, at the present day may be taken as a protest against the extravagance of writers who preceded him. "I am sorry it is so," says Austin, "for nothing would give me greater pleasure than extensive knowledge, especially of the strict sciences. But (speaking generally) he who would know anything well, must resolve to be ignorant of many things."

In what sense was I a student? The question is one which at the present moment applies to many clerks who are bound by covenant to the study of law. To most of these, the study at a very early stage presents a well-marked division; on the one hand, consisting of all that is involved in the idea of theoretical knowledge, and on the other hand, of all that is comprised in practical skill.

The requirements of the profession demand a close and almost exclusive devotion to an intricate system of procedure, with its innumerable forms and rules, its dry routine and petty details, and, in fact, to every movement of that complicated machinery by which the administration of the law is carried out. Here, also, the necessity is found pressing for an acquaintance with so much of substantive law as will enable the practitioner to be a safe guide in the common and every-day emergencies which arise in the course of business. Such a course of education and employment the student early learns (or rather he is taught) to regard as a routine, illiberal as the trade of a shopkeeper or the drudgery of a mechanic. He is here, not a student, but a trade-apprentice. Every writer who addresses him presents his acquirements to him in this repulsive aspect. On the other hand, the temptations are strong to stray away from this ignoble field of practical knowledge to the higher and more abstrusive branch of legal science—to the study of general principles, and what is termed the philosophy of law. But such a study, if there be leisure enough to pursue it, creates a distaste for those very acquirements which, being indispensable to professional skill, are therefore to the student an absolute necessity. If indulged in, it is even apt, in accordance with a prevalent opinion, absolutely to incapacitate the mind for practice. Probably, no situation to the young presents a dilemma so perplexing. To combine and bring together this twofold element of law, the theoretical and the practical has been the aim and purpose of most writers, who, like Savigny, recognise this distinction as belonging to the



general nature of law itself. But what is meant by theory as applied to law? Mr. Austin raises a distinction between "theory of what is, and theory of what ought to be;" but the term is so vaguely applied that it forms at the present day one of the many obscure terms which must be thoroughly analysed before any scheme for the improvement of the study can be intelligibly propounded. Meanwhile, the cultivation of law in this twofold aspect, the theoretical and the practical, the scientific and the empirical, is distinctly marked in the history of the study, but nowhere sufficiently accounted for. Cujacius, the great master of Roman law, is said to have rejected all forensic experience with scorn, stating he had misspent his youth in such studies. Savigny, who rates Bartolus much below the older lawyers, gives him credit for original thoughts to which his acquaintance with the practical exercise of justice gave rise. The older jurists were chiefly professors of legal science rather than conversant with forensic causes; and this has produced an opposition between theory and practice in the Roman law, to which we have not much analogous in our own, but the remains of which are said to be still discernible in the continental jurisprudence. The necessity, therefore, of practical knowledge in the face of allurements to a higher region, and the more abstruse branch of the science, where a philosophic spirit may be cultivated and encouraged, accounts in some measure for the abandonment of the profession, and even of the study itself, by those who approach it, not merely as a necessary preparation for the exercise of a profession, but for its own sake as an intellectual pursuit.

That the study is dry and barren is an antiquated complaint of the student. For more than a century his cries had been heard, but it was his fate never to be understood. Lawyers, metaphysicians, and men of letters, applied their skill to a diagnosis of the complaint, but the result was not satisfactory, for up to the present day this "error," as it has been called, of the student stands so imperfectly investigated, that no two writers can be found who agree in accounting for its prevalence, or in suggesting a remedy. Indeed, some writers of the school of Raithby refused to investigate the complaint at all, and were content to believe the student suffering under a delusion. He was a lunatic, or perhaps a hypochondriac. "I feel it," says the patient, whom we might suppose in an agony of suffering, caused by some unseen disorder, and we may imagine his despair when his physician does not understand him, or understanding, refuses to believe him. "Nonsense!" says the grave doctor; "you, my good sir, are dreadfully mistaken; and since it would be unkind to keep back the truth from you, I must inform you that your

case is simply "one of common hypochondriasis." Precisely in such a predicament was the student to whom the law proved a painful study. "Melancholy and untrue," says Raithby, "is the picture which they draw of the legal study who represent its prominent features to be those of subtlety and impudence, and of a labour dry and barren." Considering that the student was at all times a hypochondriac, it is not in the least surprising to find his pictures both melancholy and untrue. But while the pedagogue represented as untrue, what to the student was consciously but too true, the cause of this universal complaint remained unknown, and a problem of considerable interest left unsolved. Dugald Stewart in some measure justifies the complaint, and attributes the prevalent aversion to this study to the circumstance that it presents at the outset a chaos of facts, apparently without any principle of cohesion or arrangement. Various, however, are the speculations as to the cause of this complaint. "I firmly believe," says Phillips, "that the intolerable aridity usually attributed to legal study is entirely due to the infatuation with which the student usually persists in exploring the details of his science, before he comprehends its outlines." But Mr. Phillips has, on the other hand, himself shown that the peculiar difficulties in the study arise out of "the perverse ingenuity with which its principles have been disarranged," and that the "complete reconstruction of the whole elementary part of the science is an absolute necessity." Meanwhile, it may be asked, what is the true meaning of this complaint? The nature of the science is undoubtedly such, that in a condition of the highest systematic arrangement which we may suppose attainable, its study must yet demand an exclusive devotion, and an intense mental application. The influence of this study, therefore, upon the mental capacities—the memory and attention more especially—must always prove powerful and decisive, and its irksomeness will depend more or less upon the object with which it is undertaken, whether merely as a means towards the exercise of a profession, or for its own sake as an intellectual pursuit.

H. R. F.

### III.—MARTIAL LAW. PART I.

By W. F. FINLASON, Author of "A Treatise on Martial Law," "Commentary on Martial Law," "Report of the *Queen v. Eyre*," "The Law as to the Repression of Riot and Rebellion," &c.

THE subject of martial law, which occasioned some excitement a few years ago, has once more acquired interest, on account of its recent exercise in India; and it may be well to review the results of the discussions—legal, judicial, and controversial—which it then underwent. But for the influences of passion and prejudice, aroused either by indignation at apparent excesses, or by party feeling and partizan animosity, the subject would be plain and simple enough. Martial law is one of those phrases which explain themselves and afford their own interpretation. It would be as rational to profess to doubt the meaning of the phrase "martial weapons" as of "martial law." The one plainly and necessarily means the weapons of war; the other, the laws or rules of war or warfare. But as there is in war no possibility of law—in the sense of anything fixed or settled—it is manifest that the *lex martialis*, or the law of war, can only mean the discretionary exercise of military authority. So it has always been understood either by our Legislature, our courts of law, or our writers upon constitutional law or legal history. And as rebellion has always been deemed by our law war against the Crown, of course martial law was always used and acknowledged in case of any rebellion which required it. In ancient times, when in consequence of constant insurrections, dynastic struggles and intestine strife, the normal state of the nation might almost be deemed to have been rebellion, martial law was a kind of institution, and was exercised on all such occasions in every reign of our history, and as against all who were supposed to be in any way implicated in rebellion, actual or contemplated.\* It was exercised either as against the army or the enemy, and in those times, when there was no standing army, and when men were soldiers only in time of war or rebellion, in either sense it was "martial law." Actual rebellion being considered as a state of war, and in those times, in the absence of a standing army, always dangerous, martial law was always exercised, and is acknowledged by all our constitutional writers of the 16th century as applicable in such

\* Hume's Hist., Vol. III., note II., pp. 200, 300.

cases as the law of war. It is so mentioned by Bacon, by Sir Thomas Smith, and by Sir Walter Raleigh. But at that time, when the country was becoming more settled, it was still used, in the absence of a standing army and an efficient police, for suppression of domestic disturbances which did not really amount to war, and under the Tudors and Stuarts commissions of martial law were constantly issued for that purpose. The Petition of Rights declared such commissions illegal, and enacted that they should no more be issued. Hence, as Lord Hale says, "It abolished martial law in time of peace," and martial law ceased to be any part of our law and constitution. For the law and constitution are framed for what is contemplated and foreseen, and invasion, war, and rebellion are not contemplated, and are in their nature extraordinary emergencies, entirely out of the pale of the constitution. Upon the very same principle it followed that martial law was still allowed, or "indulged," as Lord Hale says, in time of war, either as regards the army or the enemy; and he laid down, as all our law writers have done, that rebellion is war. The very nature of martial law, as defined in the Petition of Rights, was "such power of summary execution as is used by armies in time of war;" and the framers of the Petition themselves acted on the doctrine that rebellion is war, and exercised martial law in time of rebellion, and for a long time, indeed, they governed England by it. •

It is to be observed that it necessarily followed from Lord Hale's own description of martial law, as something "rather indulged or allowed" by the common law than as law, that it was something entirely different from the common law in its offences and its penalties, and therefore in its proof. For, of course, the proof of one kind of offence must differ from another, and one which requires, as most capital offences, at common law did, especially treason, proof of the criminal intent, would be quite different from one which made the act itself penal, and required no particular intent. Hence, Lord Hale speaks of acts as capital offences against the laws of war, which were minor offences, at least not capital, by the common law; but for which parties would be liable to sentence of death by martial law.\* And it is to be borne in mind that he distinctly declares martial law to be applicable *either* to the army *or the enemy*:—†

"Though the charge was treason, and possibly the proof might come up to it, the facts proved did not amount to it, because having no treasonable intent, *though it were offence against the laws of war, and the party subject to sentence of death by martial law.*"‡

\* Pleas of Crown, Vol. I., p. 166.

† *Ibid.*

‡ Pleas of Crown, Vol. I., p. 166. State Trials, Vol. I., 743.

Here Lord Hale distinctly declares that a man might be subject to death by martial law for an act for which he might not be liable to death at common law, for want of strict proof of the criminal intent. The necessity for such stringent security arose, as he pointed out, whenever armed men were assembled, even loyal, and under the control of their sovereign, and of course *à multo fortiori* as against the forces of an enemy, either in rebellion or invasion; for which reason he said it was allowable either against the army or the enemy. Accordingly, when, after the Revolution a standing army was established by Parliament, the exercise of martial law, which otherwise would have been illegal in time of peace, was expressly allowed, even as against the soldiers of the Crown, in time of peace. But the Mutiny Acts, as they expressly recite, are only necessary because the exercise of martial law would be illegal within the realm in time of peace, and they apply only to the soldiers of the Crown, restraining, in their favour, and for their protection, the otherwise absolute power of the Crown over armed men, but restraining it *only* as regards the soldiers of the Crown in time of peace and within its dominions. Hence the Mutiny Acts embody, so to speak, the *minimum* of martial law—so much of it as is deemed necessary by Parliament at all times, even in time of peace, and even within the realm, with an overwhelming force in support of the authority of the Crown, and as against its own soldiers, enlisted in its service; and as regards them, under those conditions, the exercise of martial law is limited, regulated, and restrained. But the exercise of martial law as against those *not* within the term of the statutes, as enemies or rebels, was left unregulated and unrestrained; for indeed it was deemed impossible to regulate and restrain the conduct of war. This view has been, ever since the Mutiny Acts first passed, constantly upheld by our courts of law and our legal and constitutional authorities. Thus Lord Holt laid it down that “martial law is not fixed; but is variable, as the general has occasion, according to” (*i.e.* of the same nature as) “the articles of war.”\* Thus, in the middle of the last century, it was laid down in court of law that even as regarded the army, who are within the terms of the Mutiny Act, the Act does not restrain the exercise of martial law in war, or out of the king’s dominions. *Inter bella arma silent leges*, said the court. “The common law has never interfered with the army in time of war,”† and not long afterwards Blackstone, in his Commentaries, following Lord Hale, says that “martial law is entirely arbitrary in its nature, and is in truth no law, but something rather indulged than allowed as a law.”‡

\* 6 Mod., 181. † *Barwise v. Keppell*, 2 Watson. ‡ Com. Vol. I., p. 413.

And writing of the laws of *England*, he said, "The necessity of order and discipline in an army is the only thing which can give it countenance;" that is, as a part of our law and constitution; and then he goes on to show how, for the purpose of keeping the standing army in order, an annual Mutiny Act passes, "To punish *mutiny and desertion*," both offences that can only be committed by the soldiers of the Crown. "This Act," says Blackstone, "established a law martial for their government," *i.e.*, so much of martial law as Parliament considered necessary for the purpose. Thus, the Mutiny Acts only regulate martial law as regards the soldiers of the Crown, and yet, as Blackstone shows, even in the Mutiny Act, which is regular military law as limited and restrained by statute for the protection of the soldiers of the Crown in time of peace, offences are capital which would be mere misdemeanours at common law.

"The Mutiny Act makes provision as to certain specific offences, and fixes the general nature of the punishments to be inflicted, so that if any soldier shall excite to mutiny, or even knowing of it, shall not use his utmost endeavours to suppress it, or shall hold correspondence with rebels, he shall *suffer death*" (2 Com., 681).

So it is laid down in a standard work of military law:—\*

"Offences cognizable under martial law are intelligence with the enemy or rebels, concealing letters or messages from, or relieving an enemy or rebel, mutinous assemblages, and seditious or mutinous words, concealing mutinous designs or not endeavouring to suppress them, or coming to the knowledge of any intended mutiny or rebellion, without giving any notice of it."†

The same doctrine was laid down by one of our courts of law in 1798, where it was distinctly said that martial law, in its proper and original sense, was quite different from regular military law—established by statute for the *army*—and had ceased to be a part of our constitution.‡ In that, its original and proper sense the Court said, "It extended to a great variety of cases *not relating to the discipline of the army*; plots against the sovereign, intelligence to the enemy, and the like, are all considered as within the cognizance of military authority;"§ that is, under martial law in its original and proper sense, as the law of war. Here, therefore, was a clear judicial recognition that martial law, as the law of war, applied to the population generally, and not merely to the army, and was entirely different even from ordinary military

\* 2 Bl. Com., 601.

† Grant & Gould, 2 H. Bl. C., 9.

‡ M'Arthur, 42.

§ *Ibid.*

law. The same doctrine, as to the limited scope of the Mutiny Acts, and their leaving the power and prerogative of the Crown, even as to the army, unrestrained, except so far as its terms go, has always been recognised in our courts, and was recognised in the Court of King's Bench in 1825.\*

It would follow, of course, that even as regards soldiers of the Crown, who are within the Mutiny Act, and are British-born subjects, if they are in a state of mutiny, and *à multo fortiori* as regards persons not soldiers of the Crown, who are in a state of rebellion or war against the Crown, martial law may be exercised without regard to any of the restraints or regulations of the Mutiny Act, subject only to the restraints of reason, justice, and humanity. And, accordingly, this has been so held in an English court of law. It was so laid down in the case of Governor Wall, tried for the murder of an English soldier. In that case it was clearly admitted and laid down that in case of imminent danger arising from rebellion or mutiny, martial law might be exercised even without the regulations or restraints of the Mutiny Act. Mr. Law, then Attorney-General, and soon afterwards Lord Chief Justice, admitted "that if there existed a mutiny which it required the strong arm of power to repress, if it was so dangerous in its immediate or probable consequences as to *supersede the ordinary power of trial for such offences*, then the regulations of the Mutiny Act could be dispensed with *even as to soldiers of the Crown, to which the Act applies*." And the Lord Chief Baron said, in such a case it was sufficient if there was such a court-martial as could be had; and if the man had reasonable notice, and as much attention to his interest as the circumstances of the case would admit of, "then, although the directions of the Articles of War had not been followed,† it would be sufficient as a justification."

All the standard text-books of military law had embodied the same doctrines, that martial law is the absolute exercise of military authority, unrestrained by any of the rules or regulations of ordinary law, civil or military.

So the great text-book of military law, which has been cited in the courts, and used in our army for the greater part of a century ("McArthur on Court-Martial"). "The military law, as exercised by the authority of Parliament, under the Mutiny Act annually passed, with the Articles of War, is not to be confounded with that different branch of the royal prerogative called martial law, which is only to be exercised in time of rebellion" ("McArthur on Court-Martial, 1"). And so it is laid down in "Simmons on Court-Martial," 1-14. "Martial law, an arbitrary law originating in emergencies,

\* *Bradley v. Arthur*, 4 B. & C., 292.    † 28 State Trials, 164.

regulated by the expediency of the occasion, under which all the inhabitants of a place or country are liable to be treated as soldiers, that is, as soldiers in a state of mutiny or rebellion."

"It has ever been deemed constitutional for the sovereign, in times of disorder and turbulence, to use the military power of the Crown for the speedy repression of enormities and the restoring of the public peace. It must be allowed that there are times when the ordinary course of justice is, from its slow and regulated pace, utterly inadequate to the coercion of the most dangerous crimes against the State, when every moment is critical, and without some extraordinary remedy, the commonwealth would be lost. The extension of a power beyond the law," that is, beyond the statute military law as well as beyond the common law, "is therefore, in such times of danger, justified, on the principle of absolute necessity" ("Tytler on Military Law," 52). The same law was laid down by the highest authorities in India. "Martial law," wrote Mr. Serjeant Spankie, a learned lawyer, "is in fact the power of social self-defence, superseding under the pressure, and therefore under the justification, of an extreme necessity the ordinary forms of justice. Courts-martial under martial law, or rather during the suspension of law, are invested with the power of administering prompt and speedy justice, in cases presumed to be clearly and indisputably of the highest species of guilt. The object is self-preservation, by terror; and the example of speedy justice" (Mr. Serjeant Spankie, Advocate-General of Bengal, cited in "Hough's Military Law," 350).

So, lastly, Mr. Hallam, in his great work on constitutional law, described martial law as allowable in rebellion, and "as the *suspension of ordinary law*," which includes ordinary military law as well as ordinary civil law. That eminent writer indeed observes, that in this country, since the Riot Act and the establishment of a standing army, the executive Government have been so strengthened that the necessity for martial law in this country has long ceased. But in Ireland, where the common law of England prevails, it was exercised at the latter end of the last century, and its exercise, though not its abuse, was afterwards approved by Parliament, and is thus spoken of by an historian, who was also an eminent lawyer:—

"Much indignation was expressed at severities exercised by the military, which were not denied, but explained and vindicated. In fact, the country was, by the acts of the disaffected, brought to a state in which the delay and forbearance, by which power can be restrained in ordinary times, would have amounted to a base desertion of duty, and the measures necessary must be rapid, strong, and effectual. Complaints will certainly arise from the exercise of them,



but they must be judged, not upon abstract or general principles, but according to the circumstances by which they are impelled (Adolphus' "History of England," Vol. VII., 50).

Even in our own time—in the very last reign—in a reformed Parliament, the Legislature has solemnly declared in a statute the right of the Crown to exercise martial law in time of rebellion (4 Will. IV. c. 40). And it would be mere quibbling to pretend that the Legislature did not know the ordinary meaning of the phrase, or did not *use* it in that sense.

Thrice during our own times these doctrines have been asserted or allowed by Parliament, and by the most eminent of our legal and constitutional authorities. In the Demerara case in 1824, in the Ceylon case in 1850, and in the Jamaica case in 1866.

In the Demerara case, martial law had been exercised not only against the slaves, but against an English-born subject, on a charge of inciting them to revolt. The case was brought before the House of Commons with surpassing energy and power by Lord Brougham, and that great man admitted the exercise of martial law, even against an Englishman, and admitted his liability under it, even to a capital penalty, for inciting men to rebellion, and he only impugned the justice of its application under the circumstances in the particular case. While, of course, declaring that martial law was no part of our law and constitution, he did not deny that "under the pressure of a great emergency, such as invasion or rebellion, where there is no time for the slow and cumbersome proceedings of the civil law, a proclamation might be issued extending the ordinary tribunals, and directing that such offences should be tried by military courts,"\* and that such a proceeding might be justified by necessity. And he distinctly declared, as something too clear to be disputed, that the proclamation of martial law renders *every man* liable to be treated as a soldier,\* that is, to be treated as soldiers in a state of mutiny or war, when they are liable, as was laid down in Wall's case, to be executed summarily without any formal trial before a regular court-martial. It must not be supposed that Lord Brougham based his admission of this doctrine in the case of Demerara on the ground that the common law did not prevail in the colony. He knew far better than to put it on that unreliable ground, which, indeed, would not have been valid, for he was pleading the case of an *Englishman*, a born English subject, who, as it has always been held, carried with him the broad, substantial rights to the protection of English law, so far as regarded his life, his person, and his liberty. Lord Brougham, there-

\* Lord Brougham's Works, Vol. X., p. 137.

† *Ibid.*

fore, did not rest his admission on the narrow ground that Demerara was a Crown colony, in which the Crown was absolute; on the contrary, he denounced that doctrine, as being as clearly contrary to English law, as it is to reason and humanity. Lord Brougham said—

“If it should be said that in the conquered colonies the law of the foreign state may be allowed to prevail over that of England, I reply that the *Crown has no right to conquer a colony, and then import into its constitution strange and monstrous usages.*”\*

That is, usages contrary to the fundamental principles of justice. This was the true view of the subject. All free British subjects are entitled to the protection of those fundamental principles of justice and humanity. Nevertheless, Lord Brougham admitted, in the strongest terms, that even an English-born subject, a civilian, would, if he had incited the natives to rebellion, be liable to execution under martial law.

“If he was proved to have committed the offence of inciting the slaves to acts of bloodshed; how unspeakably aggravated was his guilt, how justly might all the blood that was shed be laid upon *his* head, and how fitly, if mercy was to prevail, might his deluded instruments be pardoned, and himself alone singled out for vengeance, as the author of their crimes.”†

Lord Brougham knew well that under martial law the mere incitement to rebellion was capital. And all he urged was that the proof of the act of incitement was not sufficient; and he observed that he well knew that if it had been proved that the accused had used words calculated to excite the natives to revolt, that proof would have been sufficient; for, in 1823, just before the Demerara case came on, it was laid down by the Court of King's Bench that a man must be taken to have intended the natural consequence of his words.‡ Mr. Brougham was too good a lawyer to imagine that a man could use words calculated to incite men to revolt and then pretend that he had not meant it, and, therefore, his defence for the accused was, that he had not been proved to have used the words imputed to him. His liability to martial law, if they were proved, was admitted.

Nevertheless, Lord Brougham insisted that the trial was illegal, because the court was not constituted regularly under the Mutiny Act; because the rules of evidence had not been applied; and, above all, because there was not such evidence as in a court of law would have been deemed sufficient; that

\* Lord Brougham's Works, Vol. X., p. 129. † P. 150.

‡ *Rex. v. Harvey*, 2 B & C., 258.

the accused had, in fact, committed the offence. These objections were, obviously, fallacious according to the authorities, and were accordingly answered, not only by the Attorney-General (Copley), but by Tindal and Scarlett; of both of whom, be it observed, Lord Brougham wrote in the highest terms in his "Memoirs;" and they maintained, that though beyond a doubt there was no such evidence as in ordinary courts of law would be sufficient to convict of any capital offence, and though the court was not even constituted under the Mutiny Act, still as it was under martial law, and the offence charged was capital under martial law—though not by common law—and as the members of the court had found it proved, the sentence of death was legal. This view was adopted and affirmed by the House of Commons, and this, although the person accused was a man of English birth, who carried with him the protection of the English law. Such were the views of martial law solemnly maintained by our greatest lawyers and affirmed by the House of Commons, less than fifty years ago, in the time of Tindal and of Brougham.

So in the Ceylon case, the same views, and even views far stronger, of martial law were asserted and affirmed. There, as Sir W. Molesworth said, "a riotous rabble broke into some houses and committed some acts of pillage, *not taking a single life*. They were easily dispersed by a few troops, some scores being killed and hundreds wounded, while not a single soldier was killed and only one was wounded. All was over nearly before martial law was proclaimed, and there was no further disturbance." Yet it was kept up for some weeks, even against the opinion of some of the authorities, and during that time twenty-two persons were tried by courts-martial (in some instances irregularly constituted), and executed. A proclamation was issued that those who even concealed property should, unless they at once delivered it up, be executed. The courts-martial proceeded so carelessly that some men were executed by mistake. And when the Judge Advocate remonstrated with the governor, in one case, that there was no evidence, he exclaimed: "Evidence or no evidence, the man shall be executed." And executed he was.\* Such was the way in which martial law was exercised twenty years ago in Ceylon. It was not merely, be it observed, for acts of murder or outrage, committed in the course of the rebellion, that men were tried and executed, but for acts merely venial at common law, and only constructively brought within martial law at all. The officers were told that men who were guilty of plunder were rebels, and ought to suffer death.† That is, men were tried and executed for mere theft, long after the entire suppression

\* Hansard, v. 102, 1102.

† *Ibid.*, 117, 210, 218.

of the rebellion, and the governor and officers who committed these acts were held by the Government of Lord Russell not even to be censurable. On that occasion it is obvious the apparent excess and irregularity had been so flagrant that it could not possibly be excused except upon the ground that martial law was entirely arbitrary, and was to be executed by those who exercised it according to *their* ideas of the necessity of the case, and with entire legal immunity: provided at all events that they were honest; and this was officially laid down by Sir. D. Dundas, then Judge-Advocate-General, before a Committee of Inquiry, entirely in accordance with all the authorities already cited.

"The effect of the proclamation of martial law is to put *all* the inhabitants generally under martial law, and that is *quite different from ordinary law*, and even from ordinary military law or the Mutiny Act and Statutes of War. It is unwritten law; it arises upon the necessity of the occasion *to be judged of by the executive*. It is unwritten law, it is not law properly so called. There are no rules laid down for martial law; it must be executed by those who have to execute it, firmly and faithfully, with as much humanity as the occasion will allow of according to their sense and conscience. *It is entirely arbitrary.*" Being asked what might not be justified under this head now, he boldly answered *anything*, adding, however, "*I can conceive of cases in which something might be done in which no necessity could possibly justify, as the torture of a child.*"\*

A vote of censure was proposed in the House of Commons, mainly on the ground that the executions were unnecessary and indiscriminating, and, therefore, excessive. That is, that there was no necessity for any further exercise of martial law at all; and that even if there was, its exercise had been so reckless as to constitute culpable excess. In support of this view, Sir F. Thesiger fell into the error of Lord Brougham, in insisting, contrary to the doctrine of Wall's case, that it was necessary that the courts-martial should be regularly constituted, and that the proceedings should be regular, and in accordance with the rules of evidence, as in courts under the Mutiny Act. But this view was obviously fallacious, and the fallacy was pointed out by Mr. Roebuck, who said: "We are met with the Mutiny Act, and told that certain forms are necessary. The Mutiny Act has nothing to do with the matter. We declare that all law shall cease. All law ceases, and we have only to consider whether they constituted the best tribunals which under the circumstances could be formed."†

\* A Report of Committee of Inquiry, 1850. Q. 5448. That is quoted in my book, p 108.

† Hansard, 117.

This was the view of the Judge-Advocate-General, which, as already shown, was entirely in accordance with the doctrines laid down by Hale and Blackstone and our courts of law, especially with the language used by the Lord Chief Baron in Wall's case. The same view was adopted by the most eminent men in the House; the chairman of the East Indian Company, Sir J. Hogg, said—"The Judge-Advocate-General was quite right in saying that martial law was a denial of all law, and could not be the subject of regulation; when martial law was proclaimed the commanding officer must use his discretion."\*

The same views, it may be observed, had been repeatedly put forth by Mr. Serjeant Spankie when Advocate-General of Bengal,† and they had been always acted on in India under our rule. In a debate which took place on the subject in the House of Lords, the same views were maintained. The Duke of Wellington, the greatest authority on the subject, declared that martial law was neither more nor less than the will of the general; in fact, martial law, he said, was no law at all. Earl Grey, an eminent constitutional authority, made a similar declaration, on the authority of Lord Cottenham, then Lord Chancellor, Lord Campbell, and Sir John Jervis, the Attorney. "Martial law," he declared, using the language of Lord Hale and Blackstone, "is no law at all, but merely, for the sake of future safety in circumstances of great emergency, setting aside all law, and acting under the military power."‡ Such was the view of all the most eminent authorities of the time.

It is to be observed that none of these eminent authorities based their opinions on any narrow distinction as to a Crown colony, in which the Crown is absolute. That distinction had been reprobated by Lord Brougham, as it had been disregarded long before by Lord Mansfield; the true doctrine being that Englishmen, as they carry with them everywhere the broad protection of the law of England, were under the broad obligations of reason, justice, and humanity which it lays down. Accordingly, though one member, Mr. Roebuck, took the narrow ground that Ceylon was a Crown colony, and that it was a possession which had been obtained by the sword and which must be retained by the sword; no other person of eminence took this ground, and it was entirely ignored by every one else, especially by Lord J. Russell and Sir A. Cockburn, who based their view of the subject on far broader grounds. Lord J. Russell, in the first place, maintained to the full extent the views of the Judge-Advocate as to the

\* Hansard's Debates, 1851. † See his opinion, "Hough's Military Law."

‡ Hansard's Debates, 1851.

*nature of martial law, and went perhaps too far when he said: "The irregularities in taking evidence, want of proper opportunity of defence, and many other things are inherent in and inseparable from the nature of martial law."\**

This it will be seen went perhaps beyond the law as laid down in Wall's case, at least as applied to the trials complained of, in which there had been such want of care that repeatedly the wrong men were executed, and men were executed in such an utter absence of evidence, that the Judge-Advocate remonstrated, and the governor said, that "*evidence or no evidence, the man shall die.*" It was going too far to declare that such things as these were inherent in and inseparable from the nature of martial law. This was going far beyond what Tindal and Scarlett had maintained in the Demerara case, and what had been laid down by Ellenborough and Macdonald in the case of Wall. And further, as to the question of excess, Lord Russell urged that "it would be mischievous if, by a vote of censure, a governor was led to feel that he must *take care* how he suppressed a rebellion, and that he must be *careful* how he punished offenders." And Sir A. Cockburn, the Attorney-General, following the lead of his chief, went even to this extent, and in the course of an elaborate speech, dealing with the conduct of the Governor, did not blame any single part of it, but defended it all, upon the ground that it was in the honest exercise of martial law. "We are told that," he said, "this rigour was excessive. I admit that it was so, if we look at the amount of punishment with reference to this particular rebellion. *But we do not punish men simply for the offences they have committed, we punish them in order to deter others from following their example. It is all very well,*" he continued, "to talk of a bloody rebellion suppressed without difficulty, but let us remember the *spirit of the people*, their spirit of disaffection, and all the circumstances of the occasion." Both Lord J. Russell and Sir A. Cockburn, in short, maintained that the governor was not to be censured, as he had done his best. "Take care," said Sir A. Cockburn, "that you don't do injustice to a governor who has *done his best.*" This view was adopted by the House of Commons, and affirmed by a large majority. And the same views were afterwards deliberately put forward, again and again, by the Government to which he had belonged, in a carefully considered and official form. A very few years afterwards, their Judge-Advocate-General, then Mr. Headlam, put forth an official letter, in which he wrote:—

"Martial law is, according to the Duke of Wellington, neither more nor less than the will of the general who commands the army.

\* Hansard, v. 117, 239.

In fact, martial law means no law at all; therefore, the general who declares martial law, and commands that it should be carried into execution, is bound to lay down the rules, regulations, and limits, according to which his will is to be carried out. The effect of a proclamation of martial law is notice to the inhabitants that the executive government has taken upon itself the responsibility of suspending the jurisdiction of all ordinary tribunals for the protection of all life, person, and property, has authorised the military authorities to do whatever they think expedient for the public safety." \*

These, therefore, were the views of martial law deliberately maintained and affirmed by the most eminent legal and constitutional authorities, by Lord Campbell and Lord Cottingham; the Duke of Argyll and Earl Granville; by Lord Russell and Lord Grey, by Sir J. Jervis, Sir D. Dundas, Mr. Headlam, and Sir A. Cockburn; lastly, by the Duke of Wellington, the greatest master of military law in the world—that martial law was entirely military, and a discretionary exercise of military power and authority over the inhabitants generally.

Seven years afterwards occurred the Jamaica case, and though on that occasion there was more of excitement and of controversy, yet the same views were originally taken by the Government, and were ultimately, in effect, upheld by judicial authority. In that case there was a very dangerous and bloody rebellion, which commenced with a horrible massacre, was kept up for several days, spread rapidly over a large tract of country amongst a part black population, many of whom, as the commissioners reported, contemplated the extirpation of the white inhabitants. Martial law on that occasion was authorized by a local Act, but the Act did not define it, and left it therefore to be executed according to its established sense and meaning. In that sense and meaning it was accordingly exercised; the district declared was put, by the civil governor, under absolute military authority, and under that authority a large number of persons were put to death by sentences of courts-martial, composed indiscriminately of military and naval officers, and officers of militia, or even laymen, mere volunteers, and sitting only under the orders of the commander, and not according to the regulations of the Mutiny Act. These courts, moreover, inflicted sentences of death upon many persons for acts not capital at common law, nor, perhaps, in some instances, even under ordinary military law, according to the terms of the Mutiny Act; and though, as the commissioners reported, "in the great majority of cases, the trials were fair and proper, and the sentences justified by the find-

\* Report appended to "Report of the Demerara Commission," p. 109.

ings," yet there were some cases in which there had been irregularities even according to ordinary military law; these cases, however, did not equal in number those which were excessive in the Ceylon case, when the *whole* number executed by court-martial were executed unnecessarily and recklessly, so that the whole number was excessive: and thus, although the total number executed in Jamaica was far greater, the real excess was far less. Moreover, the excesses in Jamaica were the natural result of the rather loose and wild ideas which had been asserted by the Government on the last occasion, and affirmed by the House of Commons. All this was in effect disclosed in the first despatch of the governor, and though this was written after martial law had been only executed a few days, it disclosed quite enough to show the sense in which it had been understood, and the *nature* of the martial law which had been declared and executed. And if it was wrong, then was the time to point it out, and warn the governor against its further continuance. In the first despatch of the Secretary of State, however, there was not only no such warning, but there was an expression of approval of his conduct in declaring and executing martial law. Clearly, therefore, the Government had no doubt at all as to the nature of martial law, as something entirely different from ordinary law, civil or military, and as authorizing the execution of persons for offences, and upon evidence, and upon sentences of courts, not legal according to any ordinary law. The governor's despatch drew particular attention to the execution of the person who had caused the rebellion by inciting the negroes to revolt, and, in language almost identical with that of Lord Brougham, vindicated its justice and propriety, disclosing at the same time that he had been tried and executed by a court not constituted under ordinary military law, and for an offence not capital by the common law; and yet in the Secretary of State's first despatch there was no expression of disapproval.

The first and unbiassed impressions of the Government, therefore, were that what had been done was not only excusable and justifiable, but even laudable. The person who had been thus executed, however, happened to have friends in this country connected with a powerful body, and their influence excited an agitation which shook the Government. Even, however, under the influence of this agitation, the Secretary of State, in a special despatch upon the case, by no means indicated any opinion as to its necessary illegality, and only required to be satisfied that the man "had been executed for an offence deserving of death, that his execution was *necessary* for the suppression of the rebellion." These inquiries implied that the execution would not only be legal but laudable, if those



conditions were satisfied, even although the tribunal which tried the man was not constituted according to ordinary military law, and although the offence was not capital by ordinary law. And he at the very same time republished Mr. Headlam's letter which embodied the views of the law laid down in the Ceylon case. The inquiries were such as the Government was undoubtedly entitled to address to its officers for the purpose of ascertaining whether they had exercised martial law with due care and judgment, although even here there was marked departure from the view taken by the Government in the Ceylon case. There was, indeed, a dubious ambiguity in the phrase "deserving of death," which might mean either morally or legally, and either by common law or military law. And the sense in which it was intended by the Secretary of State was clearly erroneous according to the principles of the common law applied to the express provisions of the Mutiny Act, which, as already shown, embodies the *minimum* of martial law. For according to that law he who had incited to rebellion was capitally punishable, and according to the common law he who had used language calculated to incite to rebellion must be taken to have intended it. Yet the Secretary of State intimated that he desired to be satisfied, not only that the man had used language *calculated* to incite to rebellion, but that he had intended the particular outbreak which had taken place, that is, its outbreak on that particular occasion, of which there was no evidence. It is obvious that upon this view the governor would be defenceless; and it is equally obvious that it was an erroneous view. Even during the agitation which was excited on this occasion, it was again and again admitted by the most violent of the agitators, and even by the prosecutors and assailants of the governor, that if there were a great and imminent danger, all that had been done would be justified or excused. Mr. Buxton said, "that if indeed the force of the governor was so small that, had it not been supplemented by measures calculated to strike terror into the disaffected population, the white population would have been in great danger of destruction, *then he could not find fault with almost anything that might be done in such an emergency.*"\* And Mr. Fitzjames Stephen, the counsel for the prosecution, admitted that even in the case of Gordon, against whom, although there could be no doubt that he had incited the negroes to rebellion, there was no sufficient evidence which would satisfy a court of law that he had intended the outbreak on *that particular occasion*, or that he had a treasonable intent, nevertheless admitted that if there had been *imminent danger* he might have been executed.† This

\* Hansard's Debates, 1867.

† Speech at the Police Court. Jamaica papers.

was, in effect, conceding the whole doctrine of martial law, in its most extreme sense, for it admitted that, if it *were necessary*, a man might be executed under martial law, for an offence, and upon evidence, which would not justify an execution at common law; and it reduced the question to one of *necessity*; and though, in order to escape the logical consequence of the concession, it was insisted that a jury must judge of the necessity for the execution—according to *their* opinions of the danger this was obviously contrary to sense and justice, as it would make the officers of the Crown criminally liable for mere errors of judgment. And it was judicially held otherwise.

It was one thing to make this a ground for the exercise of the undoubted right of the Crown to censure the governor; but it would be quite another thing [to make mere difference of opinion the ground of a criminal prosecution, and to convict an officer of murder because, in the opinion of others, he had erred in his judgment. Yet this appeared to be the scope of the threatened prosecution for murder, based upon a legal opinion which was obtained and very extensively published, and produced a great impression. This opinion, indeed, commenced with a proposition which, logically carried out, refuted its conclusion, for it laid down: "Martial law is the assumption by the officers of the Crown of absolute power exercised by military force for the suppression of insurrection and the restoration of order and lawful authority. The officers of the Crown are justified in the exercise of force, and the destruction of life and property to any extent that may be required for the purpose. But they are not justified in inflicting punishment after resistance is suppressed, and after the courts can be re-opened. And courts-martial, by which martial law, in this sense of the word, is administered, are not, properly speaking, courts-martial, or courts at all, but are mere committees formed for the purpose of carrying into execution the extraordinary powers assumed by the Government." That is, that martial law was only the exercise of military power to execute the ordinary law, a view under which, of course, no trials of rebels by court-martial could be legal at all. The proposition, indeed, laid down in the first part of this passage, understanding it in its natural sense, as allowing the officers to use all the measures necessary in *their* judgment, contained all that was involved, according to the authorities, in martial law. But the latter part of the passage, which deprived the courts-martial of all legal authority, referred it virtually to a jury, whether, in *their* opinion, an execution was necessary; so that thus an officer would inflict an execution at the hazard of a conviction for murder, if any jury, excited by popular outcry, should be brought to think the execution unnecessary.

This view<sup>\*</sup> assumed that the common law was in force (which was a fallacy, as it had only been extended to English-born subjects and their descendants), and it also assumed that martial law in no way suspended or affected the common law, so that those who had acted would have to justify all their acts by the rules of the common law, whether as to offences, penalties, or proof. And in this view, which of course left the Government officers defenceless, their assailants proposed to arraign them on a trial for murder, with the professed object of ascertaining the law. That object, however, could not possibly be attained in that way, as, even assuming the view of the law thus put forth, and assuming the execution illegal, still there would be the question of felonious malice, which implies wilful illegality; and this, indeed, they proposed to make out by showing that the execution was in fact an abuse of martial law. The trial of the governor, therefore, on a charge of murder, would not in the least decide the legality or illegality of martial law; nor would his trial on any criminal charge have that effect, and this was eventually laid down by the Court of Queen's Bench, who declared that whether martial law was legal or illegal, the governor would not be criminally liable if he believed it to be legal and exercised it honestly. A criminal prosecution, therefore, could not possibly answer its proposed object of ascertaining the law. On the other hand, the trial of the governor and officers, under the influence of a violent and exciting agitation, would (as the agitators avowed) in all probability result in their execution, and thus would deter others in a similar position from ever again venturing to exercise the power of martial law, so essential to the protection of our fellow subjects abroad in the midst of hostile races, and would therefore have the most mischievous results. For that very reason, such a prosecution was, according to the authorities, improper, and contrary to all legal principle; and, moreover, on that account, it could only be maintained by entire misrepresentations of the law which were therefore put forth, under the apparent influence of a legal opinion published to the world. On the other hand, it was manifest that the wild and loose doctrine which had been upheld by the Government in the Ceylon case, that a governor or military commander was not even censurable for the most reckless and inconsiderate exercise of martial law, had probably led to the excesses which occurred in Jamaica, and was an error equally mischievous. Under these circumstances, it appeared to the writer that the occasion was opportune for the publication of a work on the subject, which should embody on the one hand the views of the nature of martial law which had been uniformly maintained by all our authorities; and on

the other hand, should also embody such just views of the responsibility under which it was to be exercised, as appeared to flow from the general principles of humanity and justice which are recognised by the law as of universal obligation.

On the first head it was impossible that he could go beyond the strong views of the authorities, and he therefore only embodied them, especially the official declarations comparatively recent, of the Judge-Advocates-General of the preceding Government. On the other hand, while maintaining legal immunity for the honest exercise of martial law, he was careful to lay down its responsibilities and restraints. At the very opening of his book he wrote thus :—

“It must not be supposed that because martial law is military power, therefore during martial law there is no control. The Duke of Wellington, when he said that martial law was no law at all, did not mean that it was above all law, but merely that it was not in itself measured by the rules of ordinary law, municipal or military. And when he said that it was the will of the commanding officer, he meant that his will was absolute, not utterly arbitrary. The common law only authorizes, and therefore only protects, such measures as under martial law are taken, and acts done, under military order and authority. The orders given and measures taken are subject to military authority and regulated by the rules of the service” [that is, in a state of war]. “Those who carry out martial law are, as regards the men, liable to summary punishment, and, as regards the officers, liable to the loss of their commissions, if they act without due regard to their orders or the usages of the service, *neither of which would ever warrant any inhumanity*; while, as to the governor he would be liable to censure or dismissal, or removal from the Queen’s service for ever.”

“For any violation of propriety or any departure from the principles of natural justice, there is ample remedy, even assuming it not to involve such illegality as to render the party liable to criminal proceedings. Thus, therefore, the officers are under a threefold control: that of the common law, the military law, and the discretionary power of the Crown.” Again, the author declared his opinion, that “though all acts done during martial law and under military authority would be legal, yet, on the other hand, if the act were not really done under martial law, nor in the repression of the rebellion (that is, with a view to it), although during martial law and under colour of it, but *wantonly and wickedly*, then it would not even be covered by a bill of indemnity, drawn in any form in which such a bill ever has been drawn.”\* It would have been impossible to lay down more clearly

\* Note, p. 417.

or more strongly, that wanton or wilful cruelty would not be covered *even by a bill of indemnity*. Nor was the author satisfied with showing what would constitute legal or criminal liability. Over and over again he pointed out that the measures taken might be *culpable*, though lawful (p. 304); and might justify dismissal and disgrace, though not criminal prosecution. All the measures, he said, might be legal, and yet many of them might be in a great degree censurable or culpable.\* At the same time the writer was careful to point out, that, the scope of the trial being the legality rather than the propriety of the measures taken under martial law, it was not proposed to enter into considerations of propriety further than to point out that it must depend upon necessity.†

(*To be continued.*)

#### IV.—MEMOIR OF MR. JUSTICE SHEE.

**I** HAVE been asked to write a memoir of my father, and having undertaken to do so, I feel that I am bound to put my name to it.

For reasons too manifest to need insisting upon, I have come to this conclusion with infinite reluctance. But how can I hide from myself that I should be doing an unpardonable thing, were I to allow my—necessarily partial—estimate of my father's character and career to pass, under the veil of the anonymous, as the judgment of some writer conceivably unbiased?

There remains, of course, another question—one, however, which concerns those who conduct, and those who read this Magazine, more than it concerns me, namely, whether this memoir ought to be written at all. Upon this I confess I am not entirely free from doubt and misgiving. I am not so blinded by filial piety as not to know that there were puisne judges before Mr. Justice Shee; that puisne judges of equal or superior learning are still to be seen at Westminster in undiminished horse-hair; and that wherever the shadow of an attorney falls upon good ground, the rudimentary germs of puisne judges are springing up like mushrooms in every corner of the Temple.

Nevertheless, the very remarkable kindness which I have met with at all hands in the profession, encourages me to hope that he, for the sake of whose memory that kindness

\* Introduction, p. xxix.

† *Ibid.*, p. xxxv.

has been shown me, may still have some friends at the Bar, who may care to hear about him. And, moreover, it is not impossible that, in the event of these pages finding their way to the other side of St. George's Channel, the life of the first Catholic since the Revolution who has forced his way to the English Bench—in the teeth of prejudices, now happily dead and buried, but formidable while they lived—may possess some interest for readers of his own religion and race.

Having said this, I will now set myself to the task which I have undertaken.

William Shee was born on the 24th of June, 1804, at Finchley, in Middlesex, and was the eldest son of Mr. Joseph Shee, a native of the county Kilkenny, and a merchant in the City of London. He was sent at a very early age to a French school, at Somers Town, kept by the Abbé Carron, a man of some note in his day, but who is now chiefly remembered as the friend, and early counsellor in things spiritual, of the celebrated Lamennais. From this he went, in the year 1818, to Ushaw, near Durham, where his cousin Nicholas (afterwards Cardinal) Wiseman was then a student; and having remained there some years, he afterwards spent a portion of the years 1823-24 in reading and attending lectures at Edinburgh, which was at that time, as I need scarcely tell the reader, a great centre of intellectual life. Being intended for the Bar, and, above all things bent upon becoming a speaker, he here joined the "Speculative Society," a society which holds in Edinburgh the place which the "Historical Society" holds in Dublin, and has been equally fertile in great orators.

Speaking at a dinner given by this society, in the year 1863, to celebrate the commencement of its hundredth session, Serjeant Shee is reported to have said:—

"I much fear that if the records of the Speculative Society were searched, little evidence would be found of anything respecting me, except that I was a good listener. But good listeners at eighteen or nineteen years of age are, perhaps, those who derive the most benefit from such societies; and you who know who my contemporaries in the Speculative Society were, will readily believe my assurance, that the early promise which they gave of the excellence which they afterwards attained, and of their distinction in professional and political life, was among the great incentives which I have had to associate with the studies of a laborious profession, an endeavour—it has been no more—to cultivate that noble art of which it has been well said by one of its greatest masters, that in all free states it has always flourished, and always maintained its supremacy.

"When I joined the Speculative Society, in, I think, the year 1823, we had very distinguished names upon our roll. Not to speak of Henry Brougham or the Scottish members of the Society, there were

on the roll the names of Lansdowne and of Russell,\* who even at that time were famous, who afterwards became illustrious, and whose example was well calculated to kindle in the breasts of young men a noble emulation not to let them get quite out of sight in the race of public usefulness and distinction.

"In that year" (he goes on to say), "the University of Edinburgh claimed as its members a greater number of eminent men than have been assembled, probably, at any seat of learning, whether of ancient or modern times. Omitting the professors of the various branches of medical science, who attracted from all parts of the civilized world students to their classes, the chairs were occupied by Irving, Bell, Hope, Jamieson, Leslie, Wilson, and Wallace. The ornaments of the Bar were Cockburn, Jeffrey, Cranstoun, Hope, and Moncrieff. With the exception of one of the magnificent speeches pronounced by our noble chairman,† at the bar of the House of Lords, in the Queen's trial, and of the last speech uttered in that assembly by Lord Erskine, my notions of forensic eloquence were formed upon the examples of those distinguished Scottish advocates, and I very much doubt if, among the eloquent and able advocates whom I have heard in England, and with whom I have struggled, I have ever found men superior to them."

In the year 1828 he was called to the Bar, at Lincoln's Inn (after having been a pupil of Mr. Chitty, the special pleader), and at once joined the Home Circuit and the Kent Sessions. In the October of this year he made his first appearance in public at a meeting convened at Penenden Heath, near Maidstone, by the High Sheriff of Kent, upon a requisition signed by many Kentish notabilities and members of the Brunswick Club, "for the purpose of petitioning Parliament to adopt such measures as might be best calculated to support the Protestant establishment of the United Kingdom in Church and State"—in other words, for the purpose of protesting against Catholic emancipation.

The Brunswick Club is now chiefly remembered as having called forth Moore's amusing verses, beginning—

*"Private.—Lord Belzebug presents  
To the Brunswick Club his compliments,  
And much regrets to say that he  
Cannot at present their patron be."*

And as for the meeting upon Penenden Heath, it would probably long since have been forgotten but for Richard Lalor Shiel's magnificent speech, one of the finest—in my judgment, the finest—ever spoken by that great orator.

With regard to the speech which William Shee delivered

\* These distinguished men had, of course, left Edinburgh at this time, but their fame still clung about the place.

† Lord Brougham.

upon this occasion, it, of course, abounds with big words, full-blown adjectives, and other juvenile defects. Nevertheless, it possesses one very *unjuvenile* merit. Its arguments are all drawn from the careers of men present at the meeting, or, at least, well known to the audience. Its illustrations have all a local colouring and application. It appeals not to general principles of justice, but to particular instances of hardship. For example, instead of talking about the "dignity of humanity," or the "eternal fitness of things," he describes the early military career, during the American war, of Lord Harris, who had signed the requisition for the meeting, and whose son was present at it: and then goes on thus—

"Now, gentlemen, I put it fairly to you—I beg Mr. Harris to put it to his father—if, when thus distinguished in early life, the fatal blight, the destructive mildew of religious bigotry had crossed his path, blasting his early hopes, and condemning him to wander, unnoticed and unknown, a poor, old, withered subaltern through life, what would be his feelings, what the loss to his country?"

Now, I say, that this was the right way to speak to a local audience, composed of men of all ranks and classes; and I further contend, that it is emphatically not the way in which two young men out of ten would have spoken. For is it not true that a big general proposition is far sweeter to the tongue at twenty-four than a lollypop is at seven, and that when we speak, we think a great deal of showing off, and very little of persuading? Whether this speech, and another which was pronounced the same evening, at a Liberal dinner at Maidstone, and which the *Kent Herald* describes as "an eloquent speech, which made a great impression," had much effect upon the Legislature, is a point upon which we may well be sceptical, but I daresay they may have had a good effect upon the minds of the Maidstone attorneys.

In the following year, 1829, during the debates on the Emancipation Bill, Mr. Shee appears to have taken a step, from which we may argue, either that Ministers of the Crown were in those days more accessible than they are now, or that barristers of one year's standing had more assurance than we now find them to possess. He seems, in connection with the matter before Parliament, to have addressed Peel upon the subject of the education of Catholics; for I find the following answer, written, it is curious to observe, the very day that the Catholic Relief Bill went up to the House of Lords:—

"*Whitehall, March 31, 1829.*

"SIR,—I beg leave to acknowledge the receipt of your letter of the 16th March, containing a very able argument in favour of the policy of admitting the Roman Catholic youths of this country to the advantage of an academical education, in common with Protestants.



"I doubt, however, whether the maintenance of the universities and public schools, precisely on their present footing, is not a part of the measure essential to the satisfaction of the Protestant mind in this country.

"I have the honour to be, sir,

Your obedient servant,

"Wm. Shee, Esq."

(Signed)

"ROBERT PEEL.

When a young man gets called to the Bar, and returning, happy, from his "call-party," takes, before going to bed, a long and loving look at the new wig that has been sent home for him, he usually—I think my professional readers will bear me out—he usually cherishes in his breast two confident expectations: one, that some attorney, who has heard of his fame at the debating society, or who knows that while in Mr. Surrebutter's chambers he was the true author of all that celebrated lawyer's most learned opinions, will be found breathless and excited, at ten o'clock the next morning, at his door, to implore him, "if not already retained on the other side," to take charge of some case of momentous importance; the other, that the "governor" will mark his sense of his son's new dignity by a handsome "tip," and possibly, by an increase of allowance. The first of these hopes is not unfrequently disappointed. The second often is, and, if possible, always ought to be realized. But in Mr. Shee's case, so far from its being realized, it was the very reverse of this that happened. His father, for many years in straitened circumstances, had now become so completely crippled in means as to be unable to help him any longer. He was told that all that could be done for him, had been; he had been educated, and put to the Bar; he must now make his own living. I mention this, in itself of no possible interest, in order that William Shee may have the credit which is due to him—among the highest that a man can have—of having risen, so to speak, from the ground, and lifted himself to an honourable position by his talents, industry, and force of character, without ever having owned, from the day he was called to the Bar until the day he died, an unearned sixpence.

However satisfactory this impecuniosity may be to me to look back upon now, it was scarcely a pleasant thing for him to contemplate at the time. He was compelled to look anxiously about for a means of putting an end to it. Of course, he betook himself to the Press. The Press is to the briefless barrister what the parish is to the labourer out of work, and perhaps, on the principle that a little knowledge is often worse than total ignorance, this may be one way of accounting for the very extraordinary law which we so often find in the papers.

Previously to this, in the year 1824, he had contributed a couple of articles to the *New Monthly Magazine*, and his attention happening to have been turned to Indian subjects, he now, in 1828, sent an article to a magazine called the *Oriental Herald*. This article being accepted, was followed by others, and after a few had appeared, the writer was appointed editor of the paper, which the proprietor had previously edited himself. This post he held for a very short time, his practice at the Bar having by the end of two years from his call become sufficient to enable him to give himself entirely to law, and dispense with the aid of furtive literature.

His early articles can, I think, leave no doubt upon the mind that if he had devoted himself to literature, and not devoted himself to oratory, he might have attained a respectable position in letters. But the instances are rare in which the same man has cultivated with conspicuous success, the essentially different, and it may be said, hostile arts of writing and speaking. One is almost sure to kill and absorb the other. These essays are rather speeches than articles. The best thing he ever wrote—a pamphlet on the trial of the last ministers of Charles X.—which professes to be a letter to an advocate of the *Cour Royale*, at Paris, resembles rather a speech than a letter. Take away the “Dear Sir” from the beginning, and the “I remain, &c.,” from the end, alter one or two passages, and omit one or two others, and the thing might have been spoken before a tribunal sitting to revise the judgment of the Chamber of Peers.

The trial of the Prince de Polignac and his colleagues, the last ministers of Charles X., is, whether we regard the grounds upon which it was instituted, or the mode in which it was conducted, one of the most iniquitous in history. They were accused of treason—a crime undefined by the law existing at the time, and for which no punishment had been provided—on the ground that they had been guilty of a series of offences which were not contended separately to amount to treason, and to which the law had appointed punishments other than the punishment which the prosecution demanded, and having been convicted upon the loosest and most inadmissible evidence of these offences—which, by the way, the Chamber, by the report of its committee, had admitted itself incompetent to try—they were sentenced to a punishment which the Chamber invented for the occasion. The trial was, in fact, though not in form or in name, a bill of attainder, with this important qualification, that it was passed by a single branch of the Legislature. The theory of the prosecution was the theory of cumulative treason, the theory of St. John in Strafford's case, “why should he expect law that would take it from others? We allow law to hares and deer, but it was never accounted

foul play to knock foxes and wolves on the head." It would be long, and to the reader, I fear, tedious, to follow the argument of this pamphlet, letter, or speech, or whatever it is to be called. The peroration was as follows:—

"What a glorious spectacle it would be for all the nations, what a triumph for the cause of freedom, of justice, and of good government, that the first commoner of France, strong in his own virtuous purpose, and the well-earned confidence of his countrymen, should now present to the representatives of the French people a Bill of amnesty, of concord, and of peace! The President is too great a man to listen to the whisperings of that pitiful prudence which goes under the name of 'a family in which it is not legitimate but a disgrace.' What has he to fear? The ungenerous and the mean may dread an acknowledgment which soothes the hurt mind, or repairs the wrongs of the defenceless and the weak, but no man of real courage shrinks from the noble duty of redress. Enough has been done for vengeance—too much for justice. Already has one mourner at the grave of earthly honours and earthly happiness, which you have dug in a pestilent prison, fallen an early victim of pious devotion to her disconsolate and heart-broken parent.\* How much suffering is necessary to move your pity? How many funerals to appease your hate? Will you wait until sorrow breaks the pride of England's noble blood,† and all Europe echoes the reproach flung upon French faith, French justice, French honour, French freedom by her who trusted to them all—an injured and widowed princess? Look to it while there is yet time. The hour is not far distant when regret will be in vain, when the day of reparation will be gone."

This pamphlet was published at the beginning of 1836; and in the May of that year Mr. Thomas Duncombe moved in the House of Commons an address to the throne, "begging his Majesty to use his influence with his ally, the King of the French, for the liberation of Prince Polignac and the imprisoned ministers of France."

I do not know as a fact, but I think it quite clear from an examination of Mr. Duncombe's speech upon this occasion, as reported in *Hansard*, that he must have read this pamphlet. Some of the sentences in his speech bear a very great resemblance to the language of the pamphlet. The motion was withdrawn, its proposer professing himself satisfied with the sentiments which the debate had called forth, and a few months afterwards the ex-ministers of Charles X. were released from Ham. One of the first acts of Prince de Polignac on arriving in England was to call upon Mr. Shee, in the Temple, to thank him for what he had written.

\* When the Prince de Polignac's daughter was on her death-bed, in the town of Havre, he was not allowed to leave the fortress to take leave of her.

† The Princess de Polignac was a daughter of the late Lord Raucliffe.

In reference to this pamphlet I may, perhaps, be allowed to quote a passage from a letter of the late Lord Strangford, in which he says:—

“It may be satisfactory to you to know that I had a long conversation last night with Lockhart\* anent this *brochure*, and that he spoke of it in the warmest terms. He said that ‘was one of the choicest and best written models of political and legal criticism that he had ever seen.’ If we send Melbourne and the Whigs to Newgate, don’t, I beseech you, undertake their defence, or you will entirely destroy the effect on the public mind, which this great and necessary act of justice is meant to produce.”

We have now got to the year 1836. In the eight years which had elapsed since his call, Mr. Shee had been making good progress at the Bar. From the beginning he had had a little good London business—the fruit of his father’s city connection. His power of speaking, rapidly transformed the Kent Sessions for him into what, from a junior barrister’s point of view, must have appeared a mine of wealth, and in common jury cases, in which a speech was wanted, both at Westminster and on circuit he grew into considerable request.

When he was of twelve years’ standing his business was sufficient to justify him in applying for the coif, and accordingly, in January, 1840, we find him made a Serjeant-at-Law.

The first showy case in which he was engaged, the case which first brought him into prominent notice, and from which his reputation at the Bar really dates, was the case of *Punter v. Grantley*, which was tried twice, in the summer of 1840, at Guildford, and in the summer of 1841, at Croydon. This case excited considerable interest at the time. The action was for trespass. Punter was a labourer, who was possessed, on the borders of Lord Grantley’s estate, of a cottage, in respect of which no rent had ever been paid, and which he claimed as his own property. The defendant having failed to obtain either rent or an acknowledgment of his title to require it, proceeded to treat the property as his own, and cut down a tree—the trespass complained of. He then applied to the Sessions, under the 1 & 2 Vict. c. 74, s. 1, for an order of ejectment, which they, under a mistake, as it appeared, and without requiring proof either of the title or the tenancy, illegally granted. Punter’s house was then pulled down, and he and his family driven to the workhouse. The question on the trial was the title of the defendant. Unless this were proved, he was a wrong-doer, against whom the plaintiff, being in possession,

\* John Gibson Lockhart, the biographer of Sir Walter Scott, and long the editor of the *Quarterly*.

was entitled to maintain trespass. The public attention called to the case by the *Times* newspaper, after the first trial (which resulted in a verdict for the plaintiff, for 250*l.*), and the facts of the case as I have above stated them, gave Serjeant Shee a splendid occasion for a telling speech; and when, a new trial having been granted, the case came on before a special jury, at Croydon, he took full advantage of his opportunities. His speech contains a powerful, an almost ferocious, attack upon the defendant, and a most pathetic description of the misery to which the plaintiff and his family had been subjected. The verdict was again for the plaintiff, and this time for the sum of 275*l.* In reference to this case, the *Times*, of August 20, 1841, says, in its leading article—

“We do not know which deserves the most commendation, this just and impartial verdict of the jury, or the noble and fearless energy with which Serjeant Shee discharged his duty as the poor man’s\* advocate. Had he been retained for the wealthiest nobleman of the land, with a fee of 1000 guineas marked on the back of his brief, he could not have shown more zeal or displayed more eloquence.”

This case was the occasion of his first great forensic achievement—the turning point in his professional career.

The *Queen v. Webster*, which was an information preferred by the Attorney-General, upon the order of the House of Commons, against a surgeon, at St. Albans, for bribery at an election, and which was tried in the spring of 1842, at Kingston, before Mr. Baron Alderson, supplied another opportunity for a slashing speech. The circumstances of the case, and the notorious bribery which at that time prevailed, and which Parliament made no real or sincere effort to put a stop to, enabled the advocate to contend that the prosecution, so far from being instituted out of zeal for the purity of elections, was a piece of party spite on the part of a majority in the House of Commons; while the character, mental and moral, of the two witnesses—“a lunatic and a liar”—who were called to prove the alleged offence, afforded matter for a telling piece of invective.

“I submit to you, gentlemen, that this prosecution is instituted for two purposes: first, to wreak the vengeance of a disappointed majority in the House of Commons; and, secondly, to throw a tub to that menacing monster—that most rational discontent, at the electoral abuses which prevail throughout the country, and which threaten ere long to submerge all the institutions of the State. If the House of Commons really wished to put down bribery and corruption, they would adopt a very different course. They would prosecute the candidates, and not an unfortunate apothecary.

\* *Punter sued in formâ pauperis.*

They know at this moment that every borough in the country has a ticket upon it,\* and is bought and sold by private contract, and the electors—whatever they may themselves think—knocked down to the highest bidder, like sheep or beeves, in a public market.”

The way in which the vacancy occurred is thus described :—

“At the time this election at St. Albans was about to take place, the two conflicting parties in the State were drawn up in battle array against each other. The banners had been unfurled, the scabbards thrown away, the guns were shotted to the lips, and the day of battle appointed. The halt and the blind, the mourners for the unshrouded dead,† all but the dead themselves were expected to be present. Gentlemen, when all the world in London were thus bent upon sublunary things, a voice from heaven was heard in the halls of Gorhunsbury, and the Hon. Edward Grimstone felt what is called a vocation for the church. Anything so inconvenient, so inopportune, as a Whig or Tory member at that particular moment, on the eve of a pitched battle in the House of Commons, wishing to take any orders but the orders of the whipper-in, had not been heard of since the Reform and Carlton were clubs. What was to be done? There was no resisting the motive which induced the Hon. Edward Grimstone to insist upon the Chiltern Hundreds. It was necessary to supply his place before the contest should take place.”

At the conclusion of this speech, the applause was so uproarious that the gallery had to be cleared, and I find, in the shorthand-writer's note, Baron Alderson saying, “I will go on until I clear the court, if this interruption goes on. I will have a decent and orderly administration of justice.”

The verdict was “Not guilty.”

The next noteworthy case in which he was engaged was an action of ejectment, the case of *Doe dem. Angell v. Angell*, tried in the summer of 1844, at Croydon. It was, to quote the present Lord Chelmsford, who was counsel for the defendant, “the last of a series of cases which had made the Angell cause celebrated amongst the profession and the public; so much so as to have afforded the foundation of a novel.” The defendant's title, often attacked, had never before been attacked successfully. On this occasion the verdict was for the plaintiff.

The Serjeant's delight was great, but, unfortunately, short lived. A new trial was granted, which resulted in a verdict for the defendant; and this verdict the court refused to disturb. I wish I could place before the reader some account of this case so celebrated at the time. But to do so, in such a

\* See Lord Brougham's speech, in June, 1841.

† Referring to a case, notorious at the time, of a member being fetched away to the division lobby from the death-bed of a near relation.

way as to be intelligible, would occupy more space than I can reasonably command. In a note which I have come across in the Serjeant's handwriting I find the following:—

“ This case is remembered by me as the most fortunate and the most unfortunate of all in which I have been engaged. To have won the Angell case, so often tried, and always, until this time, with the same result, was as great a satisfaction as forensic success can afford ; to have lost it again, as great a disappointment to me, as it, no doubt, was o my client.”

Having, in 1847, attempted, without success, to get into Parliament for Marylebone, in the year 1852 Serjeant Shee stood for the county of Kilkenny, and was returned at the head of the poll, by an immense majority. The part which he played in politics now demands from me some notice, and those of my readers who are not politicians—“ neither Whigs nor Tories, but special pleaders,” according to the legendary saying—or, who being politicians, have not succeeded in training their palates to that pungent variety of politics which is produced in Ireland, and for which Englishmen only acquire a taste with much time and patience, will do well to take leave of me for the next two or three pages. They can rejoin me, if they be not already weary of my company, when I come out of the by-lane into which I am now turning, and get back into the broad and familiar road of *nisi prius*, in travelling along which we may have something in common to discourse about.

Without some notice of Irish politics during the years of 1852-7, this sketch would be incomplete. But in speaking of them I will be as brief as I possibly can, remembering that the questions then in agitation are now happily settled, and that of all repulsive things, stale newspaper, not yet mellowed into history, is the most nauseous and revolting.

The general election of 1852 is remembered in Ireland, for the strong determination which was then come to by the Liberal party in that country, to bring to bear upon the settlement of the Irish land question the full weight of the constitutional influence which the tenant-farmers had acquired by the Irish Franchise Act of 1850.

In September, 1852, a conference, attended by forty-five members of Parliament, met in Dublin. At this conference it was resolved that Mr. Serjeant Shee should be asked to take charge of Mr. Sharman Crawford's Tenant Right Bill of 1851 ; and that the members of Parliament elected on tenant-right principles should hold themselves perfectly independent of and in opposition to every Government which would not make part of its policy, and a Cabinet question, a measure *fully embodying the principles* of Mr. Crawford's Bill. Mr. Sharman

Crawford's Bill was accordingly introduced in November, 1852, by Serjeant Shee and Colonel Greville.

At this time, as those who have taken an interest in the matter are aware, there was before Parliament for discussion what was called the "Napier Code," consisting of four Bills, to two only of which, the Tenants' Improvements Compensation Bill, and the Leasing Powers Bill, it is necessary for me to refer, introduced by Mr. Napier, Lord Derby's Attorney-General for Ireland. These four Bills, and Sharman Crawford's (or Serjeant Shee's) Bill, having been read a second time in the House of Commons, were together referred to a select committee, in February, 1853.

The first clause of Sharman Crawford's Bill contained a recognition of a tenant's right in Ulster, irrespective of, and unconnected with, industrial improvement.

The Government contended that either this clause or the whole Bill must be abandoned, and a division taking place upon the clause, the tenant-righters were beaten by a large majority, of which so true a friend to the cause as Mr. Bright formed part. Sharman Crawford's Bill was then abandoned.

On the other hand, the Napier Bills, modified by an amendment in accordance with the views of the tenant-right party, substituting money payments for compensating periods of occupation, were reported, passed the House of Commons, and were read a second time in the House of Lords.

This being the state of things, and Serjeant Shee having acquired a complete certitude of the total impossibility of forcing the Tenant League Bill through Parliament, by his failure to carry, in the session of 1854, a Bill introduced by him and Mr. Pollard-Urquhart, which was almost the exact counterpart\* of that Bill, came to the conclusion that it was his duty to act upon a *cy-près* construction of the resolution of the conference of 1852; and thinking that the Napier Bills, as amended by the select committee, contained if not all that the tenants were entitled to ask, at least, all that they had the remotest chance at that time of getting, he determined to adopt the provisions of those Bills.

Accordingly, in the session of 1855, he introduced a Bill, of which the first part consisted of Mr. Napier's Tenants' Improvements Compensation Bill, and the second part of Mr. Napier's Leasing Powers Bill.

\* The Bill, introduced in 1854 by Serjeant Shee and Mr. Pollard-Urquhart, was the exact counterpart of the Tenant League, or Mr. Sharman Crawford's Bill, with the exception of the following clauses:—1st. The Ulster clause, rejected by the select committee.—2nd. A clause remitting the arrears of rent during the famine years, which, as a matter of fact, were no longer by law recoverable.—3rd. A clause protecting from eviction for a limited time tenants *who had not, but were willing to improve*.



He thought that, inasmuch as those Bills had already received the sanction of the House of Commons, a Bill amalgamating them might have been carried through Parliament. And so, no doubt, it might, if he had been properly supported by the country. But this support did not come. No petitions were presented in favour of the living Bill which was before Parliament. The tenant-righters, or, at least, the major part of them, were taken up in drinking to the success of, and vowing eternal fidelity to Sharman Crawford's dead Bill—a Bill, which in fact was still-born, and had never breathed the air of committee, but which the Serjeant was accused of having strangled. It was scarcely to be expected that Lord Palmerston's government—not a zealous government at any time—should show much zeal in furthering a measure which those whom it was intended to benefit would not support, and accordingly the clause which provided for retrospective compensation was lost on division, and the Bill thus mutilated was, of course, withdrawn by its proposer. For having introduced this Bill and abandoned Sharman Crawford's Bill, Serjeant Shee lost his seat for the county Kilkenny; and, therefore, it becomes interesting to see what Sharman Crawford himself thought of the Serjeant's conduct. I find him writing to the *Clare Examiner*, in March, 1855, as follows:—

“I am bound in honour and justice to say that, in my opinion, the course now taken by him is, under existing circumstances, the one best calculated to promote the success of the tenant-right question. If I had the desire to raise popularity at his expense, I might become an objector—I might appeal to the country to stand upon *my Bill*, and on this plea seek a return to Parliament for myself; but the success of the cause being my single object, no matter by whom conducted, no unmeaning partiality for my own Bill, no personal considerations of any kind shall stand in my way in giving what I hope will be considered an honest opinion on the conduct of the question by the honourable member for the county of Kilkenny, who has, in my judgment, faithfully performed his duty to the tenant interest, with honesty of intention, and for higher abilities than I could approach to.”

I will enter no farther than I have already been compelled into the controversy between Serjeant Shee and his opponents. I should be the last man in the world to question their sincerity. I cannot help thinking that they must have seen reason to distrust, perhaps to change, their judgments, when they saw the tenant-farmer remaining, year after year, with his neck under the heel of his landlord, until he was picked up and set upon his legs by Mr. Gladstone. But be their judgments changed or unchanged, I am content to rest the justification of Serjeant Shee's conduct in relation to the land

question upon the letter which I have quoted, from the "father of tenant right," Mr. Sharman Crawford.

Looking back now, I cannot regret Serjeant Shee's failure, in 1855, to effect a settlement of the Irish land question. I feel sure, bitterly as he felt it at the time, he would not regret it himself, were he alive. In consequence of that failure, the tenants have obtained far ampler justice by the Act which has immortalized Mr. Gladstone, and which, although it will probably require some future modification, in order that the intention with which it was passed may be given full effect to, has already accomplished more for the moral, no less than the material, welfare of Ireland, than any other legislative measure, with the single exception of the Emancipation Act. It is impossible, I say, to regret a failure which has been the mother of success. But I may be permitted to regret that a man who fought so manfully, and sacrificed so much in the tenant's struggle, should not have lived to see the final triumph of the cause which he had at heart. This remark will also apply to the other great measure of the present Cabinet, the Act for the Disestablishment of the Irish Church. No man thought the bringing about of religious equality in Ireland more important than did Serjeant Shee. But tied down, as he felt himself, in conscience, by the oath which was then imposed upon Catholic members of Parliament, and by which they were bound not to use their privileges, to "subvert the Church Establishment," or "weaken the Protestant religion," he was in favour of the "levelling-up," rather than the "levelling-down" mode of redressing, to some extent, the evils of religious inequality. The books which he published, the speeches which he made, and the Bill which, in 1854, he asked leave to introduce into Parliament, were all conceived in this sense. In them he proposed to take from the Church some of her superfluities, and to employ the money so obtained in building Catholic churches, and providing moderate glebes and decent dwellings for the Catholic clergy. It may possibly be asked, how he reconciled this proposal with the obligations of the oath to which I have referred? The answer is that he thought it absurd to talk of the Church Establishment being "subverted" "by a measure which would have left every archbishop a suitable residence, and 4000*l.* a year; every bishop a suitable residence and 2500*l.* a year; to the great majority of the beneficed clergy an income of 300*l.* to 400*l.* a year, with a house to live in; to none less than 200*l.* a year, with a house to live in; and to curates, whose stipends in few cases then exceeded 75*l.*, stipends of 100*l.* a year;" just as it was ridiculous to imagine that "the just power and influence of the Protestant religion would be *weakened* by a measure which would have removed from the minds of the inhabitants of

every parish in Ireland all rational discontent upon the subject of religion."

The Irish Catholics are probably not sorry that Parliament refused leave to Serjeant Shee, in 1854, to bring in his Bill "to Amend the Laws relating to the Irish Church." The Irish Protestants, on the other hand, may possibly be of a different opinion. They never had a less rancorous foe, or one who entertained for their clergy, in the trying and unnatural position in which they were placed, a more sincere respect and admiration. In one of his speeches, in an action, by the way, in which this Magazine was concerned, he went out of his way to say, "Of the clergy of the Irish Established Church, I may be permitted to say, knowing them well, that a higher class of gentlemen does not exist in the United Kingdom."

After the dissolution of 1857, at which he lost his seat for Kilkenny, Serjeant Shee, although he stood several elections, and never, as far as I am aware, was without an election address in his pocket, never sat in Parliament again. I may, therefore, now sum up his political opinions. They are summed up when I say that he was an advanced and thorough-going Liberal. He was for ballot when he stood for Marylebone, in 1847, as he was when he stood for Stoke in 1862. When, however, I say that he was a Liberal, I ought to append to that word the qualification—"in the United Kingdom." For, by one of those strange inconsistencies which we meet with so often, and find so difficult to explain, no sooner did he transport his mind across the Straits of Dover, than he became a Tory of the purest water. In the pamphlet to which I have already referred, it is true that he speaks in praise of the revolution which placed Louis Philippe upon the throne. But this is manifestly a mere trick of rhetoric to enable him more successfully to attack the proceedings of that Government. In his heart, he thought the charter of 1814 very nearly the "perfection of human reason," and the Governments of Louis XVIII. and Charles X. the best that had ever existed upon the soil of France. And he viewed from a similar stand-point the politics and revolutions of Italy. I impute this curious and self-contradictory attitude of mind partly to the effect of old prejudices and associations coming down from his youth, spent at a school of French Legitimist *émigrés*; partly to the connection which in Continental politics actually exists—and is by some deemed permanent and necessary, though by others merely accidental and temporary—between Conservatism and Catholicism; partly to the horror which he felt at the crimes and breaches of private faith and personal honour, from which violent political changes are seldom free, and partly also to the writings of Burke; who,

as Buckle, I think it is, says, "went mad upon the French Revolution," and with whose opinions, and indeed language, his mind was so completely saturated that he often quoted him unconsciously. It should be observed, however, that Burke was one thing at a time—a Whig and a Tory in succession—whereas his disciple was both things at the same time—a Liberal in the United Kingdom, and a Tory upon the Continent.

Upon the loss of his seat for Kilkenny, his professional business, which had fallen off during the five years he was in Parliament to the extent of one half in money value of what it had previously been, at once began to revive. Prudent attorneys had fought shy of an advocate whose whole mind was wrapped up in politics, and whose name was to be seen every second day at the end of a long letter in half the newspapers of Ireland. They now again began to find their way to the chambers in Serjeant's Inn. Henceforth his life was spent in the courts of justice.

But while he was still in Parliament two cases were intrusted to him which I cannot pass over in silence. The first, *Boyle v. Wiseman*, I merely mention, because, although not of much interest to the Protestant reader, it is highly interesting to Catholics on account of the precise and accurate exposition which the speech, for the defence, contains of the historical relations of the Catholic bishops to the Government of this country. The other case, which was the *Queen v. Palmer*, is of more general concern.

I imagine that of those who were present at this trial, or who have read the report of it in the faithful short-hand notes of Mr. Angelo Bennett, nine out of ten have concurred in the opinion arrived at by the jury, and by Mr. Fitzjames Stephen, in that lucid summary of the evidence which is to be found at the end of his "General View of the Criminal Law." Possibly not even one of the ten will be found to doubt the guilt of the prisoner. Nevertheless, Serjeant Shee believed him innocent to the last, and it is well known that he incurred blame—and from a professional point of view, possibly justly—for avowing that belief in his speech. In regard to this I will content myself with quoting what was said by the Attorney-General,\* in the magnificent peroration of that noble "reply."

"If my learned friend was sincere in that—and I know he was; there is no man in whom the spirit of truth and honour is more keenly alive—it only shows how, when a man enters with a bias upon his mind upon the consideration of a subject, he is led into error; and when my learned friend said that he had entered upon this case

\* The present Lord Chief Justice.

with an unbiased and unprejudiced mind, who could have failed to feel that never in anything could he have been more deceived than in thinking that? For who that has to give his best energies to a defence upon such a charge as this, would not shrink in his own mind from the conclusion that he was to advocate the cause of one whom he believed to have been guilty of the foulest of all crimes?"

In reading Serjeant Shee's speech—confessedly a great one, for oratorical power and for clearness and grasp of mind—two things should be remembered: first, that as I have often heard him say, none of his great speeches were ever made with less preparation—I mean, of course, *verbal* preparation—the amount of labour involved in the trial and its great length rendered this impossible; secondly, that the report is, if one may say so, almost too accurate. Every little mistake, every slip of the tongue, every remark which a counsel makes to fill up the time while he is hunting for a paper, appears as it occurred.

I have a letter in my possession which Palmer wrote to his counsel from the dock during Lord Campbell's summing up. He says: "I thank you for your exertions on my behalf, as I am satisfied that you have done all that mortal could do. Whatever may be the result, I am satisfied with you and your exertions." Men—especially men on trial for their lives—are so little apt to be fully content with the efforts which others make on their behalf, that I may be forgiven for citing from the prisoner's mouth this testimony to the ability of his counsel.

It may possibly be interesting to some of my readers if I place before them a brief tabular analysis of the evidence on this trial, and the inferences founded on it. The one I offer is anything but exhaustive. It is, on the contrary, most incomplete. But it may, perhaps, serve to recall to the mind *some idea* of the nature of the case.

*For the Prosecution.*

**A. AS TO THE MOTIVE.**

1st. Palmer was pressed for payment of a large sum of money, due upon forged acceptances, which he had no means of meeting.

2nd. He got *all* Cook's money, and applied it to those acceptances.

*For the Defence.*

**A. AS TO THE MOTIVE.**

1st. There is evidence that Cook was helping Palmer to meet his liabilities.

2nd. Cook's death would, and did, bring upon Palmer *alone*, claims in respect of which he and Cook were jointly liable. In respect of these, if he killed Cook, he would have to deal not with a personal friend, and an easygoing man, but with executors and men of business.

Therefore, he had a motive,

*Conclusions.*

**A. AS TO THE MOTIVE.**

1st. Can Cook have been supposed willing to help to the extent of all he had in the world?

2nd. These claims were, with one exception, upon *genuine and secured bills*.

The other bills were forgeries. One set of liabilities involved merely bankruptcy, the other set involved penal servitude.

*For the Prosecution.**For the Defence.**Conclusions.*

for wishing Cooke to live; none for wishing him to die.

3rd. His *one* hope of *final* escape from his difficulties lay in his obtaining payment of a policy of insurance on his brother's life. This policy was disputed, and the cause of his brother's death was being investigated.

Therefore it was not safe for him to commit another crime at that time.

3rd. This could not be counted upon being paid *in time*.

At the same time it is only right to remark that Palmer may have hoped to hold on until it should be paid, by the help of Cook; and that Cook, feeling sure that it would be paid, may have been willing to help even to the extent of all he had.

**B. AS TO THE DEATH.**

1st. A number of doctors say that the symptoms must have been produced by strychnia.

2nd. They also say, that strychnia may be administered in so small a dose, as, after producing death, to leave no trace in the body; and, therefore, that Dr. Taylor's not finding it, does not prove that it was not administered.

3rd. Palmer bought strychnia.

**B. AS TO THE DEATH.**

1st. A number of doctors say that the symptoms were consistent with death from natural causes, and inconsistent with death from strychnia.

2nd. They also say that if strychnia had been administered, it must have been found in the body. It was not found.

**B. AS TO THE DEATH.**

1st. The doctors for the defence admit that the symptoms were "very like" those of strychnia.

2nd (a). It may, or may not be, that strychnia, if administered, is sure to be found in the body. Upon this there is a conflict of evidence.

(b.) It may be that it was to be found in the body, but that Dr. Taylor did not know how to find it.

3rd In any case, Why did Palmer buy strychnia, and what did he do with it?

This abstract is, I admit, extremely incomplete. Purporting to give the pith of a twelve days' trial, it must necessarily be so. In one particular it is greatly favourable to the prisoner, inasmuch as it omits all the evidence as to the administration and finding in the body of antimony, by which slow poison it was contended that he had prepared Cook's body for the more deadly poison of strychnine. Nevertheless, it can scarcely fail to cause the reader to join with me in wondering, not that the defence failed, but that a defence was possible. And yet we know that when the jury retired, their verdict, although confidently anticipated, was not by any means regarded as a foregone conclusion.

Of the other celebrated cases in which Serjeant Shee was engaged, I feel that I should not be justified in attempting a particular account: they are too fresh in the recollections of such persons as would be likely to take an interest in them, to warrant me in entering into their details. I should be merely quoting from yesterday's *Times*.

The Roupell cases at Guildford and at Chelmsford; the Bewick case at Newcastle; *Hudson v. Slade*, in which he appeared for the Benchers of the Middle Temple; and *Seymour*

v. *Butterworth*, in which he was counsel for this Magazine, were all occasions for great speeches. I find passages all over the newspapers in praise of the eloquence of which their reports give but a faint and inaccurate reflection. Sometimes the praise is so exaggerated as to be almost amusing. Still it conveys an idea of the effect which the speech produced upon men's minds at that time. I find, for instance, the *Times* reporter saying—\*

"It is impossible by any description to do justice to the power and eloquence of utterance with which this passage" (so mutilated as to be unintelligible) "was delivered."

I find the correspondent of the *Dublin Evening Mail*,† a staunch political opponent, almost inclined to find a new Irish grievance in the fact that Serjeant Shee was not more fully reported.

"On two or three occasions recently," he writes, "the acute and critical assembly which he addressed through the jurybox, was so far moved as to forget its etiquette, and to give audible expression to its feelings of pleasure. Early this week again the solemn limits of the Court of Queen's Bench rang again and again with vehement applause. But of these addresses scarcely a sentence was preserved in the journals of the following day."

The *Law Journal*,‡ writing after his death, says—

"At the Bar, Serjeant Shee earned a reputation almost unique in its character. Aided by a commanding figure, a noble aspect, and a magnificent voice, he was, as an advocate, always impressive, and at times sublime. His rhetoric might, without affectation or exaggeration, be described as of the old Roman type. He possessed in a peculiar degree the art of marshalling and massing the facts of his case, as a good general does his troops, so as to crush the opponent with their concentrated force. In an age when oratory is a lost mystery in the Senate and at the Bar, it is something to point to a man who, five years since, presented in the Courts of Westminster Hall an example of its virtue and its power."

If I may be allowed to express an opinion, the characteristics of his speaking were, clearness and vigour. The language had no particular merit, except that which belongs to a sort of rugged vehemence and force. He was a man of strong feelings and a clear head: these are the qualities which are reflected in his speaking. Now, it unfortunately happens that these two qualities, lucidness of exposition, and power of in-

\* *Times*, December 24, 1862, *Hudson v. Slade*.

† *Dublin Evening Mail*, December 29, 1862.

‡ *Law Journal*, February 21, 1868.

vective, are precisely those of which it is impossible for me to give examples. A material obstacle—want of space—stops me in regard to one. A moral objection meets me in respect of the other. It is manifest that I cannot copy out whole speeches. It is equally clear that I should be doing very wrong, were I to write down, in cool blood, and long after the event, the harsh things which were at the time justifiably said by an advocate in the discharge of his duty.

Those who have listened to him when dealing with complicated masses of facts, will remember how conclusively he wound himself about the judgment. Those who have seen him transfigured with passion, pouring forth, as it were, a hail-storm of fierce and angry words, will not readily forget the impression made upon them at the time. It should be observed, however, that he never went out of his way to attack people, his maxim being (I find it in almost every one of his speeches), “do the best you can for your own client, but do not, if you can help it, vilify the other side.”

Whatever may be thought of his abilities, I can bear witness to his untiring industry. I always knew that he had been a hard worker. But when I came the other day to look up old briefs and memoranda of forgotten cases, I was perfectly astounded at the evidences of labour which I found. Usually the notes which a man makes for his own use are intelligible only to himself, but those of which I am speaking are perfect maps, which might almost be printed as they stand, of the ground over which his opening speech, or his argument *in banc*, was to travel. He did not believe in anything great being done easily. He would say, “A man may *talk* without preparation, but no man can *speak* without it.”

He had a great love for his profession, and a high opinion of its members. In a speech which he made at Edinburgh, a few months before he was raised to the Bench, he says, speaking of the Bar, “a body of men more free from the taint of political, national, or religious prejudice, a more generous-minded, a more liberal, a more magnanimous body of men does not exist.” He took a great delight in the social pleasures of circuit, the dinners at mess, the fun at grand night; and from the fact that his business was of a very fluctuating character, and that he often found himself in a circuit town with very little or nothing to do, he had more opportunities of mixing on pleasant terms with his juniors, than the leaders of the Bar often have. I think there can be no doubt that he was very popular on circuit. *The Law Journal* says:—

“It arouses enthusiasm in a member of the Home Circuit to talk to him of the days when the late Mr. Justice Shee was its leader—a leader who was the leader of the whole circuit, and had a kind word



and a look of sympathy for the youngest member, and who would sing his song and help all to make the genial hour more genial."

He was made a judge \* of the Court of Queen's Bench at the beginning of 1864, in the sixtieth year of his age. To Lord Westbury belongs the honour of having placed the first Catholic on the Bench.

As a judge, it seems to be admitted, that with a competent knowledge of law, he combined great industry and patience, and courtesy, to those who practised before him.

I have seen it, however, objected that he was sometimes apt to forget that he was an advocate no longer, and to charge the jury with too much ardour and force. He once said of himself, "it is my misfortune, at times, not to be able to speak otherwise than earnestly." There may, therefore, possibly have been some ground for the accusation, at the same time it should be remembered that the profession, as a whole, has never yet been able, conclusively, to make up its mind upon the question, whether or no a judge's charge should be totally devoid of meaning. One view of the matter is very emphatically stated by Mr. Fitzjames Stephen. He says:—

"Facts submitted to a strong mind are naturally brought into their logical relation and made to indicate the conclusion which ought to be drawn from them. Impartiality and indecision are totally different things. A judge, summing up, is an advocate who chooses his side impartially, and gives the jury as vigorous a statement as he can of the grounds on which this conclusion rests, and of the view which he takes of the arguments against it. When this is well done, it is the greatest possible assistance to the jury in the discharge of their duty."

In conclusion, I may mention that upon two points relating to the repression of crime, Mr. Justice Shee held opinions at variance with those which appear to be generally current. In the first place, he was strongly in favour of the abolition of capital punishment. He thought that, in order to justify its retention, its necessity must be, not assumed as it now is, but proved by the failure, after a fair trial, of a secondary punishment. In the second place, I mention it with fear, he was not at one with reporters of the penny papers upon the merits of flogging. He considered physical torture a barbarous and brutal punishment, and one far more likely to foster, by its example, cruel and savage tendencies in the community, than to check them in the particular criminal.

I have now related everything that I have thought likely to be of interest concerning the man whose life I have been asked to write.

\* He had previously, in 1860, been offered the Chief Justiceship of Madras,

He died on the 19th of February, 1868, and on his death the legal paper which I have so often quoted wrote of him :—

“As a man, he was universally respected—we might almost say beloved. His nature was thoroughly genial, his disposition generous, and his fiery spirit, though it might scorch an adversary for the time, in the result kindled admiration. There was in him a strong dash of the chivalrous, a type of character valuable in proportion to its scarcity.”

His life was co-extensive with a time of great growth in that noblest fruit of our civilization—tolerance of each other's opinions. When his career began, he was able to say, with truth, of himself and his co-religionists :—

“It is not only the high offices of State from which we are debarred. In every rank of life, in every gradation of society, we are impeded in our just and honest pretensions.”

When he died all this was changed, and religious bigotry had not only been effaced from the law, but had died out of the mind of England.

Of his talents and of his character it would not become me to say more than I have ventured to quote from the opinions of others, or have let fall, incidentally, in the course of this writing. Of course, *I* thought him perfect. By his children he could not fail to be thought so. He possessed every quality by which young minds are fascinated and won. To us the kindest of fathers, he was also—what many excellent fathers are not—a hearty and sympathetic companion ; and, besides this, his intellectual gifts, the use he made of them, and the physical advantages which gave effect to them and set them off, made him seem in our eyes a hero, a very demigod, whom I and my brother regarded with feelings partaking almost of the character of worship.

Lord Lytton, in one of his essays, observes :—

“How proud men are of their fathers, when they have done nothing themselves to be proud of.”

Perhaps this may partly explain our feelings in this respect.

*Temple, April 20, 1872.*

GEORGE SHEE.

## V.—THE OLD BAILEY, AND ITS PRACTICES.

**T**HE Old Bailey Bar has long possessed an unenviable notoriety. It has long had the reputation of being the refuge for the destitute, the place of easy professional virtue. Had a man's reputation become clouded, the Old Bailey was still open to him. Had he been expelled from a circuit mess, or had his budding professional career given such promise of ignoble fame that his fellows on circuit deemed it expedient not to allow him to join such mess, there was always believed to be one spot where no questions would be asked, and where a not too great scrupulousness of conscience was an advantage. From the days when Jeffreys learned the art of bullying witnesses and deceiving juries at the Old Bailey, it has always been the school of the rougher and more questionable virtues, and the Bohemia of the Bar. Mr. Chaffenbrass, the distinguished Old Bailey practitioner, in Mr. Trollope's "Orley Farm," forms a not unfair representation of his class. He practises the whole of the Bailey arts, the browbeating of witnesses, the throwing the jury off the scent, the suppression of the truth, the suggestion of the false. He has no objection to putting a question to a witness which may injure him for life, which contains a suggestion that he knows to be unfounded, provided that such question or suggestion will damage the witness in the eyes of the jury. He glows with indignation at the thought of the conspiracy which has been hatched against his client. He resents with scorn the suggestion of the possibility that one with so many exemplary virtues as the tenant of "Orley Farm" could, under any circumstances, have been guilty of the charges alleged against her; and he expresses his hearty contempt for his more scrupulous junior, who had hesitated to use every means, honourable or dishonourable, within his power to save his client; telling him plainly, that with such a tender conscience he has mistaken his branch of the profession. All who know the Old Bailey, know that men of the stamp described by Mr. Trollope still exist. But there is a lower class still, with which both the public and the profession are now pretty well acquainted. These are the men to whom we have already alluded. They are the dregs of legal society; the residuum of a noble and honourable profession. Unfortunately, the outside public is too much in the habit of identifying these men with the general Bar practising at the Old Bailey. Let us say at once that the black sheep of the legal flock,

even at this Court, constitute but a very small per-centage of its numbers. There are, at the Bar of the Central Criminal Court, men whose characters are as high as those of any men practising in any other of our courts. Let us say this once for all, because it is of another class we propose to speak. There are, on the other hand, men who would be a disgrace to any profession; men who systematically set at defiance the etiquette of the Bar; men who have no characters to lose; who will take a brief without asking any questions; who will sign it as having received payment when they have done nothing of the kind; who will employ their own clerks to tout and make no inquisitorial inquiries of their proceedings.

There are several circumstances which account for the low estimate which has always attached to the Bar of this Court, and for the belief that in it are to be found the pariahs of the profession. Its practice is exclusively criminal, and criminal practice is not what one would choose who looked solely to the development of his morals. Some men can go on for years handling pitch, and yet retain as clean fingers as when they commenced. But, on the other hand, some men cannot — perhaps even get them soiled at the outset. Then, too, the public opinion of the Old Bailey Bar is not so powerful among the members as it is on the circuits. The men do not dine together. They meet together as strangers, and separate as strangers. The circuit mess, with its purely informal constitution, its voluntary organization, is yet, as every barrister knows, a powerful safeguard against the malpractices of any on circuit. Nothing corresponding to it exists in London, nor, if it did, would it probably be of much use. The delinquencies of the Old Bailey Bar, however, are due far more to what we must call the surroundings of the Court, and the bad system of prosecution which prevails among us, than to either of the causes named. How these have operated it is not difficult to trace. To do so, we must go back a few steps in the history of criminal law.

In former years, when no counsel appeared for the prosecution, it was the practice of judges themselves to examine the witnesses for the prosecution from the depositions. This practice, though it still lingers both at the Middlesex and Surrey Sessions, was rightly denounced by several of the judges as improper and indecent, and as placing the judges in an apparent position of partizanship. The custom then came in of handing either the original depositions or a copy over to counsel, by direction of the Court, in order that such counsel might conduct the prosecution in proper form. At first this direction was only given in cases where the prisoner was defended, but it soon ceased to be so limited, and the practice obtained of handing the depositions to counsel in

every case where the prosecutor had not himself instructed counsel. The fee to counsel was included in the allowance to the prosecutor for costs, and was paid by the clerk of the court to counsel on receipt of it from the prosecutor.

In cases where the prosecutor employed his own attorney and counsel, an allowance was, and still is, made to him towards repayment of the expense incurred in so doing. But owing to the beautiful economies of our legal system, such allowance has always been utterly disproportionate to the expense actually incurred. The English practice has always said, "If you choose to bring a man to justice, you must do it at your own risk. You are sure to be out of pocket. But we cannot help that. If you wish not to lose money, let the thief go free." And persons who have once incurred the risk of a private prosecution continually do let offenders go free rather than put themselves to so much trouble and expense a second time. The Court seldom or never allows the full expense of the prosecution. In an ordinary case of larceny, for instance, where the attorney's bill against the prosecutor for getting up the evidence and conducting the prosecution could never be less than 10*l.* the allowance would be 1*l.*, 3*s.* 6*d.* for counsel's fee, and 1*l.* 1*s.* for preparation of brief, or 2*l.* 4*s.* 6*d.* towards the payment of 10*l.* The allowances now made were regulated by rules or scales made by the justices of each county, in pursuance of 7 Geo. IV. c. 64, until the passing of the Act 14 & 15 Vict. c. 55, by which the power of the justices to make such rules was revoked and given to the Secretary of State. But the Secretary of State has far too much to do to trouble himself about the conduct of prosecutions, and the consequence is, that he has never yet exercised the power so far as relates to allowances for attorney or counsel. The rules were always subject to the direction of the Court in particular or exceptional cases.

Under such a system it was, of course, to be expected that a fertile crop of abuses would grow up. It was soon found that in very many cases attorneys appeared for the prosecution where it was clear the circumstances of the prosecutor were not such as to enable him to pay an attorney's bill. Nor was the explanation long in forthcoming. The demand for cheap justice soon created a supply of practitioners, and if ever the "cheap and nasty" applied, it was here. It was discovered that certain attorneys, or persons practising in and using the names of attorneys—the latter, men whose reputation need not be inquired into beyond the evidence of that fact—were hanging about the police courts and about the precincts of the Central Criminal Court, and soliciting prosecutors to employ them, upon an assurance that the prosecutor should incur no liability, and that the attorney

would be content for his remuneration with the sum allowed by the Court out of the public purse. Now, such a suggestion to a poor private prosecutor or to a policeman, obviously comes home with great force. He knows nothing of the practice of the law, has possibly never seen an array of wigs before, and believes that his path is beset with pitfalls on every hand. Why should he not accept the offer of the attorney, who understands everything, whose business is to practice in criminal courts, and who promises to relieve him of all liability and of all trouble? The sum allowed by the Court is so small that it may easily be inferred that the attorney, or the person representing himself as such, would be induced to increase it by indirect means. What those means were we shall see presently.

But the Central Criminal Court has for some time possessed a most efficient officer in the person of Mr. Henry Avory, clerk of indictments, a gentleman to whom the whole Bar (excepting always the black sheep) are under very deep obligations. With a view to check this special malpractice by non-professional persons, or by black-leg attorneys, he obtained directions from the Court that no allowance should be made to a prosecutor for professional assistance, unless he had retained the attorney in writing. Old Bailey practitioners were, however, much too cute to be stopped by any such provision. The new regulation was soon evaded. The prosecutor was induced to put into writing that which had before been verbal only. The attorney, or his clerk, or more generally a pseudo clerk, that is, a person who, for a consideration, was allowed to use an attorney's name, gave in exchange a written undertaking to protect the prosecutor against the consequences of his retainer. Mr. Avory, therefore, took another step. He added to the regulation, that no allowance should be made, *although there might be a written retainer*, if it was given with any such understanding for non-liability. In several instances, we believe, Mr. Avory required proof by the prosecutor, of an actual payment of money to the attorney before making any allowance. The matter of *Wheeldon and Davis*, brought by Mr. Avory before the Court, and reported in the newspapers, will show how the regulations were sought to be evaded, and difficulties thrown in the way of the officer of the Court, in his endeavours to put a stop to a practice of so mischievous a character. At the risk of bringing under the notice of our readers what most of them will remember, we must ask their attention to a portion of the report alluded to. The following is from the evidence of Mr. Wood, the prosecutor:—

“Mr. Wood then entered the witness box, and said that the

attorney's clerk came to him and suggested that he should give him a retaining fee of three guineas for Mr. Cooper, an amount which he (the clerk) had himself paid that morning. Last week, the clerk went to his house while he was at work away from home, and his wife invited him to enter and sit down. The clerk stated that the case of the prosecution of the man for the manslaughter of her son ought to be properly represented at the court, and suggested that he should be employed. The clerk subsequently came to where he (Wood) was employed; and, in answer to his representations, he (Wood) said it was a public prosecution, and that he was not going to pay any expenses whatever. The clerk answered, 'There is no expense incurred by you whatever; you just give me the case, and we will conduct it for you.' He said, 'But it's a police-court affair; let the police-court conduct it.' He had his suspicions, and did not want to enter into any bargain. The clerk said, 'You are the prosecutor;' but he replied, 'No, I am not; I am not bound over.' The clerk then said, 'Haven't you signed any paper?' The answer was, 'I have signed no paper, except one at the police-court, when the man was charged.' The clerk said, 'It is very strange—there must be something wrong. Good afternoon. You will very likely hear from me in the course of a few days.' In the course of last week, he received a letter, in which the clerk stated it would be necessary that Mrs. Wood should attend the court, but that he did not know whether his (Mr. Wood's) expenses would be paid. Both came to the court, when the attorney's clerk said, 'I have retained Mr. Cooper for you, and paid him three guineas.' He replied, 'Very good.' The clerk further said, 'It will be necessary for a passage of money to take place between you and me.' He replied, that he was not going to part with any money, and that the clerk had promised him that it would not cost anything. The clerk then said, 'For me to get my expenses from the county this is necessary; for you will be placed on your oath to say whether you have paid me a guinea.' The clerk then introduced him to a smaller gentleman, and placed a certain amount of money in his (Wood's) hands, observing, 'Now put it back into my hand.' That having been done, 'Now,' he said, 'you can take your oath that you have paid me a guinea.' This occurred in the gateway next the public-house opposite. They then went into the public-house, and they had a pot of ale, the gentleman paying for it. He partook of a portion of the ale; and subsequently asked for a guarantee against the liability to pay any costs. The little gentleman seemed to understand the necessity for one, and remarked, 'It would be as well that you should have a little paper over it.' The clerk then procured pen and ink, and wrote the following note:—

"*Regina v. Tannett.*—Oct. 18, 1871.—I hereby indemnify you against any further costs in this matter upon the payment of one guinea to me, irrespective of those allowed by the county.

"For Richard Davis.

"J. P. WHEELDON."

If we add that Mr. Davis, having been sworn, denied all knowledge of the transaction, we must also say that Mr.

Commissioner Kerr told him flatly that he did not believe what he said. Mr. Avory determined to meet these new evils too. He procured further directions from the Court, in pursuance of which he issued the following notice:—

“ Certain persons frequenting the precincts of the court, and being or pretending to be attorneys or attorneys’ clerks, having on many occasions solicited prosecutors to allow them to conduct prosecutions, and instruct counsel, and deliver briefs ; and having offered to do so without cost to the persons employing them ;—all prosecutors and witnesses are hereby informed, that neither the Court nor its officers, in any manner, sanction such proceedings ; that the Court expressly forbids them ; and that, upon the application of any prosecutors to the clerk of the court, he (if the case be a proper one) will instruct counsel to conduct the prosecution.”

We have already pointed out that the fees allowed for prosecution were altogether too small, and led to much of the evil complained of. They are probably too small to remunerate the non-professional men who have taken up the profession of public prosecutors. Accordingly, these gentlemen have to resort to additional practices of questionable morality in order to live. We have very good reason to believe that the same individual—attorney, attorney’s clerk, or mere tout—*has appeared as attorney for the prosecution and for the defence.* Until we have the judge examined as to his character by the prisoner at the Bar, we shall look in vain for a better illustration of the depths into which parsimony, in the administration of justice, has led us. Now, let us see by an example how the condemned practice worked, and how the attorney, or non-professional attorney’s clerk, or pseudo clerk, made his money. Suppose the attorney to have been instructed. He had to procure and pay for a copy of the depositions, which might cost him six or seven shillings. He had then to put them in the shape of a brief, for counsel, deliver the brief, and pay the fee. The allowance to him would ultimately be the fee he had paid to counsel, and a guinea, or a guinea and a half at the outside, for his brief and attendance. In many instances he would have marked on his brief a fee of two guineas for counsel, and only one guinea would be allowed.

With a view to assist the Bar, Mr. Avory has for some time required counsel’s signature to the brief before allowing anything for the fee. If, therefore, a barrister conducts a case and does not get the fee marked on it, he has nobody to blame but himself. The attorney can get nothing on the brief until the barrister has put his signature thereto. Of course, it must always be remembered that counsel are to a considerable extent in the hands of the lower branch of the profession. It



is, no doubt, very difficult for men with little or no practice to refuse briefs when offered them by anybody. Competition is fierce. The briefless are many. Each man believes that he only requires opportunity in order to distinguish himself and rise into good practice. Hence, men hesitate to offend those who can give them work. Some, even of those who insisted on being paid before signing their briefs, were ready to return what they had received in excess of the sum allowed. If they did not, they knew well that they would never hold another brief from that attorney. Others, less scrupulous, signed their briefs without receiving anything, but with the understanding that they were to receive whatever sum was allowed. Below this class, again, there remained the lowest depth of the Old Bailey Bar, men who there is every reason to believe accepted less than the guinea, and who thus, besides dragging their profession through the mire, robbed the rest of its members. Mr. Avory succeeded in catching one or two specimens of the black-leg non-professional men. We can only regret that he was not equally successful with the members of the higher branch of the profession. Those who have frequented the Bar of late years have known pretty well who are the men who have been guilty of these malpractices. Certain men were seen to hold great numbers of briefs received from men of doubtful, or rather, not doubtful, reputation. In consequence of the notice issued by Mr. Avory the malpractices were checked, and several counsel who before had plenty of briefs have had none since the new regulations. The vigorous steps thus taken have done something to remedy the evil. He now, by authority of the Court, requires each attorney practising at the Central Criminal Court to swear that the person using his name is in his employ as clerk, and is paid by salary, periodically, and not by any commission on business done, nor by any arrangement by which the profits arising from business are in any way shared or divided. He requires, further, that the attorney or his clerk shall swear : (1.) That he has been duly retained and instructed by the prosecutor in the case to conduct the prosecution ; (2.) That the signature at the foot of the written retainer is of the proper handwriting of the prosecutor in the case ; (3.) That he, or some one named, delivered a brief in the prosecution to Mr. —, and that he has paid in cash to the said Mr. — a fee of —, for and in respect of the said brief in the prosecution ; and (4.) That the signature or initials on the said brief produced and shown is (or are) of the proper handwriting of the said Mr. —

We believe these new regulations will do much to remedy the evils complained of, and if Mr. Avory succeeds in the task he has undertaken, he will merit, as he will obtain, the thanks of both branches of the legal profession. Hitherto, as

fast as one set of abuses has been got rid of, another has made its appearance. The whole atmosphere of the place requires the fullest ventilation; and so far as we are concerned, we are determined that it shall have it. In the Recorder, in the Common Serjeant, in Mr. Commissioner Kerr, as well as in the officers of the Court, we have everything that can be desired. They have set themselves to cure the manifold evils which they found existing. So far, however, all their efforts have been unavailing. We have much hope in the efficacy of the measures recently adopted, and we trust that, worked thoroughly by Mr. Avory, with the sanction of the Court, and with the support of public opinion, they will be successful. Other measures are, however, desirable. It would be well if something could be done to create at the Central Criminal Court a professional feeling of a higher order than at present exists. The public outside is inclined, occasionally, to amuse itself over the curiosities of Bar etiquette, and the trades-unionism of the Bar. But after all, such scandals as we have had at the Old Bailey, where Bar etiquette is weakest, and in New York, over the Erie Railway business, though we have not gone so low as *that*, where Bar etiquette can scarcely be said to exist, show that the *esprit du corps* of a protected profession is a great public safeguard. How to create such an *esprit du corps* in connection with our London criminal Bar is the difficulty. A well-written article in our contemporary, the *Law Times*, advocated the formation of a barristers' guild. But we cannot agree in the suggestion. Apart from the difficulty of forming a guild within a guild—which is what the proposal amounts to—there exists the fact that the Benchers of the several Inns of Court still retain their jurisdiction. A Benchers' Court is no doubt open to the objection that it is a tribunal before which it is impossible to go without the fact being generally known, and the supposed delinquent suffering, rightly or wrongly, in the estimation of his fellow-barristers. But, after all, nobody supposes that the Benchers would be otherwise than lenient judges; and if it has rarely happened that persons whose conduct has been brought before them have left the court with the remark that they do so without a stain on their character, it has been because they have not so left it. On the whole, we are inclined to believe that the Benchers of the several Inns constitute the proper tribunal before which to bring the delinquencies of the disreputable members of the Bar. The Benchers are men of position, men who know how necessary it is to keep up the appearance as well as the reality of the honour of the Bar, men often with judicial experience—above all, men who, by the traditions of the Bar and in actual fact, are at the head of the great colleges to which the profession belongs. To them we must look for aid against

offences which tend to degrade the profession of which they are the guardians. But when the Benchers are ready to do all that they can do to maintain and extend the purity of the Bar, much must still remain to be done by the individual members themselves. Organization and regulations may do much; but the best, the only effectual, safeguard which the public can have is the general high character of the Bar. If the man who is under temptation to take work without troubling himself to learn where it comes from, feels that if he does so he will surely forfeit the esteem of his professional brethren, will, if the fact becomes known, be avoided by them, will find that they will not hold briefs with him, he will hesitate before he enters on a course likely to be attended with such inconveniences.

On one topic more we must here say a few words. Many of the evils here complained of arise from the want of a system of public prosecution. Everybody at the Bar knows the haphazard way in which cases are prepared for presentation to the Court. Copies of the depositions are furnished to the prosecuting counsel at the last moment instead of briefs. The evidence outside has been carelessly prepared. The prosecutors, private persons or policemen, knowing perhaps nothing of the requirements of the law as to evidence, and having no inducement to put themselves out of the way to get up the case thoroughly, are bewildered amid the confusion of a criminal court. It is not to be wondered that they should readily avail themselves of the services of the first person, professional or non-professional, who offers to help them. As we have already seen, the allowances for prosecution seldom cover the actual expenses, and few persons who have once been put to the cost of a prosecution will care to incur it again. The appointment of a public prosecutor would at once rid us of touting clerks and attorneys. A woman who had been robbed would know at once to whom to apply in order to get the prisoner punished, and would be saved at least from many of the inconveniences to which she is now subject. It would, no doubt, very considerably increase the expense of prosecutions to the public purse, but this would be more than counterbalanced by an increased proportion of convictions, a probable diminution in crime, and the freeing of our legal system from a series of scandals which will cause the next generation to marvel how it could happen that they were tolerated so long.

## VI.—PRIVATE BILL LEGISLATION.

**MR. DODSON'S** proposal to transfer the bulk of the jurisdiction over Private Bills from Parliament to an ambulatory tribunal "of a judicial character," has not found favour with the House of Commons, and certainly would not be agreeable to the Parliamentary Bar, to Parliamentary agents, or the profession generally. The first and perhaps most obvious objection to such a plan is that no one tribunal could do the work. In the last session of Parliament thirty-seven committees sat, and the Bills before them occupied 207 days. The ground had previously been cleared for them by the labours of the Examiners of Private Bills, the Standing Orders Committee, and the Court of Referees, which had determined all cases of *locus standi*. We believe that Mr. Dodson was far too sanguine in supposing that three or four judges or commissioners, who, by the way, were not necessarily to be lawyers, could get through the work which now comes before these various tribunals, in time to allow of an appeal to Parliament before the prorogation. However this may be, the prospects of Parliamentary agents and the Parliamentary Bar, already not very brilliant, would, under such a system, be dismal indeed. At present, the multiplicity of committees sitting at the same time does limit practically the power of the leaders and of leading juniors to attend to every case. But in a single external tribunal, whether sitting in London or the provinces, it is obvious that a few men would monopolize the practice, and might, and probably would, appear on every Bill to the exclusion of the rank and file. Again, at present many members of the Common Law Bar are brought into the committee rooms; but this casual source of fees would be to a great extent at an end also for practitioners outside the charmed circle. The Parliamentary agents would suffer still more than the members of the Bar, for if the greater part of the business of the new court were transacted, as Mr. Dodson expected, in the provinces, at certain local centres, the services of London agents would not be needed, and the work would fall into the hands of local solicitors.

Such being the results of the proposed system upon the profession, would the interests of the public, which of course must be primarily considered, receive any solid benefit by this substitution of a *quasi-judicial* for a Parliamentary tribunal? We say "*quasi-judicial*" because it is nonsense to suppose that a court constituted, as Mr. Vernon Harcourt

suggests, chiefly of laymen, pronouncing upon the merits of Private Bills, could have much of what Mr. Dodson mildly calls "a judicial character." It would much more nearly resemble a court of arbitration, exercising legislative rather than judicial functions. Could a court so constituted, and discharging such functions, hope to escape the suspicion of bias in the exercise of what, after all, must be a discretionary power? Regard being had to the nature of their functions, there is much to be said in favour of a Parliamentary committee, composed of three or four men indifferently selected and having no local interests—men of social position, generally of business habits, and always presided over by a chairman well seasoned in the committee-room, and qualified by long practice, as well as by natural powers, to conduct the inquiry. The influence of the Parliamentary Bar over such a tribunal has probably been a good deal overrated. The men composing it are not easily led by the ears, and listen with impatience to speeches not built on a simple business-like statement of facts and reasons. Above all, whatever decision may be given, promoters and petitioners are alike convinced of the impartiality of the tribunal. Occasionally, mistakes are no doubt made, and the discretion vested in the members of the committee may be wrongly used; but when this has been said, all has been said, and it is by no means clear that a judicial tribunal, having to legislate rather than to administer the law, would give more general satisfaction. On the contrary, there is great force in Mr. Bouverie's objection that a judicial tribunal is wanting in the elasticity which is necessary when varying wants and circumstances must be met, and when a decision given one year may be inexpedient and not for the public advantage in the year following. Nor is it clear that there would be a material saving of expense to the parties by the establishment of a local tribunal constituted as this would be. In practice, it has not been found that the system of ambulatory election judges and local inquiries has relieved candidates from cost in defending or attacking seats. Such inquiries would be far more costly, when, upon a vigorously opposed Bill, engineers and other experts, besides half a score of counsel, were taken from London at the busiest season, and compelled to forego all other fees while attached to the particular case.

From the tone of the House when Mr. Dodson's resolutions were discussed, we may conclude that his scheme is decently buried, and that the House of Commons, at least, is not disposed to part with its jurisdiction over Private Bills. There is reason to believe that the House of Lords would be still less inclined to relinquish this jurisdiction. Such reluctance is little to be wondered at. Under the sanction of private Acts

of Parliament vast sums of money, not falling far short of the whole amount of our national debt, have been lent and spent; and colossal interests have grown up, vitally interested in the system which the late Chairman of Committees seeks to remodel, and, on the whole, well satisfied with it. The existence of such interests as these suggests great caution, especially before adopting the revolutionary scheme lately propounded. Moreover, Parliament has not to deal here merely with suitors whose causes should be advanced with as little delay and as little expense as possible. Public as well as private rights have often to be guarded, public departments have to be consulted, and the question to be decided is whether private persons or public bodies shall be allowed to obtain powers, frequently over-riding general legislation, and conflicting more or less with private rights. It was hardly probable that either House would part with any portion of its control over the railway companies, whose monopoly is every year increasing, and whose power needs constant curbing by the supreme authority of Parliament. On their side, the railway companies would probably themselves resent an attempt to place them at the mercy of an unknown tribunal, competent or incompetent, which could not, in the nature of things, create or be guided by any code, and the decisions of which would almost certainly fail to command public confidence, even where no reflection was cast upon its impartiality. Public confidence in the court would be further shaken by invariable appeals to Parliament when the interests at stake warranted an appeal; and thus, in the great majority of contested cases, there would be a double hearing and a double set of costs, just as at present, with liability to still greater delay, and no prospect whatever of greater economy than at present. Thus, promoters and petitioners would come round to the Parliamentary Committee after all; and the question may well be asked—"Why not improve the existing jurisdiction, instead of supplementing it by one inferior in authority and in dignity, and not, as far as we can see, likely to be more satisfactory to the suitor?" The President of the Board of Trade has now taken in hand the amount of Private Bill legislation of Parliament, and it is easy to see that his plan will fall far short of the root-and-branch reforms contemplated by Mr. Dodson.

One or two easy and obvious reforms may be indicated here. The House of Commons complains of overwork. It may be replied, that Private Bill legislation is not the least useful, though it may be the least ambitious part of this work of Parliament. Turnpike roads, the supply of gas and water, the drainage and improvement of towns, the conservancy of rivers, the making of docks, the maintenance of harbours, the construction of railways and tramways—all these, and

more, are the creatures of Parliament, called into existence and regulated by means of Private Acts. It is a pity that such labours are so little known and cannot be better recognised by the country. They are, however, of immense public value, and ought not, we think, to be abandoned for the more showy and prominent duties of general legislation. That they might be lightened is certain. For example, the number of members serving on any committee might be safely reduced from four to three, without impairing the efficiency of the tribunal. The question of joint committees is a larger one, into which we have not now space to enter. But one other change, which might well be adopted in the interest of promoters, is the reduction of the House fees, which are now excessive, and go far beyond the sum necessary for defraying the legitimate expenses of the Private Bill machinery of Parliament. With these and other changes which might be indicated, the Legislature still keeping its present control over Private Bill legislation, we believe that private wants as well as public interests would be consulted, both Houses might be relieved from considerable labour, while a substantial and safe reform might be effected in this branch of Parliamentary jurisdiction.

## VII.—THE PROPOSED ECCLESIASTICAL JUDGE.

**I**T was a saying of Benjamin Franklin that nothing was cheaply bought which was not wanted. The strongest argument that has been used on behalf of the Ecclesiastical Courts and Registries Bill is, that it is an economical arrangement, but the noble lord who is responsible for it seems to us to have failed to show that one of its chief provisions, namely, the appointment of a new ecclesiastical judge, is a necessary one.

It must be admitted that the procedure of the Ecclesiastical Courts is a field to which the attention of law reformers is well directed, for though the objects, with which some of the suits which come before those courts are prosecuted, may not commend themselves to general approbation, it should be remembered that a cumbrous and expensive procedure tells with equal hardship upon those who are called upon to defend, as upon those who choose to promote, such suits; and whatever we may think of the policy of doctrinal suits, with regard to quasi-criminal causes, common justice to the accused demands a reform of the mode in which they are conducted. However, we are not at present concerned to discuss the necessity of such reforms nor to pass an opinion upon the particular

method by which the Bill before us purports to effect them; but admitting the necessity and expediency of such reforms, we are not prepared to admit that the consequence of those reforms would be a material increase in the amount of work thrown upon the Ecclesiastical Courts. The proof of this is, in our opinion, incumbent upon those who advocate the appointment of a new judge, for we hope to show that the amount of work discharged by those courts under existing circumstances does not necessitate such an appointment.

The Bill does not touch the present Diocesan Courts, but by its 16th section enacts that the two archbishops may appoint a barrister of fifteen years' standing to be judge of the Provincial Courts of Canterbury and York; and the 21st section empowers the Queen in Council to assign him a salary not exceeding a sum which it is proposed to fix at 3000*l.* per annum. We should certainly have expected to find that the House of Lords, before passing these sections, had satisfied themselves that the present provincial courts were overwhelmed with work. But what is the actual state of the case? Let us take the chief of the two provincial courts, the Court of Arches. Before that court there is at the present time not a single cause pending; last year there was one; and in 1870 there were two, the total number of days or parts of days which the court has sat during the last three years being forty-five.

It is true that the present judge of the Court of Arches receives, as such, a salary of only 30*l.*, but as judge of the High Court of Admiralty he is remunerated on a scale which puts him on an equal footing with the other judges in Westminster Hall, while his work is in the aggregate far lighter than that of the latter judges. The combination of the two courts may be irrational and indefensible, but why divorce them at the expense of having to create a new judge exclusively to discharge functions which are now discharged by a judge who is neither underpaid nor overworked?

Moreover, the erection of a court having exclusive jurisdiction over a special class of cases is itself a retrograde step.

How is such a court to fit in with the scheme propounded by the Judicature Commission, the very key-stone of which is the abolition of special jurisdictions? We can only suppose that the framers of this Bill have disregarded the possibility of that scheme being carried into effect, for it cannot be contended that even cases involving points of doctrine could not be adequately provided for under a scheme which allows the constitutions of the court to be modified by the calling in of skilled assessors, when the cause to be heard requires some special training or knowledge.

A system of assessors would cause just as much ecclesiastical



learning to be brought to bear upon ecclesiastical suits as it would mechanical knowledge upon patent cases.

If such suits are to be tried at all, we see no reason why the court which hears them should not be embraced within the general scheme. And we may add this in the interest of those who support the opposite opinion, that when all other suits come before one supreme court, decisions of a court which stands outside that supreme court are much less likely to command the respect and obedience of the community. The framers of the Bill appear indeed to have hesitated to carry out their principles to their fullest conclusion, for they do not propose to alter the constitution of the Appellate Court, and yet if the Judicial Committee can be so constituted as to form a court fit for the trial of ecclesiastical causes, it is difficult to see why the court of the first instance should not be susceptible of a corresponding modification; indeed, it would not be impossible to give the supreme court jurisdiction over ecclesiastical, as well as other causes, without disregarding the requirements of the 94th section of the Bill, namely, that the judge appointed by the Act be a member of the Church of England.

● With regard to the fund out of which the 93rd section directs that all salaries, charges, and expenses be paid, it is unnecessary to remark at any length, as full justice was done to the subject in the House of Lords. As to one element of that fund, namely, the fees paid on visitations, we have only to add that it is at least extremely doubtful whether the churchwardens can, when there is no rate in their hands, be legally compelled to pay them.

As to the other chief element, namely, the fees paid by applicants for marriage licences, we fear that that also is likely to become an evanescent quantity, for the abolition of those fees was one of the recommendations in which a majority of the late Commissioners on the Marriage Law concurred.

We are content, however, to assume the existence and the sufficiency of this fund, we only quarrel with its proposed application, and we trust that in doing so we have sufficiently demonstrated that a new ecclesiastical judge at the proposed salary is not under the present circumstances wanted, and that the existence of the court over which he is intended to preside would be incompatible with the reformed system of judicature which we have in view. It is to be regretted that the time of the Upper House was so long occupied in discussing a Bill which is open to such obvious criticisms, and were it not for the fact that it has actually passed that august assembly, we should feel bound to apologize for bringing even such a small portion of it before the attention of our readers.

## LEGAL GOSSIP.

THE cartoon in last week's *Punch* reflects in a way which *Punch* continually does, and in an admirable manner, the popular sentiment. As often as not this sentiment is wrong, and it is altogether wrong this week. If the cartoon representing two scoundrels comparing experience in prison have any meaning at all, it is that in this country a man gets a much lighter punishment for ill-treating his wife than he would for ill-treating any other woman. This view is the reflection of a number of paragraphs which have appeared in the newspapers *à propos* of a sentence imposed by Mr. Commissioner Kerr upon a man who had ill-treated his wife. Nobody who knows the Commissioner would suspect him of undue leniency or of any tendency to rose-water theories. But the paragraphs referred to have their origin, as so many of a similar character have, in the ever-ready assertion of a certain class of newspaper writers, who are prepared, at a moment's notice, to write an authoritative comment on any subject in heaven or earth or under the earth. Decency might suggest that the Court, with all the facts of the case before it, would have at least as great a chance of being right as these writers themselves, whose information is derived through reports obtained not seldom from the lowest class of reporters.

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One of the medical newspapers has called attention to the system of flogging which is just now in such popular favour. We are glad it has done so, because our own belief is that its effects are altogether bad. Our contemporary considers the question from a medical point of view; we solely from its effects on society. He says that it is worse than continued toothache, or any series of natural pains combined; that it is barbarous in its cruelty; that it is as bad a form of torture as could well be devised. We say that every scrap of evidence that can be brought forward on the point shows that it is not deterrent, and that, therefore, it is useless cruelty; that it takes away from the person so tortured the last spark of self-respect he is possessed of, and so leaves less chance of his turning into honest ways; and that its effect on the whole community in general, and on the scoundrel class in particular, is demoralizing. To hear some people talk, this whipping might be a new form of torture, a grand discovery in prison treatment. Why, the thing was tried for centuries in England; done with infinitely more thoroughness than this gen-

ration is in the least likely to do it ; tried and found to be the most complete failure. All Howard's wonderful labours—and Howard had nothing of the namby-pamby, amiable, beautiful philanthropist, rose-water method about him, Thomas Carlyle notwithstanding—go to show that in proportion to the cruelty with which prisoners are treated is the amount of crime in the country. England, with its Draconic code, hanging a wretch for cutting a hop-band or stealing a skein of thread, had yet a higher amount of crime than any country in Europe. There are men in England now who have had experience, any amount of it too, in New South Wales and Van Diemen's Land, in the old convict days, and who could tell that wherever the lash went most frequently crimes were most frequent. "Serve the scoundrels right;" "Make them cautious another time;" "A warning to others;" "No sympathy with scoundrels," is the modern cry. "Hang them, every one of them;" "Get rid of the whole breed;" "Strike terror into all ill-doers;" "Hanging is the easiest and cheapest way of getting rid of rascality," were the cries of the corresponding class a century ago. Both cries are those of mere stupidity and ignorance. Rascality is not thus easily got rid of, and the best thing that we can do is not to be led by a few common-places about scoundrelism to ignore facts.

The question of an international copyright between this country and America—a subject which we handled in the first number of our monthly issue—has been stirring the literary atmosphere again. Without arrogating to ourselves more than an ordinary share in the revival and advancement of this question, we have assuredly been much gratified to find that not only in this country, but also in America, the views which we then advocated in opposition to the Philistinism of the *Times* have met with both practical and speculative recognition. The *Observer*, in its issue of the 23rd or 30th ult., gave in its adherence to opinions precisely similar to those which we had expressed in February last. Mr. John Stuart Mill, and other literary and experienced men, happily of not too insular inclination, also publicly advocated opinions similar to our own, as furnishing a suitable and sufficient basis for an international copyright treaty. Mr. Appleton and other influential men in the United States, have also been stirring in the practical direction which we were the first to recommend and to approve ; and notwithstanding some amount of opposition in the States arising principally from publishers of lesser reputation, it seems not improbable that an author's copyright and a publisher's copyright will ere long be established in America, with liberty to this country to come in, if it pleases, to take the benefit of it.

Now, this is the species of international settlement which we desiderate. It is superior to the cumbrous system of direct international negotiation; and growing up spontaneously in either country, it is more likely than not to be at once commensurate with, and not in excess of, practical requirements, as, unhappily, too many concocted arrangements are.

It remains, therefore, now only to be seen whether this country or America shall be the first to concede an author's copyright. We were grieved to observe that the English Foreign Minister, Lord Granville, had expressed himself, if the *Echo* may be believed, as being opposed to the settlement which we proposed and which the Americans are already acting upon. We regret that his lordship should follow with the Philistines rather than keep company with Israel; and we regret this, not merely from a regard for his lordship, but also from a regard for ourselves as constituent units in the English nation. For it seems likely that we shall be forestalled by the Americans in their proposed concession, and be left to come in behindhand with our submission and approval. At all events, we entirely fail to perceive how his lordship can prevent the Americans on their part doing in this matter as they wish; and English authors, on their part, also taking advantage of the opportunities of a wider circulation and consequently larger remuneration which the American publishers are promising to secure for them. We reiterate our eulogium of selfishness as the true index and criterion of the internationally wise and right; and we hope for the credit of the nation, that our Foreign Minister may speedily veer round from the direction in which our contemporary represented him as sailing, and steer steadily in a direction which will lead him to some practical result, that shall be alike honourable to England and satisfactory to America.

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The Code of Evidence Bill, introduced by Mr. Heron, Q.C., and Mr. Pim, has been the subject of two evenings' discussion before the Law Amendment Society. Mr. Joseph Brown's paper on the Bill was one of the ablest we have ever read—quite a model in its way; and the first night's discussion was well worthy of it. Mr. George Denman was in the chair, who, besides being the author of the Evidence Further Amendment Act, as the representative of his father, may be said to have seisin of the subject of evidence. Mr. Pitt Taylor spoke admirably. These alone, on the subject of evidence, were a stronghold in themselves. They, as well as the other speakers, agreed so cordially as to the insufficiency of the Bill, if it is to be a code, and as to the wretched drafting of many of the clauses, that Mr. Pim, one of the M.P.'s whose name is on the back of the Bill, explained, good—

naturedly, to the meeting, that though his name was there he had nothing to do with it. The discussion was postponed until Monday, the 29th, when Mr. Pitt Taylor was in the chair, and Dr. Waddilove, who moved the adjournment, re-opened.

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The Irish art of terrifying witnesses, and so deterring them from giving evidence in criminal prosecutions, seems to have arrived at a point of perfection in London, which has rarely been equalled in its native soil. The latest case has scarcely attracted the attention it deserves, and we, therefore, will briefly recapitulate the main points. An old offender having been committed for trial for felony, and still further evidence of identity being required, the detective employed in the case succeeds, after some difficulty, in ingratiating himself into the confidence of a Mrs. Snellgrove, who, in an unguarded moment, when she believes she is only talking to an old customer of her husband, states that she saw the robbery, and knows the thief well, but, of course, living in the neighbourhood of his friends, she dare not say anything to the police. The detective, having obtained the required information, reveals himself in his true character. The poor woman exclaims, "Oh, what will become of me? What will my husband say?" and refuses to attend to give evidence. The detective procures a subpoena, and Mrs. Snellgrove at last, though most reluctantly, promises to attend the Sessions. The detective has scarce left the place when the poor woman is waited upon by a female, who represents herself as the wife of the accused, and first appeals to Mrs. Snellgrove's sympathies and then to her fears. The fear of the law, however, is too strong for the witness, and upon the detective calling again she accompanies him to the court. While in the waiting-room she is again threatened by some of the prisoner's friends, and her terror is so evident that while giving her evidence the chairman directs the court to be cleared. In the event the prisoner is convicted and sentenced to seven years' penal servitude, it is thought necessary that the witness should be sent home, protected by constables, who caution the prisoner's friends against further molesting her. Some hours after, Mrs. Snellgrove having carefully reconnoitred her street, ventures out on an errand; she is scarcely out of her door when she is attacked, with great ferocity, by the alleged wife of the convict and another woman. The injuries inflicted are so severe that the woman has lost the sight of one eye, and even been in danger of total blindness. After great exertions the police succeed in apprehending two women, whom Mrs. Snellgrove identifies. At the police court the prisoners conducted themselves most violently, and threatened the witnesses

in open court. One woman, when called on to give evidence, states she has been threatened outside the court, and absolutely refuses her testimony, on the ground that she cannot afford to lose her eyesight or her life. The presiding magistrate having exercised considerable pressure by suggesting that he will be obliged to commit her, the woman at last makes a meagre statement, but cannot be induced to say who had been endeavouring to dissuade her. Mrs. Snellgrove's assailants have been committed to the Old Bailey, and will, no doubt, meet their reward.

That such a state of things should be possible in the metropolis towards the end of the 19th century, is simply disgraceful to the English administration of the criminal law. If the system of terrorism had not been successful in numerous other cases, it could not have grown to its present proportions. It is usual to attribute such matters to defects in the law. This is a very simple and easy process, but it is frequently, and in this case specially, untrue. The law has numerous provisions for the protection of witnesses; what is wanted is, that there should be some authority charged with carrying the laws into effect. The witnesses should be under the protection of a public prosecutor. A few such prosecutions as that of *Reg. v. Steventon*, 2 East R., 362, where the defendant was indicted at common law, and convicted of having dissuaded witnesses to give evidence, would do much to restrain such practices now too general among the criminal classes. It will be obvious that such prosecutions cannot be satisfactorily undertaken by the police, but that legal assistance is absolutely necessary. An enormous improvement might even now be effected, by attaching to our London police force a law department, instead of the present system of leaving most prosecutions to any society or private individual who may take the matter up, or in an important case to the Solicitor of the Treasury, whose time is already fully occupied.

We might further suggest, that if any alteration is to be made in the existing law, power should be given to summon witnesses to initiate the proceedings by laying informations before magistrates.

If we should succeed by this reference to Mrs. Snellgrove's case, in impressing on the magistrates and the police the paramount necessity of checking in the bud the very slightest attempt to intimidate witnesses on criminal prosecutions, we feel that we shall have done something towards the protection of innocent witnesses, and to the furtherance of the interests of justice.

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It is just ten years ago that the arrangement was made in Doctors' Commons by which the proctors were deprived of

their right to take out marriage licences for their districts, and duly compensated for that deprivation. That compensation was estimated at so much per annum for ten years, and therefore expires this year. It was part of the same arrangement that the three offices for marriage licences, namely, the Bishop of London's Registry, the Vicar-General's Office, and the Faculty Office, should divide among themselves, in certain proportions, the fees arising from the granting of such licences. This arrangement also comes to an end in the course of next month, and the consequence will be less agreeable to applicants for licences than to the Doctors' Commons touts. It will inevitably follow that each office will endeavour to secure the largest share of applications, and this object can only be attained by the employment of touts. Unfortunately, the race is not, as might have been expected, extinct. It has apparently become traditional that no one can find his way to one of the marriage-licence offices without a guide, and the intricacy of the geography has helped to make this tradition a reality. However it may be, the touts will be found ready to hand, and henceforward, instead of deriving a precarious existence from what they can extract from the public upon whom they force their services, they will add to that source of profit the rewards they will receive for the service which they render to the office by which they are employed. To the public they will be as great a nuisance, and to Doctors' Commons as great a scandal, as ever. When practitioners have about their doors men whose function it is to ask of passers-by what their business is, it is not surprising that they are tempted to employ these men as touts on their own behalf. It is, therefore, the interest of the legal profession as well as of the public to devise some means by which the absurd system of competition between the three offices may be put an end to, either by combining them into one, or by giving each an exclusive right to grant licences for a given district.

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We have often been surprised at the tedious process resorted to in magistrates' courts of taking the depositions of witnesses. As at present constituted, the clerk of the court takes the testimony in long-hand writing: three-fourths of the time occupied is needlessly wasted. Not only is the time of the magistrate squandered, but the time of professional gentlemen and other people who are engaged in prosecuting or defending prisoners likewise. These remarks apply more particularly to the recent cases of Chaffers, Pook, and those of the Fenian prisoners. Where would the Tichborne case have now been had the evidence been taken down in long hand? Why, they would have just been calling the thirtieth witness for the plaintiff! Take, also, the case of Harmer, for perjury, recently

reported at the Westminster Police Court, which lasted over a week. If the testimony had been taken down in shorthand, it could have been finished in a day and a half, allowing for all necessary adjournments for other cases to be heard. It would be much better if a duly qualified and competent shorthand writer were appointed to take down the depositions of witnesses in the same way as is at present done at the Central Criminal Court, Divorce Court, Admiralty Court, the committee rooms in the House of Commons, and various other courts of law. Convenience of the magistrates would be greatly consulted, and the obtaining of justice would be facilitated, by the adoption of this suggestion. Moreover, much of the value of cross-examination is lost from the slowness with which the clerk takes the evidence down. An untruthful witness has time to get ready for his next answer, and to see how his last bears upon the general impression he wishes to convey. The subject is worthy the consideration of the Government or the Judicature Commission. County Courts would be greatly benefited by this innovation in cases where notes are taken at all.

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The Attorney-General seems to have snubbed Mr. Eykyn the other night, when he asked whether, having regard to the proposed constitution of a Supreme Court of Appeal, it was expedient that an ex-Lord Chancellor of England should be appointed paid arbitrator at a *maximum* fee of 3,500 guineas under the Bill now before that House, to wind up the affairs of the European Assurance Society; whether there was not an implied contract or understanding between the State and the ex-Lord Chancellors of England that, in return for the pension of 5,000*l.* per annum granted on retirement, their time and services as judges should be reserved for the country, on the judicial tribunals of which they are members; and whether it was consistent with the dignity of their position, if such understanding did exist, that in accepting the office of arbitrator they should take reward for their services? Did the Attorney-General feel a little chafed at a question so deeply concerning the future of the heads of his own learned profession, and perhaps of himself, being put by a civilian? Or did he wish to avoid giving a direct answer? At any rate, he protested against the question being put to him. He said it was a question of a sort which he was not the proper person to answer, and if he were, the question was difficult, delicate, and interesting. Such a question is surely within the province of any Hon. Member to ask. Who would the Attorney-



the inquest was that the father was committed for trial at the next sitting of the Central Criminal Court. The decision, we think, was a very proper one, and were the law to be put into force in all such cases of parental neglect, whether fatal or otherwise, we might do something to get rid of this pest. We have no objection to the fullest religious toleration, and even equality. Shakers and Contortionists have as much right to the protection of the law as Archdeacon Denison or Mr. Spurgeon. But when people kill their children by neglecting to have them vaccinated, or from any other scruple, religious or not, they ought to be brought within the power of the law.

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The want of space both for books and for the accommodation of readers and students in Lincoln's Inn library being much felt, it was resolved by the Bench, in the spring of 1871, to extend the library. Its dimensions, as originally built by Mr. Philip Hardwick, in 1844, were 80 feet in length, 40 in width, and 60 in height; the extension was fixed at 50 feet in length, to be carried out eastward, in the same style of architecture as the original building, with the exception that windows are to be put on both sides of the extension, thereby securing ample light, of which there has been none too much in the library hitherto; it is proposed to make some alteration in the glass of the windows on the north side, by which the whole library will be better lighted. It is considered that the height and width of the library are sufficient to admit of the addition to the length without sacrificing the architectural features internally or externally. The library was originally designed on the most approved principle, namely, that of projecting bookcases dividing the room into recesses; a light iron gallery is carried round the lower part, by which every shelf is within hand reach. New and additional offices and conveniences, and a spacious class and lecture-room, are provided by the extension; a new tower is placed at the south-east corner, which will serve as an additional means of communication from the lower part of the building to the library, and also as a separate entrance to the library, thereby relieving the main building from the traffic incident to the use of the library. The idea of this mode of extension was correctly conceived by the Bench, and is being well carried out, under the able direction of Mr. Gilbert Scott, architect, by Messrs. Jackson & Shaw, the contractors. The greatly increased importance of the library, and the educational functions now discharged by Lincoln's Inn in common with the other Inns of Court, rendered the extension necessary. It is expected that the new part will be brought into use early in 1873. The dimensions of the library, as extended, will be 130 feet in length, 60 feet in

height, and 40 feet in width; those of Lincoln's Inn Hall are, length 120 feet, height 62 feet, and width 45 feet.\* The additions to the library are progressing very satisfactorily. The walls are ready for the roof, the whole of which is prepared and now being fixed. The bookcases are ready to be put in as soon as the roof is finished, and no doubt the additions will be completed by October, and everything arranged by the end of the long vacation.

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Last Sunday week being the first Sunday in Easter Term, some of Her Majesty's judges and serjeants-at-law, according to an ancient custom, attended in state an afternoon service at St. Paul's Cathedral. In spite of the bad weather there was a very large congregation, and the service was held in the dome area. The judges and the serjeants, all of whom wore their full robes, on their arrival at St. Paul's were met by the Lord Mayor and his attendants, and a large deputation from the Court of Common Council, wearing their mazarine gowns, and each carrying a bouquet. A procession was then formed, and the judicial and civil dignitaries were conducted to their seats in the choir, being followed by the clergy and choristers of the Cathedral, headed by the Dean and Canons.

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The alterations in the Middle Temple Gardens and in the fountain in Garden Court are approaching completion. Sir Lawrence Peel repudiated the idea of being a Vandal in cutting down the finest of the trees around the fountain, and what he has done certainly bears out his repudiation. All the alterations are being conducted under his directions. He has planted at least a dozen trees in its room, and the next generation will probably be grateful to him for so doing. The fountain has been removed, but it has been replaced by a good jet, and those who love to remember that this was the place which Charles Lamb frequented; where John Westlock contrived by accident to meet Ruth Pinch, herself waiting for her brother Tom coming out of those curious chambers in Garden Court, need have no cause for alarm. Sir Lawrence's change is in this respect really a restoration. The fountain which has been removed is itself a modern innovation, the jet is the genuine thing, and, what is more to the purpose, is a prettier and more refreshing object than that which it replaces. The fence round the fountain has been entirely removed, and with great advantage. The steps leading into New Court have been widened—a great improvement. On each side of them have been placed the ugly posts surmounted by golden lambs

\* An excellent account of the history of Lincoln's Inn, and of the New Hall and Library, will be found in "Lincoln's Inn, and its Library," by W. Holden Spilsbury, Librarian. Pickering. 1850.

which formerly occupied a corresponding position towards the steps leading from Garden Court into the garden. This latter entrance has been stopped—a questionable improvement; but a new entrance has been made through the Treasury Passage in Middle Temple Lane. The railing separating Garden Court from the space round the fountain has been removed, and has been replaced by a short wall with a neat coping upon it. This, too, is an improvement. So also is the encroachment of the garden into Garden Court. The Templars will have to give a hearty vote of thanks to Sir Lawrence Peel when he has completed his alterations.

The following is the opinion of Lord Chief Justice Cockburn on the Supreme Court of Appeal Bill, and submitted for consideration to the Lord Chancellor and the law officers of the Crown:—

“The scheme for the creation of a new appellate judicature, which after much reflection I would submit for consideration, is this:—

“I would have but one Court.

“It should consist of—

“1. The Lord Chancellor.

“2. Such members of the House of Lords, having held judicial office, as should give notice to the Lord Chancellor of their willingness to serve as judges of appeal.

“3. The Lord Chief Justice of England, the Master of the Rolls, and the two Lord Presidents of division of the High Court of Justice.

“4. Four Lords Justices of Appeal.

“As the Master of the Rolls is *ex officio* to be a member of the Court, without other judicial duties, there would thus be at least five regular judges besides the Lord Chancellor, the law lords, and the Presidents of the High Court of Justice.

“This would give a body of from eight to nine regular judges independently of the Lord Chancellor and the Presidents of the High Court of Justice, at an expense, on an average, of 15,000*l.* to 16,000*l.* a year, in addition to the present expenditure, an amount which the country would cheerfully pay in order to obtain a Supreme Court of Appeal of the highest class.

“The Court should be permanent, and its sittings continuous, except at times of legal vacation. The Court should be one entire Court, whereby the inconvenience will be avoided which is likely to arise from particular business being, as proposed by the present Bill, assigned to one division as distinguished from the other—namely, that one division may be

without work to do, while the other has more to do than it can accomplish. But looking to the number of judges of which the Supreme Court, constituted as I propose, would consist, it should be competent to the Court to sit in two divisions for the better despatch of business, provided always that the quorum should consist of not less than four. With such a tribunal, the alarming arrear of colonial appeals would speedily be reduced, and the appellate business of the country disposed of without delay and to the satisfaction of the profession, the suitors, and the country.

“Another advantage which would incidentally result from having no distinction as to competency with respect to appeal business of every sort between one division of the Supreme Court and another, would be that it would have a tendency to make both Bench and Bar endeavour to render themselves familiar with the civil law, on which the law of many of our colonies is founded, and thus to enlarge the sphere of our judicial knowledge and modify the too exclusive character of the legal profession of this country.”

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It is understood that the Right Hon. Russell Gurney, Q.C., M.P., Recorder of the City of London, is to be elevated to the peerage on his return from his present mission. Sir T. Chambers will be elected to the Recordship that will then be vacated, and the Common Serjeantcy will be open to competition. Mr. Serjeant Robinson, Mr. Besley, the Hon. R. Bourke, M.P., Mr. Serjeant Sleight, Mr. J. J. Powell, Q.C., and Mr. William Cooper, are the candidates whose names have been mentioned in connection with the vacancy.

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A report of the Board of Legal and Historical Studies recommending the removal of modern history from the subjects of the Law and Modern History Tripos, and the substitution of constitutional history and constitutional law of England, has been the subject of discussion at Cambridge. Dr. Abdy stated that the experience of the two recent examinations for the Law and Modern History Tripos proved that the merits of the candidates were not properly brought out. Mr. Seeley, the Professor of Modern History, agreed to the report, but doubted the expediency of making the change in the way proposed. It was at last resolved that the whole question should be referred to a syndicate to consider how the subjects of history and law could best be separated, and to make provision for the due encouragement of the study of the latter subject.

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The Rev. Henry Ware has been elected to the chaplaincy of Lincoln's Inn.

A proposal to hold an International Prison Congress originated about three years ago in the United States, a country which has for many years paid special attention to the questions relating to prison management and the treatment of criminals. A prospectus embodying the proposal was circulated in various parts of the world, and sent not only to governments but to persons known to have directed their attention to the questions proposed for consideration. The proposal was everywhere well received, and London was selected as the most suitable place for the congress. A preparatory congress was held at Cincinnati, in the United States, in 1870. The task of arranging the preliminaries of the International Congress was imposed on Dr. Wines, who, besides taking a warm interest in juvenile reformatories, has for many years guided the Prison Association of New York, and is now secretary of the newly-established National American Prison Association, with its seat in the city of New York. He entered into communication with persons of all nations, and with the accredited representatives of their Governments resident at Washington. Last year he visited England, appointed as a commissioner by an Act of the Congress of the United States, to take steps, with the several Governments of Europe, and with those interested in the subject, for the organization of the proposed Prison Congress. It is now definitely fixed that the International Congress shall open in London on the 3rd of July next, and shall continue for a fortnight. Nearly every European country, the United States, the principal of the Governments of South America, and of our own colonies, have appointed commissioners, who will attend it, and give the congress the opportunity of comparing together the various penal and reformatory systems existing in the countries which they severally represent. Representatives from the various institutions and authorities having to deal more or less with the prevention and repression of crime, including penal and reformatory treatment, will attend the congress from all parts. We regret to see that the application of the executive committee of the congress was so thoroughly misunderstood at the meeting of the Middlesex magistrates last week. The mixing up of the Social Science Association, and it would almost appear the British Association with the proposed movement was an egregious blunder, and evidently showed that the gentleman who denounced the proposal as a "myth" knew nothing at all about the matter. A letter which appeared in the *Times* on Monday, signed by the secretary, puts the matter in the proper light as showing that the intended congress is entirely distinct from the Social Science Association. We regret to observe that the application to the Government for aid in defraying the expenses of

the congress has failed. Considering that it is probable that the delegates from the United States will be conveyed here in an American man-of-war, and that the different nations of Europe will be represented by the leading men of their country, we think that the refusal comes with very bad grace.

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#### IRELAND.

The *Irish Law Times*, after stating the gloomy side of the question of the position and prospects of the Bar, says:—"Side by side with the reforms which despoil the Bar, other reforms have been in progress which tend to create a healthy and necessary class of business, which may, under different conditions, supply to some extent the place of the fictitious and unreal system which enriched the Bar, while it impoverished the country. The County Courts are destined to take a place in the future judicial arrangements of this country, which few realize at present. Business will be there transacted of a kind requiring the services of counsel. The consolidation of Civil Bill Jurisdictions must follow from the removal of the chairmen from the ranks of the practising Bar, which is demanded by public opinion. The reforms which have been suggested by the Judicature Commission must sooner or later be established here as well as in England. The Land Act has scarcely come into operation, and yet it has already given a good deal of employment to counsel, and if local sessions Bars were regularly organized, it is certain that counsel would be employed in almost every case. A more liberal scale of fees, both for counsel and for attorneys, we may remark in passing, is a measure of reform for which we need not wait until the recommendations of the Judicature Commission become law. It has been demanded by the unanimous voice of both branches of the profession, and we publish this week a communication upon the subject. In addition, the class of cases remitted from the Superior Courts, and (more important still) the proceedings upon bills of exchange, and contracts of various kinds which, but for the Act of 1870, would have been instituted in the Superior Courts, are all of them likely to afford employment to counsel. The class of cases in which their services will be called into requisition will be largely increased when the Civil Bill Courts are invested with jurisdiction in questions of title. Then the Equity jurisdiction which is about to be conferred upon the Civil Bill Courts will give rise to a class of cases in which the services of counsel will be required. We have already observed that the effect of this measure (in our opinion) will be to develop a new class of business, and not to take an appreciable amount of business from the Superior Courts."

"All these reforms tend towards the creation of local sessions Bars, which would necessarily follow from the consolidation of County Court jurisdictions, and more frequent sessions. Thus an opening would be afforded for junior barristers which does not exist at present. Large fortunes would not, of course, be made by practice before these tribunals, but many men would be glad to compromise their chances of great wealth for the certainty of an early and sufficient competence.

"As to the general prospects of the profession, they will be largely affected by the proposed transfer of local legislation to Irish tribunals. A most profitable class of business would thus be opened up to the Irish practitioners. It must be remembered that the number of applications for Private Bills must be largely increased when the tribunal is made easily accessible, and expenses are thus greatly diminished. For all these reasons we cannot regard the future of the Irish Bar as menaced by recent and impending legislation to the extent which many suppose, although the decentralization of the institution is probably imminent. Instead of our great central institution in which the avenues to success are difficult of access, we shall probably have a number of localized Bars in which merit will be more quickly recognised and rewarded, and will ultimately (through circuit business) lead to a position at the Metropolitan Bar."

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#### SCOTLAND.

Recently, a report from the University Court of Edinburgh, containing a scheme for a new degree, to be called the degree of Bachelor of the Law of Scotland, intended "for those persons preparing for the profession of law who may not be able to give up the time necessary for obtaining the M.A. degree, and for attending the full curriculum in law," have been submitted to the University Council. The Council approved of the scheme, and requested the Court to take the necessary measures for carrying it into effect. The subject is one on which it will be necessary to communicate with the other Scotch universities, the ordinance which it is proposed to alter being applicable to them as well to Edinburgh. The council approved of the resolution of the University Court which extends the qualifications of candidates for the B.D. degree to "graduates in arts," instead of restricting them to "Masters of Arts." By this arrangement candidates will be qualified who hold the B.A. degree of the English, Irish, and colonial universities.

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## BOOK NOTICES.

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

Early Roman Law. The Regal Period. By E. C. Clark, M.A., of Lincoln's Inn. London: Macmillan & Co. 1872.

THE first question which suggested itself on seeing the title of this book was, where can the matter be found to occupy 150 pages on the regal period of Roman law? This period is of course antecedent to the compilation of the Twelve Tables. Nevertheless, on going through Mr. Clark's book, we have found sufficient answer to such a question. We had recently occasion to speak in high terms of Ortolan's sketch of the history of Roman law, and his edition of the Institutes, a work which, in spite of a depreciatory criticism, in the *Spectator*, we must yet regard as almost a model text-book. But the translation of Ortolan, which we then noticed, by no means supplies the place which this book will occupy if the succeeding parts are done as well as this in Roman legal literature. The writer has made independent research, has not gone to abstracts, but to original authorities. These he usually quotes. His great ancient authority, more valuable than all the rest as throwing light on ancient Roman law, is Gaius. To him we are indebted for the form of the *sacramentum*, and for information regarding *adrogatio*, the *vindicatio*, *cessio in jure*, the *mancipium*, and on many other topics belonging to early legal history. But Mr. Clark has brought to the execution of his task wide reading, learning, and acquaintance with what has been done by German students towards the clearing up of difficulties in connection with this subject. On this account, and because it is a successful attempt to cover, as yet, unoccupied ground in English, we welcome his book. It is not a specimen of book-making, but an honest attempt carefully worked out to write a history of Roman law. Having said thus much for it, we must now have our grumble at it, and add that the style is just simply as dry and unreadable as it can possibly be. We grant that Roman law is not of itself light reading. But with the examples of Ortolan and Maine before us, and with some few pages here done in a better manner, Mr. Clark ought not to have been so wearisome. Before long his book will be cribbed from on every hand by men of less ability and no research, who can write readable English.

Index to Precedents in Conveying, and to Common and Commercial Forms. By Walter Arthur Copinger, of the Middle Temple. Stevens & Haynes, Bell Yard, Temple Bar. 1872.

THE use intended to be made of this book is well indicated by an extract from Boswell placed on the title-page. "Knowledge is of two kinds," says Dr. Johnson; "we know a subject ourselves, or



we know where we can find information upon it." Mr. Copinger claims to have indexed in this volume above 10,000 precedents. The classification is done alphabetically, and where we have tested it is well done. It is the sort of book which may be described as a practitioner's table-book—a book for ready reference, by means of which a barrister or solicitor can save time by finding at once where he can discover the precedent of which he is in search. We have little doubt that it will soon find its place on the table of most men in practice, or will be promoted to that highest post of honour, a place where it can be reached without trouble.

**A Manual of the Practice and Procedure of the Mayor's Court, London, in Ordinary Actions and Foreign Attachments, with Statutes, Forms, and Costs.** By G. Manley Wetherfield, Solicitor. Longmans, Green, Reader & Dyer. 1872. Price 2s. 6d.

THIS is a useful little book, prepared by one who claims to have had special opportunities of becoming acquainted with the peculiarities of the court about which he writes. It is not intended to be more than a handbook, and does not come into competition with Mr. Brandon's more elaborate work on the same subject. Its price will probably ensure for it a large circulation.

**A Handbook of Sewage Utilization.** By U. R. Burke, Esq. London: E. & F. N. Spong, Charing Cross. 1872.

A BOOK on this subject was wanted, but we cannot conscientiously recommend this. Fifty-six pages are altogether too small a space to contain anything like a fair statement of the ascertained facts on the subject of sewage utilization. We regret not being able to commend Mr. Burke's book, the more because there is evidence not merely of careful work in it, but of a power of arranging facts, of methodizing his results, which give evidence that he could do something better. We may also call his attention to the fact that in some of the earlier sanitary reports, with which he is apparently unacquainted, there is an immense amount of valuable matter, and that the *Transactions* of the Social Science Association, which Mr. Burke hardly seems to be acquainted with, form a perfect mine of information on the subject. Should he work these mines, he may produce a work of very great practical value.

**The Law relating to Fraudulent Conveyances.** By Arthur Joseph Hunt, of the Inner Temple, Esq., Barrister-at-Law. London: Butterworths. 1872.

THIS is a work calculated to be of service to the profession. The subject is of never failing-recurrence, and the decisions are by no means easy either to reconcile and to arrange; and yet each decision, without any exception that we know of, is an authority in itself. Mr. Hunt has brought to bear upon the subject a clearness of statement, an orderliness of arrangement, and a subtlety of logical acuteness which carry him far towards a complete systematization of all the cases. Neither has his industry been lacking; the cases that have arisen under the Bankruptcy Act, 1869, and under the Bills of Sale Act, having been carefully and completely noted up and disposed

by him in their appropriate places. The index, also, is both accurate and careful, and secures much facility of reference to the various matters which are the subjects of the work.

**A Treatise on the Conflict of Laws, or Private International Law ; including a Comparative View of Anglo-American, Roman, German, and French Jurisprudence.** By Francis Wharton, LL.D., Author of "A Treatise on American Criminal Law," "Precedents of Indictments," "State Trials of the United States," &c. Philadelphia. London : Stevens & Sons. 1872.

THIS book comes too late to hand to enable us to do more this month than mention its publication.

**Parliamentary Papers.** London : P. S. King, Parliament Street. 1872.

*Bankruptcy Disqualification.*—Certificate under the seal of the London Bankruptcy Court, that Lord de Mauley has been discharged from all debts and liabilities due at his bankruptcy, &c. *High Court of Justice Bill.*—Observations of the Lord Chief Justice, the Master of the Rolls, and Mr. Justice Lush, on the High Court of Justice Bill and Supreme Court of Appeal Bill. *Justices' Clerks' Salaries.*—Bill, as amended in Committee. *Land Rights and Deeds.*—Bill to Amend the Law relating to Land Rights and Deeds in Scotland. *Queen's Bench Procedure.*—Bill to Amend the Practice and Procedure of the Crown side of the Court of Queen's Bench, in Ireland. *Register of Sasines.*—Returns relating to the Fees taken at the General Register of Sasines in Edinburgh, Expense of Register, &c. *Supreme Court of Appeal.*—Bill for Establishing a Supreme Court of Appeal.

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## APPOINTMENTS.

Mr. Charles S. Whitmore, Q.C., County Court Judge and Recorder of Gloucester, and Mr. John R. Maule, Q.C., Recorder of Leeds, have been appointed to inquire into the charges made against the magistrates of Bolton, as to their conduct at the time of the late riot on the occasion of Sir Charles Dilke's lecture. Dr. Deane, Q.C., has been appointed Vicar-General of Canterbury ; Dr. T. H. Tristram, Chancellor of the Diocese of London ; Mr. Walter Phillimore, Chancellor of the Diocese of Lincoln ; Mr. Alfred Walker Simpson, Recorder of Scarborough ; Mr. H. T. Cole, Q.C., Recorder of Plymouth and Devonport ; Mr. C. S. C. Bowen, Recorder of Penzance ; Mr. Sims Reeves, Recorder of Great Yarmouth ; Mr. Henry T. J. Macnamara, Judge of the Brompton and Marylebone County Courts ; Mr. T. Perronet Thompson, Judge of the Liverpool County Court ; Mr. Carlos Cooper, Judge of the Guildhall Court of Record at Norwich ; Mr. Charles Palmer Phillips, Commissioner in Lunacy ; Mr. Winning, Second Master of the Crown Office ; Mr. John Forster, honorary and unpaid Commissioner in Lunacy ; Mr. Mark Smallpiece, solicitor, Clerk to the Magistrates of Guildford ;

Mr. R. C. Heath, Clerk of the Peace for Warwick ; Mr. P. T. Wallis, Town Clerk for Bodmin ; Mr. Francis Wynne, Town Clerk of Denbigh ; Mr. R. G. Edwards, Registrar of the Denbigh County Court ; Mr. R. A. Ward, Clerk to the Magistrates of Maidenhead ; Mr. Benjamin Page Grimsey, Registrar of the Ipswich County Court.

IRELAND.—Mr. John Francis Teeling has been appointed Taxing Master in the Court of Chancery ; Mr. J. P. Hartford, Sessional Crown Prosecutor for Kilkenny.

JAMAICA.—Mr. Robert Kerr, Advocate, has been appointed a District Judge.

GRENADA.—Mr. William Anthony Musgrave Sheriff, has been appointed Attorney-General for the Island.

AFRICA.—Mr. Robert Dawson Mayne has been appointed Chief Magistrate of the Settlement of Lagos, on the western coast.

## OBITUARY.

### *March.*

- PALMER, Nathaniel, Esq., Barrister-at-Law, aged 82.  
 8th. RUSSELL, John, Esq., Solicitor, aged 34.  
 9th. WARD, W. Lakin, Esq., Solicitor, aged 65.  
 14th. BUCHANAN-KINCAID, John, Esq., Barrister-at-Law, aged 64.  
 14th. BENNETT, E. Holland, Esq., Barrister-at-Law, aged 35.  
 20th. WENTWORTH, W. Charles, Esq., Barrister-at-Law, aged 79.  
 23rd. SMYTH, William, Esq., Barrister-at-Law, aged 63.  
 25th. STURGEON, Charles, Esq., Barrister-at-Law, aged 72.  
 26th. ASTON, Benjamin R., Esq., Barrister-at-Law, aged 51.  
 27th. MACDONALD, James, Esq., Barrister-at-Law, aged 65.  
 27th. LOFTUS, Thomas, Esq., Solicitor, aged 86.  
 28th. SMITH, William H., Esq., Barrister-at-Law, 63.

### *April.*

- 5th. MALCOLM, J. George, Esq., Barrister-at-Law, aged 72.  
 5th. SELBY, Prideaux, Esq., Barrister-at-Law, aged 61.  
 6th. SMALLPIECE, W. H., Esq., Solicitor, aged 58.  
 7th. HASSELL, E. Williams, Esq., Barrister-at-Law, aged 75.  
 8th. CLAYFIELD-IRELAND, T. P., Esq., Solicitor, aged 35.  
 8th. SAUNDERS, Charles, Esq., Barrister-at-Law, County Court Judge.  
 10th. TIBBETTS, William, Esq., Solicitor, aged 50.  
 10th. HADDOCK, C. Milner, Esq., Solicitor, aged 41.  
 16th. BRADDON, Henry, Esq., Solicitor.  
 21st. FREEMAN, D. A., Esq., Barrister-at-Law, aged 48.  
 22nd. YOUNG, Arthur, Esq., LL.D., Solicitor, aged 25.

THE  
LAW MAGAZINE AND REVIEW.

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NO. V.—JUNE 1, 1872.

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I.—MARTIAL LAW. PART II.

By W. F. FINLASON, Author of "A Treatise on Martial Law," "Commentary on Martial Law," "Report of the *Queen v. Eyre*," "The Law as to the Repression of Riot and Rebellion," &c.

IN the practical conclusion to which the writer pointed, he anticipated indeed the opinions of two successive Governments; the Government of Lord Russell held that martial law was an indemnity for all acts done *under military authority*, but dismissed the governor, and declined to prosecute him; and the Government of Lord Derby adhered to the same view; which was subsequently confirmed by judicial authority.

It is true that the author's publication, and especially in its reproduction of the Ceylon case—and his implied disapprobation and implied censure of the extreme views of Lord Russell and Sir A. Cockburn in the Ceylon case—had excited some irritation against him, among their friends, and the partisans of the prosecution; under the influence of which, he thinks, great injustice was done to him. But, nevertheless, his legal views have been in effect adopted and upheld.

The Chief Justice, indeed, doubted, and *only* doubted, as to whether, in a colony where the common law prevailed, that did not exclude martial law except as against soldiers (p. 19); and he added, in a note: "It follows from what has been said, that the question of the power to put martial law in force in Jamaica is not affected by the precedents of Demerara, Ceylon, or any other Crown colony, as there the power of the Crown is absolute." (P.19.)

This was adopting the narrow ground taken by Mr. Roebuck in the Ceylon case, but which had been denounced by Lord Brougham in the Demerara case, and was not taken by Lord Russell or Sir A. Cockburn in the Ceylon case, nor by any one but Mr. Roebuck. And for the reasons already given, it is conceived that it is contrary to the principles of law to suppose that severities can be allowed as against any free British subjects, which would be oppressive as against Englishmen. But the Lord Chief Justice plainly implied, that in cases where the Crown was absolute, *martial law* would be allowable, and it is absolute in India. On the other hand, Mr. Justice Blackburn, in his charge, laid down the legality of martial law unreservedly, either in this country or any other part of our dominions, wherever it was really necessary, and he showed that it was not legal in this country now, simply because it was not necessary. And he asserted that this view had the concurrence of the other judges of his own court, and of all the other judges. As to the Court of Queen's Bench, this was afterwards denied by the Lord Chief Justice, but it will be seen it made no practical difference, and none at all as to India or any Crown colony. For the Lord Chief Justice, in his latest utterance on the subject, said, even speaking of a colony where he assumed the common law to exist:—

“We consider that a governor sworn to execute the laws of a colony, if advised by those competent to advise him that those laws justify him in proclaiming martial law, cannot be held criminally responsible, if the circumstances call for its exercise, and though it shall afterwards turn out that the received opinion of the law was erroneous.”

So that the Lord Chief Justice had no doubt whatever as to the lawfulness of martial law for the suppression of rebellion where the common law did *not* prevail.

And as to the abstract legality of martial law, even in a country where the common law prevails, we have since had the opinion of a Court of Error. In the course of the considered judgment delivered by Mr. Justice Willes, the fundamental proposition of the writer's original work was distinctly laid down, that rebellion is war, and authorizes measures of war.

“The duty and responsibility of a governor in case of open rebellion are heightened by the consideration that the existence of law itself is threatened by force of arms and *a state of war against the Crown established for the time*. Whether the proper, as distinguished from the legal, course has been pursued by the governor in so great a crisis it is not within the province of a court of law to pronounce.”

And at the conclusion of the judgment Mr. Justice Willes said very emphatically:—

“We have thus discussed the validity of the defence upon the

question argued by counsel, but we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds, as showing that the acts complained of were incident to the enforcement of martial law." \*

This strongly confirms the statement of Mr. Justice Blackburn, that most of the judges concurred in the view of the law he had laid down; and as, even at common law, all the authorities are one way, and the Lord Chief Justice could only intimate a doubt as regards the power to declare martial law, there is, therefore, practically, no difficulty whatever.

And so as to the continuance and exercise, as well as the duration, of martial law; the author had been careful to convey his views almost in the very language of Sir A. Cockburn. Thus, Sir A. Cockburn had said that "regard must be had to the spirit of the people, their disaffection, and all the circumstances of the case:" and the author again and again spoke of the danger which excused martial law, as "arising from the existence of a wide-spread feeling of disaffection" (Introd. xxv), "the existence of a *state or spirit of rebellion*" (xxxiv); and almost copying Sir A. Cockburn's words, he wrote, "The necessity lasts as long as the *spirit of insurrection*; and the disparity of military force" (xxxv). And so all through his work the author maintained, in accordance with Sir A. Cockburn's view, that the question would be, How the circumstances appeared to the authorities *at the time*. Thus, again and again he laid it down that the conduct of the officers of the Crown would be judged of with reference to the state of things *as they appeared to them at the time* (p. 265), and the impressions of the facts on which they acted (p. 266), and not with reference to the views which might be entertained by others at a distance and after the event. It is obvious that, once admitting, what was admitted on all hands; that there might, under circumstances of adequate danger, be a necessity for such measures as were implied in martial law, this was practically the vital question; upon this all responsibility for the measures taken must depend. The great point of controversy, as already shown, was whether the legality of the executions was to be judged of upon such legal evidence as could be adduced before a jury, both as to the *complicity* of the parties and the *necessity* for their execution; or whether it was to be determined with reference to the real and honest judgment of those who were concerned. The advocates of the prosecution upheld the former view; the author maintained the latter, and *this* view was ultimately approved by judicial authority. Entirely in accordance with this view, Mr. Justice Blackburn, in his charge, said—

"The question is, whether a person placed in the position of the

\* 10 Best & Smith's Rep.

officers, having the information they had, *believing what they believed*, and knowing what he knew, looking at the *facts as they appeared to him*—whether under the circumstances a person of ordinary firmness and moderation would have *perceived* that what he did was in excess.”\*

And the Lord Chief Justice and the whole Court, in commenting upon this charge, did not in the least except to that portion of it; on the contrary, they conveyed their approbation of it. The Lord Chief Justice said, indeed—

“That the continuance of martial law could not be excused even as regards criminal liability, when the necessity which alone could justify it had ceased, by the entire suppression of all insurrection.”

But this must be construed with reference to the passage in Mr. Justice Blackburn’s charge before quoted, and which was not dissented from by the Court; but, on the contrary, expressly adopted; for the Lord Chief Justice said, “The governor would not be liable for errors of judgment”—that is, for errors either as to the declaration, continuance, or exercise of martial law. So that, practically, the author’s original view was upheld, that it would be a question of the exercise of an honest judgment on the circumstances *as they appeared to the parties at the time*.

As regards the *nature* of martial law, again, there is really no more difficulty. As already pointed out, the phrase really explains itself and requires no interpretation. And though the Lord Chief Justice professed a *doubt* on the subject, as to whether it did not mean regular military law, which is by statute, and only applies to the soldiers of the Crown, it was only a doubt, and it is clearly untenable in the face of the authorities. Moreover, several passages in the charge show that the opinion of the Lord Chief Justice really remained as it had been when he was Attorney-General, that martial law, the law of war, was arbitrary, and applied to all who are engaged in any way in the war of rebellion. For he said—

“We are not dealing with the cases of rebels killed on the field of battle, or put to death afterwards without any trial at all. A rebel in arms stands in the position of a public enemy, and therefore you may kill him in battle as you might a public enemy. Being in the position of a public enemy, you may refuse him quarter.” (P. 25.)

That is, you may kill prisoners in cold blood, *without* trial.

It might perhaps be doubted whether this is the law—at least, whether it would be justifiable except under circumstances very extreme and exceptional, though it would be

\* “Report of the *Queen v. Eyre*.”

too much to say that such circumstances might not arise. And this is the passage, no doubt, under the authority of which Mr. Cowan lately acted in India, until restrained by his superior, Mr. Forsyth, who insisted upon no executions without *trial*—a point on which the writer in his work put much stress. But if it be law, as the Lord Chief Justice lays down, to kill men in cold blood, without trial, this it is obvious can only be under martial law, and because it is *quite different* from ordinary law—even ordinary *military* law; for ordinary law, civil or military, does not authorize executions without trial. But it has been seen that rebels are in a state of war against the Crown, and are, therefore, necessarily liable to be treated as soldiers in a state of mutiny. And the Lord Chief Justice admitted—though he did not always bear in mind—that martial law, in its offences and penalties, is entirely different from ordinary law. For he said, that “neither Hale nor Blackstone, though profoundly versed in the knowledge of the law of England, knew much about the *law martial*, which had not then been the subject of any distinct work or treatise.” (P. 105.) This implies, of course, that the law martial was entirely different from the common law. It also, upon consideration, will be found to involve that it is quite different from regular or ordinary military law, for that is by *statute*. And indeed there was no Mutiny Act in the time of Hale, though there was in the time of Blackstone; and it is of course impossible that the Lord Chief Justice could have imagined that the great commentator was ignorant of that important part of statute law, which, indeed, he adverts to, and *distinguishes* from martial law in its original and proper sense. The Lord Chief Justice, therefore, implied that martial law was entirely different from ordinary military law; which, indeed, was the doctrine laid down by his colleague, Sir D. Dundas, in the Ceylon case, and by Mr. Headlam in his official letter.

Again, he admitted the same thing in another way, for having described military law, he went on to say:—

“If such be the law as applied to the soldier, why should it not be the law as applied to the civilian? Why are we to be told that when we come to deal with a civilian by martial law, it is to be something different from that martial law which is applied to the soldier?”

And as it is absolute as regards the soldier in a state of mutiny, so it is as regards rebels, if the rebellion is really dangerous. That is the whole doctrine of martial law; and though the Lord Chief Justice did not carry out the conclusion, it does not the less follow from his premises, according to the authorities, to which he does not advert. It is manifest that in the view of the Lord Chief Justice, martial



law was entirely different from ordinary law, even from ordinary military law, and this, indeed, as it is what was laid down by his official colleague, and upheld by himself in the Ceylon case, might be supposed to be, until disavowed, still his real opinion.

From this of course it would follow, necessarily, that the offences, the penalties, and the proof, would all be different, and that evidence which would not be sufficient to sustain a capital charge by ordinary law, would be sufficient, *under an adequate necessity*, to excuse or justify an execution under martial law. Otherwise there would be no effect at all in martial law, whereas the very object is to attain something far more terrible and effective than ordinary law. This conclusion followed necessarily from the premises laid down by the Lord Chief Justice, though he hesitated to admit the inevitable conclusion, which pointed to legal immunity, and was fatal to the prosecution.

And, indeed, in his charge, he animadverted upon certain propositions, chiefly quoted in the writer's work, from the official opinions of his former colleague, the Judge-Advocate-General, in terms so strong as at first sight to appear to imply an utter dissent from them. And having cited from the writer's work several of these passages (already quoted), which he had taken from the opinions of Sir D. Dundas, the Lord Chief Justice pronounced them "mischievous, not to say detestable, and entirely without authority." But, in the first place, it can hardly be conceived that he meant thus to characterize the opinions of his own colleague, whom he elsewhere speaks of as "a distinguished authority." Nor, if he had intended it, would he have omitted to mention that the passages were taken from his colleague's opinion. And, in the next place, the passages cited from the writer's work were none of them cited *as he wrote them*, but the Lord Chief Justice had evidently written on imperfect and incorrect quotations, prepared by some one hostile to the author's work. Thus, in the instance just referred to, the passage, as given by the author, spoke of martial law as "not bound by the rules of *ordinary* military law." This passage was miscopied, omitting the word "*ordinary*," on which its whole sense turned, and with the omission also of the reference in the notes to the opinion of Sir D. Dundas, from which it was taken, and with the omission of the important qualification *twice over* quoted by the writer:—"It must be exercised firmly and faithfully, *with as much humanity as the occasion allows of, according to their sense and conscience.*" And again, in quoting this and other similar sentences, "Martial law is entirely arbitrary: it is far more extensive than ordinary military law," &c. It was not mentioned that these sentences were *literally copied from Blackstone*, and from the judicial

declarations of the law in Wall's case (p. 81); and it was on these incorrect quotations the Lord Chief Justice made his comments. It is to be observed, however, that the language of these comments was not that in which a judge is accustomed to lay down the law. It was not distinctly said that the passages cited were *not law*. The expressions used were such as might have been used by the Court of King's Bench when they held trial by battle to be *legal*, and were just such as would be used by a judge who could not venture to declare that the propositions stated were not law, although, for some reason or other, he disliked them, and was displeased at their being put forth.\* But, in truth, as *cited*, the author had not put them forth. Nor is there a single passage in the writer's work which, written as he wrote it, in the connection in which it stands, and with the explanation to be drawn from the context or the notes, was distinctly condemned by the Lord Chief Justice.

The question as to the nature of martial law is, it will be seen, closely connected with the question as to the manner of its exercise; and this again is closely connected with the *responsibility* for its exercise; as to which the author was most careful and emphatic, and his ideas were ultimately upheld, and affirmed by the Lord Chief Justice and the other judicial authorities who had occasion to express their opinions upon the subject. The author was careful to show that the exercise of martial law was so far under the control of the common law, that any abuse would be criminal and punishable.

"The common law controls martial law, in the sense in which it controls all authorities, and military authority among the rest, by keeping of it within its bounds. And even in carrying out martial law, the common law and military law alike impose reasonable and salutary restraints. For instance, in measures of punishment, even on the most summary inquiry, there is the duty imposed by those dictates of natural justice which the law of England renders as of universal obligation, and incumbent even on the most inferior or irregular tribunals: the duty of making some inquiry, hearing evidence, and of listening to the defence, and of using reasonable care and means to get at the truth—the duty, in a word, of a fair trial, and the entire and wilful non-observance of this great duty might so far invalidate such proceedings as to impose a *criminal* liability; though, on the other hand, as there are numerous degrees of care, the mere failure in some degree to use due care, however highly culpable, would not be criminal or render the proceeding illegal."

\* The writer has every reason to believe that it was not the views he put forth, but rather his *giving currency to them on that occasion*, which excited the displeasure of the Lord Chief Justice.

And further, he went on to lay down—

“That in carrying out martial law these great principles of natural justice, which are of universal obligation, must not be disregarded, and these appear to dictate that no man shall be put to death, unless in self-defence, or taken red-handed, nor without the most careful inquiry that can be made under the circumstances; though this must more or less depend on circumstances, and it does not follow that the officer who fails to observe it fully is culpable or criminal.” (P. 87.)

This had not been laid down in the Ceylon case, even although cases were brought forward in which there had been not only an utter disregard of the rules of justice, but the most shocking recklessness. The Lord Chief Justice, in his observations on the subject, could only follow and adopt those of the author, although the Chief Justice wrote in such terms as to convey the impression that the author's views were of a very different character:—

“But it is said that as the necessity for suppressing rebellion is what justifies the exercise of martial law, and as to this end the example of immediate punishment is essential, the exhibition of martial law in its most summary and terrible form is indispensable. If by this it is meant that examples are to be made without taking the necessary means to discriminate between guilt and innocence, I can only say I trust no court of justice will ever entertain so odious and fearful a doctrine. There are considerations more important even than the shortening the duration of an insurrection. Among these are the eternal and immutable principles of justice, principles which could never be violated without lasting detriment to the true interests and well-being of a civilized community.” (P. 108.)

This it will be seen is almost borrowed from numerous passages in the author's book. It was only, therefore, on a very incorrect notion of his work that the Lord Chief Justice spoke, when he said—

“Of late, doctrines have been put forward, to my mind of the wildest and most startling character—doctrines which, if true, could establish the position that British subjects not ordinarily subject to military or martial law, may be brought before tribunals, armed with the most arbitrary despotic power—tribunals which are to create the law which they are to administer, and to determine upon the guilt or innocence of persons brought before them, *with a total disregard of all those rules and principles which are of the very essence of justice, and without which there is no security for innocence.*”\*

It is plain the Lord Chief Justice here alluded to the writer's book, for no other had been published, and he imme-

\* Charge, p. 22.

diately proceeded to quote from it, but it is manifest that the Lord Chief Justice had not carefully read the book, or he could not have given such an account of it, directly contrary to its whole tenor and character. The author again and again wrote of "those rules of substantial justice which are of eternal obligation." (P. 403.)

The writer laid down, indeed, that a governor or commander would not be criminally liable for error of judgment, or the acts of his subordinates, but that he would be liable for his own wilful or reckless excesses. And the Lord Chief Justice, in his latest utterance on the subject, entirely adopted that view. He wrote—

"The governor would not be liable for error of judgment, and still less for excesses or irregularities committed by subordinates, whom he is under the necessity of employing, if committed without his sanction or knowledge. On the other hand, in the absence of a careful and conscientious exercise of judgment, mere honesty of intention would be no excuse for a reckless, precipitate, and inconsiderate exercise of so formidable a power, still less for any abuse of it in regard to the lives and persons of her Majesty's subjects, or in the application of immoderate severity, in excess of what the exigencies of the occasion imperatively call for."

With regard to the manner of executing martial law, especially in the execution of prisoners, the author was careful to lay it down that *trial* was necessary, and *fair* trial. He said "that prisoners, unless liable to be shot at once, as taken red-handed (and that should be by order of officers), must be tried by court-martial." (P. 89.) He said, also, that "the great question would be whether the prisoners had a *fair* trial;" i.e., as he went on to explain, not according to the *strict* rules of evidence or procedure, but "those rules of substantial justice which are of universal obligation, and the wilful and material violation of which invalidates every judicial proceeding." (P. 403.) Everything he wrote on the subject was in accordance with these views; which, it will be seen, are those laid down on former occasions by the highest authorities. It is true that the Lord Chief Justice, in the course of his charge, commented on some isolated, imperfect, and incorrect quotations from the author's work, so as to convey a very different idea of their character; but the passages, as really written, are, it will be seen, in entire accordance with all the authorities. These passages, in reality, only embodied what might be termed almost a truism—that under martial law persons might be put to death for offences (and therefore upon evidence) which would not justify a capital conviction under common law. All writers on the subject had recognised this. Thus, Tytler wrote of martial law as necessary

"in times when the ordinary course of justice was, *from its slow and regulated pace*, inadequate;" and even Lord Brougham had said that on such occasions "there was *not time for the slow and cumbersome proceedings* of the ordinary law." And Mr. Adolphus, in alluding to the rebellion in Ireland, said that, at a certain stage, "the proof against the parties being clear and indisputable, the proceedings were not founded on any extraordinary powers, but according to the usual course and practice of the law" (Hist. Eng., vol. vii., p. 743); which plainly implied that if the proof had not been so clear, the proceedings would have been by martial law. And even in a court of law—it was said by a predecessor of the Lord Chief Justice, Lord Kenyon—that judges ought not to review the regularity of a trial, even by regular court-martial, in time of peace.\* The author merely embodied the spirit and effect of these authorities. Hence he wrote such passages as these, which, isolated, taken from their context and explanatory notes, were animadverted upon by the Lord Chief Justice:—

"In time of peace the courts can afford to be strict, critical, and technical in the definition of offences, or the proof of guilt; but in times of *great public danger there really is not time for it.*"

The strongest of these and similar passages did not go farther than the opinion of Mr. Tindal in the Demerara case; and stopped far short of the views of Sir A. Cockburn in the Ceylon case: that a governor had done well who had executed men *without any evidence* of guilt; or his still stronger opinion in the Jamaica case itself—that prisoners might be executed *without trial*. The effect of these passages of the author's work was only that strict legal evidence was not required, nor such evidence as would be required to prove a capital offence at common law.

So, although the writer was very careful to lay down, again and again, that men were not to be executed under martial law unless their death was *necessary* for the suppression of the rebellion (in which case it was admitted even by the counsel for the prosecution, that the man might be executed, even although there was no sufficient legal evidence of any offence capital at common law), this was altogether omitted in the extracts with which the Lord Chief Justice had been supplied. Thus, in the sentence:—

"That, though at common law the criminal intent is so important and generally essential (always in capital crimes), it is not so in martial law, which looks rather at the actual than the intentional cause of the mischief, and the necessity for an exemplary penalty."

\* *Rex v. Suddis*, 1 East.

The explanatory note was omitted.

"The rules of *strict legal proof* and that *perfect* demonstration which are required at common law are dispensed with under martial law ; the great question is whether the man has caused the mischief, so that he must be taken to have intended it, and whether his death be necessary to remove the danger he has caused." \*

The words, "he must be taken to have intended it," are copied from a considered judgment of the Court of Queen's Bench, in a case repeatedly cited in the book, as one where it was laid down that a man must be taken to have intended the natural consequences of his words. So that the passage, thus explained, meant that a man who incited people to massacre was liable to execution because he must be taken to have intended the natural meaning of his words, but that he was *not* to be executed, even then, unless his death was absolutely necessary for the suppression of the rebellion. So again, on the next page, the author wrote:—

"In time of peace the courts can afford to be strict, critical, and technical in the definition of offences or the proof of guilt, but in times of great public danger there is not time for it. The question then is, who has caused the danger, and helped to cause it, and who are those whose punishment would be most deterrent? At such a time, if it is *plain* that a man has caused a rebellion, and *that nothing but his death will stop it*, what does it matter whether he directed exactly *what* has happened?"

This is further explained by the very next sentence—

"Under the common law a person must be charged with some specific crime, as that he has killed *such and such a person*, or the like, &c." (Pp. 62, 63.)

So that the obvious meaning was, that if it was *plain* and beyond a doubt that a man had caused a rebellion and massacre, that is, by inciting people to it—as he could not have done this without using words likely to cause it, and he must be taken to have intended it—then he was liable to be executed under martial law, whether or not it could be shown that he intended the killing of any particular person ; but that even then he was not to be executed unless the danger was such that *nothing but his death would stop it*. In the extract supplied to the Lord Chief Justice, however, this was altered, and it was made to read thus:—"And if his death will stop it," which was a very important alteration in the meaning of the passage as the author wrote it, for he had carefully, in this as in the other passage, put the strongest possible case of *necessity* ; and, as he wrote them, they were identical in meaning with that

\* *Rex v. Harvey*, 2 B. & C.

which was admitted even by the counsel for the prosecution, namely, that if the danger was imminent, then a man who had used language calculated to cause a rebellion, might be executed under martial law, although there was no sufficient legal evidence of an offence capital at common law. In the incorrect form, however, in which the extract was furnished to the Lord Chief Justice, this was all lost sight of, and accordingly the passage was made the subject of severe animadversion. It was upon the passages thus imperfect and incorrect that the Lord Chief Justice wrote:—

“ I have seen it written, and I almost shuddered to read it, that a court-martial would be justified in executing a man when mischief had resulted from his acts, although that mischief had been entirely beyond the scope of or even contrary to his intention ; as if it could make any difference in the gravity of the offence for which a man was tried, whether he was tried before one tribunal or another.” (P. 154.)

All this, however, was entirely misapplied to what the author had really written. What the author had maintained was, what Hale and Blackstone had written, and the Lord Chief Justice had admitted, that under martial law the *offence* was different, and therefore of course the *evidence* was so, and that as the act of incitement, with whatever intent, was capital under martial law, express proof of intent was not required. The Lord Chief Justice added: “ I cannot too strongly express my dissent from this most dangerous and pernicious doctrine, for which, I am glad to think, that there is *no authority whatever*.” But as to this, after reading the authorities, the reader can judge. The passage cited by the Lord Chief Justice, as the ground of censure, was one which was literally copied from a judgment of his own court. So, when the writer further explained his meaning:—“ Nor again is any *formal* trial or any *strict legal* proof necessary. The trial may be quite summary : it is sufficient if *at the trial* there is such proof as satisfies the honest judgment of those who have to act” (P. 17)—the writer here only embodied the effect of the charge in Wall’s case, which he again quoted largely from ; \* but *all reference to which was omitted* in the extracts supplied to the Lord Chief Justice ; and then, judicial authority being ignored, he described the writer’s views as “ without authority.” This implied that his own opinion as Attorney-General could not be considered as authority ; for otherwise, it will be seen the passage was entirely in accordance with it ; for there he maintained that a governor had done well who, upon his own belief of a man’s complicity

in the rebellion, had ordered him to execution, even although the Judge-Advocate had remonstrated that there was no evidence against him. But this the writer considered, as already intimated, would be going too far, and therefore, building on the safer ground of judicial authority, he required "such *proof at the time* as satisfied the honest judgment of those who had to act." (P. 63.) And this view was ultimately upheld and assented to by the Lord Chief Justice himself.

The Lord Chief Justice, however, followed the author's practical conclusion. The author laid it down :—

"It is a general principle that whatever the amount of culpability involved in putting a man on his trial, the person who has so put the party upon his trial cannot be legally liable for conviction by the court (that is, of course, for murder), however erroneous the verdict, or however defective the evidence, unless it is so *apparent* that there was no evidence that a *conspiracy to commit an act of wilful and malicious injustice can be presumed.*" (P. 95.)

Here it is laid down distinctly that in such a case the parties would be liable even for murder, and this idea was adopted; and the Lord Chief Justice, in his charge to the grand jury, went elaborately into the evidence with a view to sustain such an accusation of conspiracy. Thus, therefore, the Lord Chief Justice, in his legal direction, followed the author's opinion. And in the case of Gordon, as to whom there was no evidence which would have justified his execution at common law, or even by ordinary military law, the Lord Chief Justice ultimately concurred with Mr. Justice Blackburn in a ruling which entirely exonerated those who put him to death, on the ground of their honest belief in their power to take that fearful step, and of the necessity for it. It is quite clear that in this respect the Lord Chief Justice had altered his opinion, for whereas in his charge he had directed the grand jury to find the bill for murder, unless satisfied of the legal power to execute the man—in his ultimate observations on Mr. Justice Blackburn's charge, he expressed his concurrence in the very opposite ruling, that whether the legal power existed or not, if the parties believed in it and were advised of it, and exercised it honestly, then they were not guilty even of a misdemeanour, that is, they were guilty of no offence at all. This, in effect, was all that the author had maintained. And, in truth, the author's views on the subject were well conveyed to the latest language used by the Lord Chief Justice. Speaking of the case of which he had declared that there was no legal evidence to justify the execution, the Lord Chief Justice said :—

"The governor (or military commander) would not be liable for *error of judgment*, or, still less, for errors or excesses, or irregulari-



ties, committed by subordinates, if committed without his sanction or knowledge. On the other hand, in the absence of such careful and conscientious exercise of judgment, mere honesty of intention would be no excuse for a *reckless, precipitate, and inconsiderate* exercise of so formidable a power, still less for any abuse of it"—

which was exactly the view put forth by the writer in his work on the subject.

Such, then, after a prolonged controversy, including several legal discussions in courts of law, were the general principles educed and universally assented to as governing the consideration of the subject. The application of these principles to the particular case which has arisen in India is very easy.

It appears that, after an outbreak of insurrection and an encounter, in which many persons were taken prisoners, the Deputy-Commissioner, Mr. Cowan, ordered fifty of them to be put to death without trial;—that the Chief Commissioner, on hearing of it, instantly sent orders to stop any further executions without trial; but that by his orders sixteen more prisoners were executed, after some sort of summary trial. These are the facts; on which, it is clear, first, that there was a state of rebellion or war which involved a power to exercise martial law, and to continue this as long as the authorities honestly and reasonably thought it necessary; and that the question upon this point would not be what others might think at a distance, and after a lapse of time, but what *they* might reasonably think *at the time*, and under all the circumstances of the exigency. But then, the essence of martial law is *military* authority; and it has always been held that the civil governor ought not to exercise it without the advice of the military commander, who can best judge of the danger which can alone justify it; and that he also ought to be intrusted with its execution, as he will be the best acquainted with the measures it may require, and of the usages of war, and of the service, by which it ought to be regulated and restrained. And of this, perhaps, the present case may afford an apt illustration, for it does not appear that the execution of martial law was intrusted to *military* men. Next, it is manifest that executions of prisoners *without trial* could not be proper, except under circumstances of such pressing danger as might appear to require it: though here, again, the degree of danger must depend on the state of circumstances as they appeared *at the time* to the official. Lastly, assuming martial law intrusted to military authority, then executions *after trial*—provided the trials were reasonably fair—*might* be justifiable under martial law. And this seems to have been the view universally taken; for the Hon. Member who asked a question on the subject in

the House expressly distinguished between the prisoners executed with trial and *without* trial, and only appeared to condemn the latter; and the Under Secretary of State, while asserting that the former were legal, did not defend the latter. All the acts done by military authority during the prevalence of the state of war or rebellion would be out of the pale of ordinary law. But there would still remain the question of the propriety of the executions, which might, nevertheless, deserve censure. As already observed, the degree of censure, if any, to be ascribed, would depend upon all the circumstances, *as they appeared at the time*, and all the circumstances would have to be considered; and a just and temperate judgment formed upon them by the Viceroy of India. We may, however, venture to observe that martial law is essentially a matter for military authority and military judgment, and there is always danger that civilians may be carried away by the cruelty of panic, or the excesses of inexperience.

Since writing the above, we find that Mr. Cowan has been dismissed, and his superior, Mr. Forsyth, removed to another district. No doubt this decision was sound, and though we are not yet informed of the grounds on which it was arrived at, it is not for the writer, as a lawyer, to enter into that question at all. He carefully abstained from doing so in the Jamaica case, maintaining, as Mr. Justice Willes said in his judgment, that the *propriety* of the measures taken on such occasions must rest entirely with the Government. The Crown, or its representative, has an undoubted right and duty to exercise a judgment as to the conduct of its officers on such occasions. For the very reason that, assuming honesty, their acts on such occasions are out of the pale of ordinary law, they are responsible to the Crown for the exercise of their power. This the author maintained in his former work on the subject, and though he then also maintained that a governor or commander was not liable for excesses they had not authorised or approved, in this case the acts done were the *personal acts* of the officials censured, and who were undoubtedly liable for their own errors of judgment, if errors there were. Into that question the author does not enter; it is out of his province as a lawyer. All that concerns him as a lawyer is to maintain, as he did on a former occasion, as matter of law, that such cases are out of the scope of ordinary law, and that it is for the Crown in the first instance to exercise its power for the suppression of rebellion, but not less to discharge a still higher and nobler duty, by vindicating, as regards all its subjects, of whatever class, or colour, or creed, the sacred rights of humanity.

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## II.—GROTESQUE LITIGATION IN INDIA.

**N**OTHING probably will strike an English lawyer in India more forcibly than the varied and peculiar forms of litigation, of which every court in the country is capable of producing specimens. On the one hand, he may watch the administration of much pure English law through the various forms of actions which arise out of contracts and torts, and the forms of relief which English courts of equity afford. The peculiarity, but more properly the simplicity, of the procedure by which the law is administered would no doubt most excite his admiration. On the other hand, however, he sees that same procedure employed in the administration of quite another law—the enforcement of rights arising out of an archaic code of ordinances, and customs whose origin is lost in the mists of antiquity. Respect for the laws and usages of the country, and the idea that they must be preserved to the people, have had the effect of bringing before our tribunals a class of litigation which is best described by the word *grotesque*.

The Hindu law boasts of a written code, scattered though it be among various books, the most ancient of which is the well-known “Institutes of Menu.” Several abstruse commentaries and digests on various subjects of law—contract, inheritance, adoption, marriage, and so forth—compose the *bibliotheca legum* of the Hindus. The religious element, however, which enters into the entire texture of Hindu law is remarkable. Almost every one of its rules points to some religious dogma or usage. Many of its precepts are merely enunciations of doctrines that lie at the foundation of their mystic philosophy. So blended and mixed up are moral lessons, religious duties, and purely legal obligations, that it is often difficult to distinguish them. By an old Regulation of the East India Company, passed in 1793, and re-enacted for the purpose of extending it to all the civil courts in the country, it is directed that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Hindu laws with regard to Hindus were to be considered the general rules by which judges were to form their decision. Here, therefore, by the side of the written law there are also to be recognised and enforced a large body of usages and customs. As might well be expected, this mine of law and custom not only produces a large amount of litigation, but such litigation as sometimes assumes the most ludicrous and grotesque character.

If, therefore, the suit be one for "account," or for "goods sold," or "money lent," or for damages, there is generally not found much difficulty in applying to it the general principles which in English law govern like cases. But let a member of a Hindu family, joint in food, worship, and estate, break away from his ancestral home and rush into court, we are then immediately plunged amid questions the most important and intricate. The rights of the several parties are to be ascertained and declared, and the whole family-system, archaic as it is, must be narrowly studied. Here family relations are found totally behind the age we live in. Mothers the perpetual wards of their sons, daughters under grave disabilities as to succession and inheritance, and brothers with their families and remote kinsmen, apparently enjoying a mutual dependence on one another. Conditions of society, which the scientific lawyer regards in the light of fossil remains of an age long past, and fit only to theorize upon, are here studied at once for immediate practical purposes. The suit goes on, and must be decided on principles recognised by such a state of society. Meanwhile, the "Kurta," or manager of the family estate, is a prominent figure in these proceedings, and sometimes the family priest is an actor in it. The family god, too, has no small share of the interest directed to it. The right to worship him is in dispute, and the Christian judge has probably to search the Hindu Scriptures—the *shastras* and the *purduas*—to determine how many days in the year *Shiva* is to be worshipped by this member of the family, and how many weeks *Vishnu* is to be adored by another.

Customs again which are immemorial create rights which are brought before our tribunals for recognition, which no courts under the sun are called upon to consider. "It has been said by an ancient Indian lawyer, that when the judges of the Sudder Courts were first set to administer native law, they appear to have felt as if they had got into fairyland, so strange and grotesque were the legal principles on which they were called to act. But after a while they became accustomed to the new region, and began to behave themselves as if all were real and substantial. As a matter of fact, they acted as if they believed in it more than did its native inhabitants. Among the older records of their proceedings may be found injunctions, couched in the technical language of English Chancery pleadings, which forbid the priests of a particular temple to injure a rival fane, by painting the face of their rival red instead of yellow, and decrees allowing the complaint of other priests that they were injured in property and repute because their neighbours rang a bell at a particular moment of their services. Much Brahminical ritual, and not a little doctrine, became the subject of decision. The Privy Council

in London was once called upon to decide in ultimate appeal on the claims of rival hierophants to have their palanquin carried cross-wise instead of length-wise; and it is said that on another occasion the right to drive elephants through the narrow and crowded streets of one of the most sacred Indian cities, which was alleged to vest in a certain religious order as being in possession of a particular idol, was seriously disputed, because the idol was cracked.”\*

In one case, an appeal came up to the late Sudder Court, in 1854, in which thirteen parties as plaintiffs sued twenty-six barbers, to compel them to shave them. It appears that a succession of barbers, of a particular caste, had lathered and shaved the ancestors of the plaintiffs from time immemorial. From father to son the same razor had come down as an heirloom, destined to shave the chins of certain families, their heirs and successors for ever. At last, however, prompted by some evil genii, the barbers absconded, and, as a result, the beards of the plaintiffs appeared, which being repugnant to the spirit of the *shastras*, the judge was asked to have the plaintiffs duly shaved, which he declined to do. In another case, certain parties sued certain individual barbers, praying that the latter might be compelled to pare the nails of the former. The first court found that it had been the custom of the defendants to perform this service for the plaintiffs, and passed a decree compelling the defendants to perform it. The barbers being indignant, appealed. The Lower Appellate Court held that such a suit will not lie; and, as is the custom of litigants in India, an appeal was immediately made to a higher tribunal. It was gravely urged in special appeal to the High Court, that a suit will lie for the enforcement of an established usage having the force of law. The High Court, in its turn, solemnly say (see *Weekly Reporter*, vol. i.), “We have carefully considered this argument, but looking at the facts of the case, we think it should be governed by the decision of the late Sudder Court, 2nd November, 1854, page 465, in which thirteen parties sued twenty-six barbers to compel them to shave them, and which appears to us to be on all fours with this. It is, indeed, urged in that case that any barber may have been resorted to, and here the individual defendants must perform the service, otherwise plaintiffs lose caste. But that was not the ground of that decision. It was that the claim was of doubtful principle, and not one of which the courts could enforce execution.” The special appeal was accordingly dismissed.

Probably it was a fortunate circumstance that the court so decided, for if (in the shaving case, at least) a decree for the

\* “Village Communities in the East and West,” p. 45.

plaintiffs had finally been made, both the judges and the plaintiffs would assuredly have found themselves under the tyranny of an exceedingly "doubtful principle." If the barbers had refused to carry out the decree and had sullenly put away their razors, then probably (as in the case where a defendant being ordered refuses to sign a document to the plaintiff, the judge may sign it in his stead) the honourable judges would have been compelled to consider the question, whether they should not shave the plaintiffs themselves. If, again, the defendants (barbers) had shown a cheerful disposition, and were prepared to shave the plaintiffs in terms of the decree, why, in that case even, it is of exceedingly "doubtful principle," and a question the casuists have nowhere decided, whether it is just to a man's wife that he should intrust himself to the hands of a barber against whom he holds a decree carrying costs, which costs, at the time of shaving, happen to be still due and unpaid.

### III.—MALICIOUS WOUNDING.\*

By C. S. GREAVES, Q.C.

THE decision of one point in *Reg. v. Ward* † is open to such serious doubts, and is calculated to produce so much difficulty in the cases to which it applies, that it ought to be fully discussed.

The prisoner was indicted for unlawfully, maliciously, and feloniously wounding W. J. C., with intent to do him grievous bodily harm. As nothing turns upon the facts in the point I shall discuss, it is unnecessary to state them. Cockburn, C.J., left the question of intent charged in the indictment to the jury, but directed them that if they took the more favourable view of the case, they should find the prisoner guilty of unlawfully wounding; which they did. But, thinking it deserving of consideration whether a wounding occasioned by an act done without any actual malice or intention of offering violence to the prosecutor would be sufficient to constitute an "unlawful and malicious wounding" within the meaning of the statute (14 & 15 Vict. c. 19), the learned Chief Justice reserved the question for the consideration of the judges. After argument on the part of the prisoner, and

\* In our last number we inserted an article on this subject written from another point of view.

† 26 Law T. R., 43.

no counsel appearing for the Crown, Cockburn, C.J., delivered the following judgment:—"We have considered this case, and are all agreed that, in construing section 5 of the 14 & 15 Vict. c. 19, it should be read as though the word 'maliciously' were introduced into it. It is an essential element of a conviction under that section that the act done should have been done maliciously as well as unlawfully. With regard to the question whether in this case the facts stated amount to proof of malice or not, there is a difference of opinion among the members of the Court; twelve out of the fifteen judges are of opinion that there was proof of malice, and that the conviction was right."

Now, the question I shall discuss is, was the decision that the word "maliciously" must be introduced in section 5 correct? In order to decide that question the following clauses must be considered. The 14 & 15 Vict. c. 19, s. 4, recites that "it is expedient to make further provision for the punishment of aggravated assaults," and then enacts that "if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned, with or without hard labour, for any term not exceeding three years." By section 5, "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did stab, cut, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding."

Now, the explanation of these sections is as follows. No rule is more clearly settled than that "in criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law."\* Upon an indictment, therefore, which charges a prisoner under section 4 with unlawfully and maliciously wounding, it is perfectly clear that the jury may convict of unlawfully wounding only. In the case just cited, the defendants were indicted for conspiring falsely to indict A B for keeping a gaming-house, for the

\* *Reg. v. Hollingberry*, 4 B. & C., 329.

purpose of extorting money from the said A B. The jury found the defendants guilty of conspiring to indict A B for the purpose of extorting money, but not to indict him falsely; and the Court held that the conviction was right; for it is a misdemeanour to conspire to indict for the purpose of extorting money, whether the charge be or be not false. And, as in that case the adverb "falsely" was not proved, and yet sufficient remained to support a conviction; so in an indictment for unlawfully and maliciously wounding, if the adverb "maliciously" was not proved, still sufficient would remain to support a conviction; for unlawfully wounding is certainly an indictable offence.

Several cases have occurred of indictments under section 4. In *Reg. v. Oliver*,\* the first count charged that the prisoner unlawfully and maliciously did inflict on R. B. grievous bodily harm. The second charged that the prisoner unlawfully did make an assault on R. B., and did unlawfully beat, wound, and ill treat R. B., and did thereby unlawfully occasion actual bodily harm to R. B. The jury found the prisoner guilty of a common assault, and this conviction was held right on the second count. In *Reg. v. Yeadon*,† the first count charged that the prisoners unlawfully and maliciously did assault H. R., and did unlawfully and maliciously kick and wound him, and thereby did unlawfully and maliciously inflict on him grievous bodily harm. The second charged that the prisoners did unlawfully and maliciously cut, stab, and wound H. R.; and the last charged the prisoners with an assault occasioning actual bodily harm. The jury found a verdict of guilty of a common assault; thus negating the circumstances of aggravation; and it was held that this verdict was perfectly legal. In *Reg. v. Canwell*,‡ the first count charged the prisoners with unlawfully and maliciously wounding, and the second with unlawfully and maliciously inflicting grievous bodily harm; and a verdict of guilty of an assault was held good, although the word assault did not occur in either count. And in another case against the same prisoners, where the only count was like the second in the preceding case, and the finding of the jury was the same, the verdict was held right.§

Although in none of these cases did the question arise, whether on an indictment for unlawfully and maliciously wounding a verdict of unlawfully wounding would be good, yet they leave no doubt that it would.||

The general rule above stated is, however, subject to this limitation that by the common law, upon an indictment for

\* Bell, C. C., 287.

† 20 Law T. R., 402.

† L. & C., 81.

§ *Ibid.*, 403.

|| And see *Rex v. Jones*, 2 B. & Ad., 611, and the cases in 3 Russ. C. & M., 308.



felony, a prisoner cannot be convicted of a misdemeanour.\* It was therefore necessary to provide by statute a power to enable the jury so to convict; and it was this necessity which led to the enactment in section 5. If it had not been for this exception to the general rule, it cannot be doubted that on the present indictment for unlawfully, maliciously, and feloniously wounding, a verdict of unlawfully wounding would have been good.

The origin of section 5 was as follows:—Lord Denman, C.J., had by the 1 Vict. c. 85, s. 11, provided that the jury might convict of assault on any indictment for any felony including an assault; but this enactment had led to so many difficulties, that when I prepared the 14 & 15 Vict. c. 100, Lord Campbell, C.J., and other law lords, agreed that that clause should be repealed, and that a conviction for an attempt to commit a felony, upon an indictment for felony, should be substituted for it, and sections 9 and 10 were framed for that purpose. The Bill did not pass in the first Session in which it was introduced, but in the next Session it, and the 14 & 15 Vict. c. 19, passed. At that time, piracy and stabbing, cutting or wounding, under the 1 Vict. c. 88, s. 2; burglary and stabbing, cutting or wounding, under the 1 Vict. c. 86, s. 2; and stabbing, cutting, or wounding, with intent to murder, under the 1 Vict. c. 85, s. 2; and with intent to disfigure, &c., under section 4 of that Act, were felonies; and when section 4 of the 14 & 15 Vict. c. 19, had been framed, it was thought right to enable a jury, where they were not satisfied that the cutting, &c., had been done feloniously, to find a verdict of unlawfully wounding, and the word “maliciously” was advisedly left out, in order that the clause might include cases of merely unlawfully wounding, as well as cases of unlawfully and maliciously wounding. If “maliciously” had been inserted, the anomaly would have arisen that a prisoner who was indicted under section 4, might have been convicted of unlawfully wounding; whilst, if indicted for any felony and wounding, he could only have been convicted of unlawfully and maliciously wounding.

The clause also was confined to cutting, stabbing, or wounding, as it was considered to be going too far to allow a conviction for a common assault on any charge of felony, although the 1 Vict. c. 85, ss. 2, 3, in offences against the person, the 1 Vict. c. 86, s. 2, in burglary; the 1 Vict. c. 87, s. 2, in robbery; and the 1 Vict. c. 88, s. 2, in piracy, each of them had words, which included an assault, in addition to the words “cut, stab, or wound.” This limitation rested on the same ground as the exception of murder and manslaughter from the

\* See *Rex v. Jones*, 2 B. & Ad., 611, and the cases in 3 Russ. C. & M., 308.

clause—viz., the serious nature of the offence charged as a felony.

Of the several clauses on which any indictment mentioned in the beginning of section 5 could be framed, the 1 Vict., c. 85, s. 4, alone contains the words "unlawfully and maliciously;" and, as in the majority of indictments on those clauses neither of those words would appear, they were necessarily omitted from the beginning of the section. The word "unlawfully," however, was necessary in the latter part of the clause; otherwise it would have included a lawful wounding, *e.g.*, in self-defence.

In determining the punishment, which ought to be inserted in any clause, the regular course has been to discover such a discretionary punishment as might be properly applied to every case within it, whatever the degree of culpability might be; and this course was adopted in section 5. For, as all unlawful and malicious wounding, as well as merely unlawful wounding, would fall within that section, the punishment of imprisonment, with or without hard labour, for any term not exceeding three years, was rightly fixed; for under it the proper punishment might be awarded for the most venial unlawful wounding, as well as for the most malicious and aggravated, by the superior criminal courts, which alone had jurisdiction to try the felonies to which section 5 applies. The punishments in manslaughter, which range from the highest, short of death, to the very lowest, are an answer to any objection to the range of punishments in section 5; and as in those cases the judge always awards the punishment according to the character of the offence, whether the death arose from an unlawful and malicious, or a merely unlawful act; so in cases under section 5, he would award the proper punishment according to the nature of the offence, whether the wounding were unlawful and malicious, or merely unlawful.

Having thus fully explained the objects and meaning of the clauses, I turn to the decision in question. Now, this simply amounts to the insertion of the word "maliciously" in addition to "unlawfully" in section 5. No reason whatever is assigned for this decision, and I can find none. There is no doubtful word in the section, and therefore the ruling amounts to an addition of the word, and nothing else. The clause empowers the jury to find a verdict of "unlawfully wounding," and the jury have a right to find that verdict; and when facts which amount to unlawfully wounding and no more are proved, it is their duty to find that verdict, and they can only find that verdict, and no other entry can be lawfully made upon the record. To tell a jury that they cannot find a verdict of unlawfully wounding, unless it was an unlawful and malicious wounding, is just as erroneous as it

would be to tell them that it must be a felonious wounding before they can convict of an unlawful wounding.

The power to convict of unlawful wounding is an entirely new power; and although the words conferring it are merely affirmative, they imply a negative. In the great case of *Stradling v. Morgan*,\* it was held that where a statute gives to any persons an authority to do that which they had no power to do before, they must do it in the manner limited by the statute, and not otherwise. So, in *Slade v. Drake*,† it was laid down that “the rule is, that affirmatives in statutes that introduce new laws do imply a negative of all that is not in the purview.” And so in *Wethin v. Baldwin*,‡ Windham, J., said, that “where a statute is introductory of a new law in affirmative words, this had the force of negative words.” Upon these authorities it is clear that the power to convict of unlawfully wounding excludes the power to convict of anything else: and yet the decision in question, in substance, destroys the power to convict of unlawfully wounding, and gives the power to convict of unlawfully and maliciously wounding.

Again, the finding of a verdict of unlawfully wounding is the execution or performance of a statutory power, and no rule is better settled than that in such a case the power must be strictly exercised. In *Rex v. Austrey*,§ Lord Ellenborough, C.J., speaking of powers created by deeds, said, “in the execution of powers, all the circumstances required by the creators of the power (however unessential and unimportant otherwise) must be observed, and can only be satisfied by a strictly literal and precise performance.|| It is also a general principle of law, wherever a power is given to any particular persons, whether it be parish officers or magistrates, to grant certificates, under which, if duly executed, other persons, especially public officers, are bound to act, that their authority must appear upon the instrument itself. It must thereby appear that they are the persons authorized, and that the certificate, warrant, or order was made in the manner and under the circumstances required; otherwise the certificate, warrant, or order is not obligatory, but void.”¶ The 9 Geo. IV. c. 40, s. 38, empowered justices to send a lunatic to the county lunatic asylum; or if no such asylum had been established, to some house duly licensed for the purpose; and it was held that where such an asylum existed, though it was full, the justices could not send a lunatic to a licensed house. Coleridge, J.—“This Act created new powers. . . . Two cases are specified: if a county asylum has been established,

\* Plowd., 207.

† Hob., 298.

‡ Sid., 55.

§ 6 M. & S., 324.

|| See *Hawkins v. Kemp*, 3 East, 440.

¶ See *Re The Suitors' Fee Fund*, 14 Law T., 819.

it is intended that all the pauper lunatics shall go to it; if none has been established, recourse is to be had to a licensed house; but the inflexible rule attaches that, under a special power, parties must act strictly on the conditions under which it is given." \* How then could a jury find a verdict of unlawfully and maliciously wounding? Such a verdict could only be supported by rejecting "maliciously" as surplusage.

It has always been considered, as a general rule, that where the words in different clauses in the same Act were different, it must be taken that the Legislature intended a different meaning. Thus, in *Edriche's case*,† where the question arose on the last clause of the Act, respecting a distress for rent, in which the words differed from the first clause, the judges said that "they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the Act as their own direct words, for *index animi sermo*. And it shall be dangerous to give scope to make a construction in any case against the express words, when the meaning of the makers appears to the contrary, and when no inconvenience will thereupon follow; and, therefore, in such cases *a verbis legis non est recedendum*. And the several inditing and penning of the former part concerning distress given to executors, and of this branch, doth argue that the makers did intend a difference of the purviews and remedies, or otherwise they would have followed the same words." So where the 59 Geo. III. c. 50, provided that "such dwelling-house or building shall be *held*, and such land *occupied*," Lord Tenterden, C.J., said: "The safest course in this case is to give effect to the particular words of the enacting clause. Where the Legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas."‡

It has been held that no words can be introduced into either a penal or remedial clause. Thus, where the 5 & 6 Will. IV. c. 76, s. 102, prohibited the clerk to the justices of a borough from being employed in the prosecution of offenders, and then imposed a penalty on persons holding certain offices, among which the clerk to the justices was not included, it was held that it was not allowable to insert words for the purpose of extending the penal clause to the clerk of the justices, although it was quite obvious that the intention was to annex the penalty to him as well as to the other officers.§

\* *Reg. v. Ellis*, 6 Q. B., 501. See also, *Haynes v. Hayton*, 7 B. & C., 298; 11 Rep., 59, 64.

† 5 Rep., 118.

‡ *Rees v. Great Bolton*, 8 B. & C., 71. See also, *Rex v. Jones*, 2 B. & Ad., 611.

§ *Coe v. Lawrance*, 1 E. & B., 516.

And where the 5 Geo. II., c. 18, required a certain qualification for a justice of the peace, and the 18 Geo. II. c. 20, relaxed the strictness of that qualification, and a question arose where the qualification was not within the express words of the remedial Act, Lord Campbell, C.J., said: "I cannot interpolate the word 'including,' as was suggested by one counsel; nor can I, as suggested by the other, in effect, reject the words 'which are leased,' &c., as applicable to 'remainder.' To do either would be to make an enactment, not to construe one. I must take the words as I find them, and following the golden rule, construe the words so as to put a just construction on them."\*

The authorities which have been cited, and the principles they establish, are abundantly sufficient to prove that the decision in the present case was erroneous.

That the decision will lead to difficulties there can be no doubt. Indeed, the difference among the judges in this case on the question of malice is abundant proof of it. In *Reg. v. Huntley*,† the prisoner was indicted for feloniously wounding, with intent to do grievous bodily harm. The prosecutor and prisoner were both in the same service, and the prosecutor had told the prisoner to cut some grass, which he did not do; whereupon the prosecutor beat the prisoner with a strap, when the prisoner took out a clasp knife and wounded the prosecutor. Platt, B., held that the assault by the prosecutor was clearly illegal; and told the jury that if they thought the prisoner acted in self-defence only, they ought to acquit him; but if they thought that in defending himself he used more violence than was necessary, they ought to find him guilty of unlawfully wounding. This case was not cited in the present; and, though it is clear that any excess of violence beyond what is necessary for self-defence is unlawful, it may admit of some doubt whether it is malicious also.

As the judges held that the wounding was malicious, the question whether an unlawful wounding was sufficient became immaterial; and bearing in mind the difficulties which may arise from the ruling that the wounding must be malicious, it may be well for the judges to reconsider the question.

It was thrown out in the course of the argument, that the placing of section 4 in the Offences Against the Person Act, and omitting section 5, was a bad specimen of consolidation. It is clear that section 4 was properly placed in that Act because it relates entirely to offences against the person, and it is equally clear that section 5 was properly omitted; for it

\* *Woodward v. Watts*, 2 E. & B., 452; and see *Reg. v. Midville*, 4 Q.B., 240.

† 3 C. & K., 142.

is not confined to offences against the person, but included piracy, burglary, and robbery, at the time the consolidation Bills were framed; and though the clauses as to burglary and robbery were afterwards omitted, piracy still remained; so that the clause could not be introduced in a Bill exclusively confined to offences against the person. Again, the clause related entirely to procedure, and would have been in the Procedure Act; and it is only where a clause is confined to the procedure relating to one or more offences in the same Act that the clause is introduced into an Act creating offences; *e.g.* the clause empowering a jury on a trial for murder to convict of an endeavour to conceal the birth.

#### IV.—DOMICILE.

RECENT legislation has placed what we may call the law of allegiance on a reasonable footing. The formerly inalienable national character of a British subject is inalienable no longer, but this character may now be put off and reassumed by means of certain well-defined acts, about the due performance of which questions can seldom arise. As regards the public law of the kingdom, therefore, by which he owes allegiance or claims protection, and its application to himself, the British subject need now feel no difficulty whether he acquires that character by birth or naturalization. The same, however, cannot be said of the law which regulates the application of the personal law of a particular territory to a particular individual. An attempt has indeed been made, by 24 & 25 Vict. c. 121, to draw somewhat closer the rules by which domicile in any case may be determined; but as the rules laid down by that Act, excellent indeed for their purpose, if they could be brought into operation, depend on the completion of conventions with foreign States, none of which have yet, we believe, been entered into, the attempt to improve the law of domicile may not unjustly be classed with numerous other Parliamentary creations which appear to have been brought to the light for no earthly purpose whatever. The law of domicile, then, still depends on judicial decision, and we venture to think that two or three recent decisions in the Vice-Chancellors' Courts on this subject have broken in on the current of judicial opinion, as expressed in recent cases in the House of Lords, and introduced again uncertainty where fixedness seemed almost attained. The cases to which we refer are *Haldane v. Eckford*

(L.R. 8 Eq., 631), decided by Vice-Chancellor James; *Brunel v. Brunel* (12 Eq., 298), decided by Vice-Chancellor Bacon; and *Douglas v. Douglas* (12 Eq., 617), decided by Vice-Chancellor Wickens. As regards the particular circumstances of these cases, the decisions may or may not be correct; but what we wish to draw attention to is not the decisions themselves, but the principles on which, according to the judgments in those cases, domicile is to be determined.

For this purpose let us first inquire what is the law on the subject as deduced from decisions in the House of Lords, and it will be sufficient to go back only to the case of *Moorhouse v. Lord*, decided in the year 1863. This case may be considered, we think, a fair starting-point, inasmuch as the language employed in it by judges of very high authority is particularly definite, and has received special reference and criticism in subsequent cases adopting, as it appears to us, the tenor of its judgment, though deprecating (as we venture to think) wrongly the terms which some of the learned judges employed in delivering their opinions. Undoubtedly, looseness of expression has contributed very much to the difficulties which have always surrounded questions of domicile. From the phraseology employed by some learned judges, it is difficult to determine whether the word domicile represents to them a particular place, or a particular quality of a particular individual. For instance, in the recent case of *Bell v. Kennedy*,\* we find one learned lord speaking thus: "The appellant's domicile of origin was in Jamaica." Another saying, "Mr. Bell's original domicile was Jamaica;" and a third, laying down, that "Domicile is an idea of law." Obviously, these expressions cannot all be accurate. The first and second cannot agree, unless it is correct to say Jamaica is in Jamaica; the second and third cannot agree, unless a territory is an idea of law—neither of which conclusions is it necessary to waste time in attempting to refute.

These are not the only ambiguities of language to be found in the books, but the true meaning of domicile is nevertheless also to be found there, and is correctly described, we think, in the case last referred to by Lord Cairns as a personal status, and by Lord Westbury as the relation which the law creates between an individual and a particular locality or country. These expressions convey in different words the same idea, and adopting them as correct, it must be remembered that to change domicile is to change a personal status or legal relation, and an intention to change domicile is an intention to change personal status or legal relation.

Now, on two points connected with this subject there is ap-

\* L.R., 1 H. of L. Sc. App., 307.

parently no doubt and no conflict of opinion. The distinction between a birth domicile and an assumed domicile is well understood, and the principles upon which the former is determined are seldom in question; and, secondly, for the purpose of acquiring a new domicile, that there must be a change of residence, and that the new residence must be in the locality of the new domicile, is a point too well established to need any remark, and we shall confine our observations to the question whether any, and, if any, what further evidence than the assumption of a new residence is required to complete a change of domicile.

In *Moorhouse v. Lord*,\* Lord Cranworth employed this language:—

“In order to acquire a new domicile, according to an expression which, I believe, I used myself on a former occasion, and from which I shall not shrink, therefore, on that account from repeating now, because I think it is a correct statement of the law, a man must intend *quatenus in illo exuere patriam*. It is not enough that you merely wish to take another house in some other place, and that, on account of your health or for some other reason, you think it tolerably certain that you had better remain there all the days of your life. You do not lose your domicile of origin or your resumed (*qu.* assumed?) domicile thereby, because you go to some other place that suits your health better; unless, indeed, you mean on account of your health or some other motive to cease to be a Scotchman, and be an Englishman, or a Frenchman, or a German.”

And Lord Kingsdown, in the same case, says:—

“Upon the question of domicile I would only wish to say this—that I apprehend that change of residence alone, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be and it is a necessary ingredient; it may be and it is strong evidence of an intention to change the domicile; but unless, in addition to residence, there is an intention to change the domicile, in my opinion no change of domicile is made. . . I think the distinction which has been taken by my noble and learned friend in the chair is a perfectly sound one. . . . A man must intend to become a Frenchman instead of an Englishman.”

Exception has been taken to two expressions in these judgments. The expression *exuere patriam* has been termed an unfortunate one, as having reference to nationality or allegiance; and undoubtedly by any one whose knowledge of *patria* is derived solely from Latin poets, and who is unacquainted with the meaning of the term as employed in Roman

\* 10 H. L. C., 272.



law, the use of the word might be considered not only unfortunate, but a blunder if the amenities of judicial language allowed such an expression to be used. In truth, *patria* represented the legal relation between a particular individual and an urban community under the Roman empire, of which *origo* or birth was the cause, real or assumed. By this relation the individual became subject to the burdens, the forum, and the positive law of the community; and in putting off this relation, he became freed from the obligations which its existence entailed. As for allegiance, there could have been no trace of any such idea in the term, for Rome being the mistress of all communities, no conflict as to the duty of allegiance could arise between the communities, whether urban or provincial, under her rule, and in putting off the "*patria*," without shifting in any degree his allegiance, the subject rid himself merely of a particular personal law. So far, then, as it is possible, considering the different constitutions of the Roman Empire and modern nations, to apply the term used with respect to the former to analogous cases under the latter, the expression used by Lord Cranworth appears absolutely correct. The use of other words, such as Frenchman, Englishman, German, to which, in this connection, objection has been taken, may not admit, perhaps, of so complete a defence.

But let us ask what is meant by being a member of a particular nation? The term Frenchman or Englishman means, we take it, no more than that the particular person with respect to whom the term is employed is connected with a particular territory, France or England. This connection subjects him, firstly, to the public law by which he owes allegiance to, and claims protection from, the State comprised within such territory; and, secondly, to the private law, giving him a civil status, and regulating such matters as his majority, his marriage, succession, testacy, or intestacy.

Undoubtedly, then, if this be a true description of the term Englishman, the ceasing to be an Englishman must be a ceasing to be subject to both the public and private law of England, and so far as it has reference to the public law, the use of such an expression in the passages we have quoted may be admitted to have been inaccurate. But we may take it that the learned judges, whose opinions we are commenting upon, were perfectly aware that allegiance, or subjection to the public law of England, at any rate, could not at the time the case of *Moorhouse v. Lord* was decided, be put off by a natural-born subject by any means; and without alluding to this well-known state of the law, these words must have had reference to the real subject-matter of the case, that is, the civil status of the individual in question. It could not have been laid down that an intention must be found

to do what, as far as the law of England was concerned, was not possible to be done; and in order, therefore, to give to these words a reasonable interpretation, which may be done without any straining, the intention of becoming Frenchman, Englishman, or German, must have meant an intention merely of changing personal status—a meaning which agrees exactly with the explanation we have given of *exuere patriam*, and which, if the definition of domicile be remembered, may be expressed simply as an intention to change domicile. According, therefore, to *Moorhouse v. Lord*, the requisites for a change of domicile are, first, a change of residence; and, secondly, an intention to abandon one system of personal law and become subject to another, and these we apprehend are still the requisites according to the subsequent ruling of the House of Lords. It is obvious that the establishment of such an intention must, in general, be a matter of great difficulty: it cannot be expected but that direct proof of the intention of the person, whose domicile is in question, with reference to the personal law to which he would be subject, will be very seldom attainable. The intention, however, must be established, and hence it is that we find in most cases of domicile the main contention is, as to the character of the new residence, and from this character the intention to change domicile is inferred. If the new residence is shown to have been permanent—if it can be shown that the person in question made the new locality his home—the presumption arises that his intention was to change his domicile; but this is nothing more than a presumption arising from the permanency of residence, and capable like any other presumption of being rebutted. That this is so appears, we think, from a passage in the judgment of Lord Westbury, in the case of *Udney v. Udney*,\* upon which passage, curiously enough, reliance is placed by those who support an opinion contrary to that which we are now endeavouring to maintain.

Lord Westbury here says:—

“Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary or intended for a limited

\* L.R., 1 Sc. App. Cases, 438.

period, may afterwards become general and unlimited, and in such case so soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established."

Now, the nature of the connection between residence and domicile is contained in the first lines of this passage; from them we conclude that domicile is an inference drawn from permanent residence, but drawn only when there is no other evidence to show an intention bearing on a choice of personal status as regulated by a particular personal law; and although in the last words of the passage domicile is said to be established when the *animus manendi* is inferred, this can scarcely be taken to mean that permanent residence is conclusive without contradicting the earlier part of the sentence, which to us appears to override all that follows, and so violating all the ordinary rules of construction.

In this same case particular reference is made to the expressions used in *Moorhouse v. Lord*. Lord Hatherley says:—

"I think some of the expressions used in former cases as to the intent *exuere patriam*, or to become a 'Frenchman instead of an Englishman,' go beyond the question of domicile. The question of naturalization and of allegiance is distinct from that of domicile."

And Lord Westbury, in referring to Lord Kingsdown's words, "A man must intend to become a Frenchman instead of an Englishman," remarks:—

"These words are likely to mislead if they are intended to signify that for a change of domicile there must be a change of nationality, that is, of natural allegiance. That would be to confound the political and civil status of an individual, and to destroy the difference between *patria* and domicilism."

We have ventured to give already a different meaning to *patria* than that which appears to be attached to it here by Lord Westbury; but whether we are right or wrong in that matter, the plain inference from these last quoted remarks appears to be that if the obnoxious expressions in *Moorhouse v. Lord* are cleansed from all connection with allegiance or political status, the residue of their meaning is correct. Lord Chelmsford, in the same case, pertinently remarks:—

"In a competition between a domicile of origin and an alleged subsequently acquired domicile, there may be circumstances to show that however long a residence may have continued, no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to

retain the domicile of origin, but whether it was proved that there was an intention to acquire another domicile."

Hence it follows, that in the opinion of the judges who decided *Udney v. Udney*, the case of *Moorhouse v. Lord* is correct when it lays down that an intention to change domicile, or in other words to change personal status, is necessary to be established in order to create a change of domicile. The case of *Bell v. Kennedy*, to which we have already referred, and which was decided in the year preceding that of *Udney v. Udney*, bears out in its general features, we think, the proposition for which we are contending, but we may remark, also, that in this case attention is particularly drawn to the distinction between residence and domicile. Lord Westbury says, in one place, "residence and domicile are two perfectly distinct things," and again:—

"We find him residing in Scotland from that time, but with what *animus* or intention his residence continued there we have yet to ascertain. For although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or contemplation."

This is a distinction which we think has been forgotten by one, at any rate, of the courts of first instance.

*Udney v. Udney* is the last decision of the House of Lords on the question of domicile, and having thus ascertained what is the law of the highest court of appeal on this subject, let us now see how it has been dealt with by the Vice-Chancellors in the cases we have mentioned above. In *Haldane v. Eckford*,\* the Vice-Chancellor, after quoting Lord Westbury in *Udney v. Udney*, agreed with the contention that had been raised in argument, that the rule laid down by him differed from that laid down in *Moorhouse v. Lord*, in which he says, "that unfortunate term, *exuere patriam* was introduced, as if it were a question of nationality, and not of more or less permanent residence." Now, the main question in *Haldane v. Eckford* may have been properly a question of more or less permanent residence, and from that the change, or the absence of change, of domicile may have been properly inferred; but to ignore altogether any requirement of "intention," appears to go absolutely in the face of the House of Lords' decisions, and especially to contradict the opinion of Lord Westbury, that domicile and residence are two entirely distinct things. As to the difference or agreement between *Udney v. Udney* and *Moorhouse v. Lord* we have already said enough.

The next case of *Brunel v. Brunel*† is more remarkable, for

\* L.R., 8 Eq., 631.

† L.R., 12 Eq., 298.

in that case there was an express declaration by the party whose domicile was in question, when urged to take out letters of naturalization, for the purpose of holding land in England, "that he did not wish to lose his status as a French citizen." Now, unless there was something in evidence subsequent to this declaration to counteract its effect, nothing could be clearer than an intention here of the party to retain his domicile of origin, and consequently an absence of one of the ingredients which, according to the House of Lords, is necessary to effect a change. But the effect of the declaration was disregarded, and a new domicile was decided to have been acquired. In the remaining case, of *Douglas v. Douglas*,\* which, though argued before, was decided after *Brunel v. Brunel*, Vice-Chancellor Wickens allows an intention must be shown, but considers that opinions have differed as to whether this intention is to be one of settling in a new country or of changing civil status. For the former opinion, unfortunately, no authorities are quoted, while for the latter, allusion is made to *Moorhouse v. Lord*, and cases in the Exchequer following its authority. The latter opinion, however, which he calls the stricter, though more convenient rule, the Vice-Chancellor cannot consider as the law of England, and, with a boldness not common on the Bench, the learned judge does not confine himself to the facts immediately before him, but in unconscious anticipation of *Brunel v. Brunel*, he goes on to say—

"The case of a person wishing to settle permanently in a country different from that of his domicile, but to retain as regards testamentary and matrimonial matters, and as regards civil status generally, the law of the country that he leaves, may have rarely arisen, and is perhaps not likely to arise. When it arises, if it ever should arise, the determination ought, I think, to be, that the intention was sufficient to warrant a conclusion in favour of a change of domicile."

Thus it appears that the judges who decided *Haldane v. Eckford*, *Brunel v. Brunel*, and *Douglas v. Douglas*, are in agreement on a very important point, but at variance, we venture confidently to think, with the House of Lords. By the latter, domicile can only be changed when an intention exists having reference to personal law, and consequently there may be permanent residence in one country and a domicile in another, while by the former the whole question of domicile is one of residence more or less permanent. The error appears to have arisen from failing to perceive that, while the main stress in cases of domicile is found in the endeavour to establish or deny an intention to take up a permanent residence, this is so merely from the exigencies of the question, and when affirmatively

\* L.R., 12 Eq., 617.

established is only a platform from which another intention is to be seen. The final intention to be established, as we read the cases in the House of Lords, is an intention to change domicile, and this may be arrived at by previously ascertaining an intention to take up a new and permanent residence, if a more direct affirmation or denial of it is not possible. In *Brunel v. Brunel* it appears to us this was possible; in the other cases, without quarrelling with the decisions themselves, we object to the principles they appeal to for support. It would be well, we think, if all such questions could be avoided by legislative enactment assimilating the law by which domicile is acquired to that by which a new nationality may now be assumed. Few questions involve more trouble and expense than those which relate to domicile, for solving which it is generally necessary to ransack the acts of a whole life, and often at a time when evidence of facts necessary to be ascertained has been rendered dim and uncertain by lapse of years. A few simple rules might render all such cases unnecessary.

## V.—THE TEMPLE CHURCH.

### ITS RECENT HISTORY AND LAST RESTORATION.

**F**ORTY years ago the interior of the Temple church presented an appearance so totally different from what we now see, that one might be well excused for denying the identity of the building. Deep-coloured and well-varnished wainscoting, of the complexion of rich Spanish mahogany, and whitewash more or less dirty, were the prevailing objects which met the eye. The congregation sat in lofty wooden pew boxes. The pulpit and reading-desk were of that rich and cumbrous beauty, or elaborated ugliness (as tastes may decide) which were then much admired. The tablets and monuments, which are now stowed away in the gallery of the round tower, were placed on the walls, adhered to the pillars, or obscured the windows.

The altar, which had delighted the taste of former generations of Benchers, was what every one would now regard as a masterpiece of monstrosity. It was of dark wainscoting, carved with shields, festoons, and the heads, shoulders, and pinions of cherubim; and garnished with fruit, leaves, pilasters, and entablature. The carving was reputed to be good; but being polished and varnished, so received and reflected the light as to present some difficulty in forming any opinion on it. The altar was sufficiently elevated to shut out

a good portion of the east window. It matched well with the pulpit and reading-desk, which were of the heaviest description both in form and ornament. The former was highly suggestive of weighty, dull, Dr. Blair-like and orthodox sermons. The vulgar vanity and bragging intrusiveness, pride, and impertinence of the monuments were undeniable. The organ was raised on a screen at the division between the round church and the nave.

"This screen was circled (as appeared by the date it bore) in 1862 at the west end of the oblong church, and between that and the round church; it was adorned with ten pilasters of the Corinthian order, also three portals and pediments, and the organ gallery over the central entrance was supported by two fluted columns of the Corinthian order, and adorned with entablature and 'compass pediment.' The inner columns were large panels on carved frames, with an enrichment of cherubim near the pediment on the south side. The screen extended completely across the church. The central archway was occupied by the organ, the ornamental point of which was carried up nearly to the ceiling of the nave. The side archways were above the screen carefully plastered up, so that their form was rendered almost invisible. The lower parts of these and the central archways were filled with glass doors and windows."\*

The service was conducted in the ordinary parish-church fashion of forty years ago, when the Low Church party had undisputed supremacy. There was just this difference. In the Temple church two professional ladies, sometimes with and sometimes without bonnets, and two men, but without surplices, came forward in the little box gallery in front of the organ at intervals, and sang hymns, psalms, and spiritual songs in quartet, to the members of the two honourable Societies, who stood up, listened, and sat down again, let us hope, edified. The organ was played by Mr. Warne, a clever musician, entirely blind. The instrument had, at the time we are now speaking of, great reputation; but more historical than real, for to the ears of a modern organist it was very defective. It had no pedal organ or pedal board—most important and characteristic parts of the organ. It had about five stops in the swell; but, notwithstanding its defects, it still discoursed most excellent music. The beauty of tone in the pipes which were there, compensated for much which was absent, and the uncritical and confiding audience for the most part was satisfied. Our professional fathers were proud of their church and their organ, and were content with the service.

At length, there arose the spirit of innovation in the

\* "A Few Notes on the Temple Organ," printed at the Private Press of Duncairn.

Societies. The fittings and decorations of the church were found to be in bad taste—the service inconvenient. A little restoration was suggested. There were not a few malcontents when this was proposed. Had we not, said they, the best preachers in London? There was Benson the master, whose silvery tones and eloquent periods were of a high order, and in his absence Theyer Smith, whose lectures, says his admirer, “though not perhaps much admired by the lawyers’ ladies, were still incomparably the best examples of learning, logic, and deep subtle thought, combined with fervent honesty and outspoken sense, of all which the metropolis could then—peradventure, can now—boast.” We had an efficient reader and a model clerk, whose antistrophes in the psalms, and whose “amens” after the prayers, were all that could be desired. Why, then, should this wild spirit of innovation have entered our plastered porch, and disturbed our whitewashed walls? Yet enter it did; and a revolution—with some of the good and some of the evil consequences of revolutions—broke out, and set up a new order of things.

The powers and authorities in the Temple, in bending to this spirit, were of course but following the example which had frequently been set them before by their predecessors, who at intervals had repaired and adorned their church, and remodelled the services as public taste demanded. We do not know of any detail as to its condition prior to the “Fire of London.” That the Puritanism of the preceding generations had defaced this beautiful building, and that the indifference of their successors had perpetuated the barbarism, is very probable, and would account for the depth of whitewash accumulated on the walls. We read in the “New View of London” (1708), that the church, “having narrowly escaped the flames in 1666, was in 1682 beautified, and the curious wainscot screen set up. The south-west part was, in the year 1695, newly built with stone. In the year 1706 *the church was wholly new whitewashed*, gilt, and painted within, and the pillars of the round tower wainscoted with a new battlement and buttresses on the south side; and other parts of the outside were well repaired; also the figures of the Knights Templars were cleaned and painted, and the iron-work enclosing them was painted and gilt with gold. The east end of the church was repaired and beautified in 1707.”

The “New History of London” describes the church as then being “well pewed, and wainscoted with *right wainscot* ;” and, in 1737, we are told the exteriors of the north side and east end were again repaired. In 1811, the church was “generally repaired.” In 1825, under the direction of Sir Robert Smirke, the architect of the Inner Temple, the repair of the *south* side (externally), and the lower part of the circular portion of “the



round," was commenced. In 1827 this job was completed. Some of the wainscoting round the columns, and some of the monuments which had been stuck to them, were then removed; but the paint and whitewash were left, and the oblong part of the church remained in all the perfection of the 18th century adornment. In 1840, the condition of the church was again reported to be such as to require instant and extensive repair. In April of that year, the two honourable Societies ordered that the roof and east end should be "completely repaired, the interior beautified, repaired, and warmed."

Sir Robert Smirke now fell ill, and the functions of architect to this restoration committee devolved upon Mr. Savage, the architect to the Middle Temple. The committee appointed by the two Societies recommended the Benchers to take various important steps. *First*, "That the doorway should be repaired, and restored to its original state." How successfully this has been done, we may in passing remark, is to be seen by any one who will examine the peeled stone and patchy work which the doorway now presents. *Secondly*, "That the interior of the church, with the tablets, monuments, pavements, &c., be repaired and cleaned; that the woodwork of the pews, pulpit, and screens, &c., should be repaired, cleaned, and re-varnished; that the Purbeck pillars should be scraped; that the two side arches leading from the round into the oblong church should be opened; and that the Benchers should take into consideration the propriety of removing the organ and altar screen, and of refitting these portions of the church more consistently with its character."

The last of these recommendations was the thin end of the wedge. The knell of the churchwarden era was sounding. The days of whitewashing and private boxes were almost at an end. The committee began to investigate closely the condition of the church; which, indeed, one thinks they might have done before they made their report. Like other people who begin to do a "little repairing," the committee found much more which required to be done than they had at first contemplated or recommended.

The flooring and lower underwork generally of the pews, pulpit, and desk, were not sound. The ground was damp, and full of bad smells. The pews would cost more to repair than they were worth. Could not better seats be inserted? Could that hideous altar, desk, and pulpit be got rid of? The flooring, too, was a foot higher than the original pavement. Accordingly, the altar screen and railing were condemned. The pews were next removed. It became needful to take away the wainscoting round the church; and this necessitated the repair of the stonework of the walls. Then the organ-loft, standing on the screen already mentioned, was found to be not

only unsightly, but in a highly dangerous condition, and down it all had to come. Next came terrible revelations as to the state of the pillars and the roofs. The six columns in the circular part of the church "were found so injured, that it was *indispensable* that new columns should be supplied." The roof of the "round" was so bad, that it ought really to be entirely renewed. This was far cheaper than repairing, it was alleged.

Encaustic paving of the proper pattern was now laid down in Minton's tiles. When the whitewash was removed from the walls and ceiling, indications of colour were discovered, which, naturally enough, suggested repainting. There could be no doubt but that the Temple church had been richly decorated. A new chapel for the organ had to be constructed; a new patent apparatus for warming the church had to be invented, which, by-the-bye, nearly burnt down the whole building twenty years ago. These various schemes were carried out in a princely spirit, without regard to expense. And although what the last restorers are so proud of having done may be superseded by the work of a younger and more enlightened community, yet we think that it may be conceded, that if Heraclius,\* the patriarch of Jerusalem, who, in 1185, consecrated the church, had seen the round building when plastered, paved, and wainscoted, by order of the benchers of the 17th and 18th centuries, and if he could again be allowed to look in at the present day, he would (if he recognised the building at all) admit that the last restoration left it in a state not only more admirable than the former one, but also with some considerable resemblance to the round church he officiated in whilst on his crusading canvass at the court of Henry II.

It would be unfair to lay heavily at the door of the restoring committee many charges of bad taste or blunders, committed in their great effort to make the church the best example of modern architects' restorations. It is upwards of thirty years ago that they entered upon their scheme. There was less experience in "restoring" and church decorating then than now. The work was, in the main, honestly and well done. The seats are, as our readers know, of good material, well placed, and thoroughly comfortable. The decorations of the

\* This Heraclius had a most unpatriarchial mode of expressing himself; and he and the king, whom he was bullying to join in the Crusades, were wont to have slanging matches. This is the conclusion of one of the conversations in which the religious had pointed out to the royal man how little the people cared for him, and how much for his "goodys temporall." "Thou art worse than any Sarasyn, and thy people followeth pray [prey], and not a man.' But the king kept his patience, and said, 'I may not wend out of my lande, for myns owne sonnes wyll aryse agayne me whan I were absent.' 'No wonder,' said the patryarke, 'for of the deuyll they come, and to the deuyll they shall.'"—*Fab. Chron.*, p. 280, edit. 1811.

ceiling, though mere multiplications of two or three figures, and on a material which is already peeling off, are probably as sensible and in as good taste as we should have them in if the church were again to be renewed. The wall paintings are in the same stiff and stupid fashion which our ancestors are supposed, and probably with some truth, to have advanced to, about the end of the 13th century, and in which certain church architects still delight. The inscriptions around the walls are in the same unintelligible letters, neither old English, nor modern German, nor anything else than ecclesiastical hieroglyphics which these architects affect. We are not sure that if the restoration had been left until our own day we might not have had more of these monstrosities. We may be thankful that while the building was put into decent repair, the last generation of Benchers did not further attempt to "beautify" the church, and at least endeavoured not to destroy its ancient features.

The stained windows at the east end of the church are by Mr. Willement. Not a few visitors suppose that the glass must be ancient. There are, of course, weak and bad designs in ancient as in modern stained windows, but judging from the beautiful simplicity of the general plan of the church, or rather of the two churches, the round one and the oblong, there could have been nothing so utterly poor and characterless as the new stained glass windows. They are positively ugly. They are false in principle. Nobody can see or can tell what they mean, and they make the east end of the building gloomy and dark. The large centre window seems to be a reduced copy from one of the well-known windows of a cathedral in France. The figures in the medallions, distorted and grotesque, in miserable imitation of old work, are of such a reduced size, that they are not only out of all proportion to the ornament which surrounds them, but the groups themselves are unintelligible. In order to give the windows depth of tone, and save them from a lean and thin effect, it was found necessary, after they had been set up, to load them with coats of oil paint on the outside. The window at the south-east corner was added a few years since. It was erected to the memory of Frederic Robinson, by some of his many friends and admirers. It is an opaque and spurious specimen of window "painting." Instead of serving the object of a window, it accomplishes the undesirable purpose of a shutter, and renders the pulpit a gloomy spot, where, even at this time of year, Dr. Vaughan requires candles at mid-day sermon. If all the windows in the church were filled in this way, no member of the Inn who resorted thither could reach his seat or read his book without a lamp of his own.

Far superior in design and colour are the windows in the

round church, which were presented to the Inn by a member of the Inner Temple, Mr. Winston. Some of the colours—the blue and the ruby especially—rival the best specimens of the best periods of glass painting, and the windows are altogether a great advance on modern stained glass-work. These, however, are additions to the church, subsequent to the restoration.

Between 1840 and 1843, the two honourable Societies laid out on the restoration of the church at least 53,000*l*. The whole of the money of the Societies which the Benchers thus expended amounted to 80,000*l*., a sum which it was remarked at the time would have been sufficient to have built eight handsome churches, each containing a thousand sittings, or to have entirely reconstructed the Temple church itself, as it now stands, many times over. The first estimate for the whole work which was thus swelled, was between 4000*l*. and 5000*l*. !

When the church was reopened, the introduction of a choral service gave rise to an exhibition of a fine fierce Protestant feeling among the masters of the Bench; and it was not without a struggle, and the encountering of much suspicion and some obloquy, that this choral service was planted in the Temple. There was then, as now, in many persons' minds, especially among the admirers of Low Church teaching, a necessary connection between orthodoxy and bad singing. Even Benchers had their prejudices on these matters; and a few lifted up their voices and cried aloud, and bore witness against the excesses of Prelatists and Papists. The dispute was compromised, and ended in the discomfiture of the Low Church party. Consequently the speaking, or parish clerk and charity schoolboy, service was to be almost abolished. The difficulty had been increased by the respected and worthy master (Benson) meeting with the grievous affliction of total deafness. He was utterly unable to hear even the loudest tones of the organ; and the choral services met with no approbation from him.

The following is taken bodily out of an article in this MAGAZINE, which appeared in the year 1860, and to which we are largely indebted throughout.

“The laws of nature, and the principles of acoustics, were alike attempted to be reversed at times by order of the Bench. One amiable Queen's counsel was heard to volunteer a promise to the musical young lady he was ‘introducing’ to the service, that Mr. Blank, ‘our capital *bass* singer,’ should perform that morning the *soprano* air in the *Messiah*, ‘I know that my Redeemer liveth;’ and, happily for the choirmaster, the worthy Bencher was under the impression that his behest had been regarded, when ‘Where shall wisdom be found’ (Boyce), was nevertheless performed. On another occasion, it is said, a great advocate for the ‘sublime choral

service,' who, however, disliked the vibrating roar of the heavy pedal pipes, desired that next Sunday all the bass notes should be omitted, as his wife was coming, and her nerves were delicate. On the occasion of the late Duke of Wellington honouring the church with his attendance, the exhilarating and brilliant chant of Mornington in E was hastily called for, to which, accordingly, the penitential psalms of the day were duly sung; and at the conclusion of the sermon, when the Duke, with the Marquis of Anglesea, was slowly wending his way *out* of the church, the brilliant idea struck a well-known and rather officious member of one of the honourable Societies, that it would be a fitting compliment to have 'See the conquering hero *comes*' played as a voluntary, and he was much chagrined that this graceful, opportune, and very original piece of flattery was not forthwith paid.

"Besides the Duke, other important people were attracted to the church. The late Duke of Cambridge came, and loudly aided, and indeed occasionally led, the solo singers in their airs, and audibly applauded, and expressed to the flattered magnates who respectfully surrounded him, his entire approval of various parts of the prayers and praises to the Almighty. In fact, many of the fashionable world condescended to 'assist' at the services. We were lately reminded of this brilliant company of miserable sinners, by the remark of an omnibus-driver on Mr. Spurgeon's congregation, of which he formed one. He boasted, saying, that 'All the Harristocracy goes to our tabernacle. Vy, last Sunday, I see, close along o' me, the Duchess of St. Albings, and on her near side Baron Bramwell.'

"During the first season after the restoration the Temple church, no doubt, often contained a very brilliant congregation. But soon the great attraction wore off. The preaching was dull, and the music mere monotonous repetition; and in the afternoon, at least, many of the middle and lower classes gained access to the church; barristers, for the most part, not being wont to put in a second appearance at church, but rather moving clubwards, or westwards with visiting cards in their pockets. This alteration in the constituent part of the congregation, mainly recruited from the shops, offices, and counting-houses in the neighbourhood, has led many afternoon preachers, who used to be appointed to fill the pulpit by the Benchers in rotation, into an erroneous style of sermon. Thinking they were addressing a congregation drawn from a learned profession, they were wont to endeavour to adapt their discourses to the supposed intellects of their hearers. Quotations in Latin and Greek were lavished, metaphor was indulged in, metaphysics were broached, theological and philosophical essays of a recondite and controversial description were freely delivered, not without creating vehement suspicion, among the visitors, of horrible heterodoxy. One Sunday's sermon produced a great sensation in the Temple. It happened that a reverend divine, either suddenly called on to preach, or having inadvertently selected the wrong discourse, delivered himself of one of a missionary character, originally composed for and addressed to a mixed congregation of Hindoos and their white brethren. Having disposed of so much of the sermon as applied to the latter, he proceeded to read a few appropriate phrases to their coloured fellow-sinners,

and unfortunately turning, as it seemed, to the occupants of the seats on his 'near side,' who consisted of a few yellow-visaged and parchment-skinned Benchers, he thus proceeded: 'And now a few words to you, my brethren, of different complexion to the rest of the congregation, and whose knowledge of the principles of our religion is necessarily less perfect than that of others who have had the privilege of being early educated to the truths of Christianity,' &c. This pointed and startling appeal gave, it is believed, no manner of satisfaction to those he addressed. For the most part, however, the "selected" preachers\* (sometimes recruited from rustic parts) were, if not of the edifying description, not uncomplimentary to the rulers and governors among the congregation of the people; and as chancellors, ex-chancellors, and expectant chancellors, patrons of much preferment, were assumed to be, as indeed they occasionally were, among the audience, it would not be uncharitable to suggest that the preacher exerted all his oratorical powers to effect the double advantage of securing a living for himself, while, peradventure, he might save the soul of a lawyer. It is recorded that one canny curate frae the North Countrie (who had a near relation—an attorney—in one of the assize towns on the Northern Circuit, and who might thus have been introduced to the notice of a disinterested Bencher), took for his text a long passage out of the Second Book of Chronicles, where the description of Solomon's Temple is given—'And he garnished the house with precious stones for beauty: and the gold was gold of Parvaim. He overlaid also the house, the beams, the posts, and the walls thereof, and the doors thereof, with gold; and graved cherubims on the walls.' And 'the weight of the brass in the Temple could not be found out.' This afforded an excellent opportunity for drawing parallels between the Temple of Jerusalem and the Temple of London—between the wisdom of Solomon and that of the Benchers; on the whole, a preference was given rather in favour of the latter and their building. 'The architecture of the Jews, if measured by cubits, was, it is true, more extensive, but somewhat barbarous; and the wit of Solomon not always so delicate as that of the present day. Was it not, too, a remarkable circumstance, that *both* Temples had been restored. Strange were the coincidences which careful thought would suggest. Thus we read, that many "of the chief of the fathers, who were ancient men that had seen the first house when the foundation of the new house was laid before their eyes, shouted aloud for joy,"' and so on—the occasion being 'carefully improved' in all ways. One main object, however, of most of the occasional pastors, in obedience to the tone prescribed in high quarters, was to show how it was perfectly consistent to introduce pompous worship into the church, without incurring the suspicion of a taint of the 'Puseyism' which was then dividing and rending the ecclesiastical world. The country parson, who would have had every groat of his Easter offering cut off by angry parishioners had he there broached the abhorred doctrines of chanting a *gloria* and decorating the communion-table, here expounded how the compromise might be well

\* This system was done away with about fifteen years ago, and one afternoon lecturer was appointed.

effected by wisdom, and ability, and good intentions; how pure Protestantism might still flourish though men-singers and boy-singers took part in the services, and elegance and ornament prevailed in the sacred edifice.

"Meantime, the sermons were generally of a character so lightly held in estimation, that many persons with bad taste were wont to escape therefrom at the conclusion of the anthem. To meet this evil, a terrible notice was affixed to a pillar in the following words:— 'No one can leave the church *after* the first lesson,' thus enjoining a 'permanent sitting and a fixed congregation.' An equally intelligent and grammatical placard was wont to be put up *outside* the church after the long vacation, viz.: 'Service in the church will begin the first Sunday in November, *and continue till further notice.*'"

(*To be continued.*)

## VI.—ON NOVATIONS, AND THE LIQUIDATION OF AMALGAMATED ASSURANCE COMPANIES.

By C. J. BUNYON, M.A., Barrister-at-Law.

THE recent decisions which we find reported under the head of Novation, appear to suggest as a principle that any man who has entered into an obligation which he finds onerous or inconvenient, and from which he would be glad to escape, may relieve himself of it by proposing an alternative to the person with whom he has contracted, and thereby may put the latter to his election. They also seem to carry the doctrine to this extent, that when any act has been done consistent with acceptance of the alternative offered, the onus is thrown upon the person doing it, to show that he has not thereby released his original security. It is needless to say that, as a general proposition, this is not the law, and that there would be no safety for any man in the ordinary transactions of life if it were so. It may then not be uninteresting to inquire, whether there is anything exceptional in the subject-matter involved, and without attempting to compare and classify the cases, to endeavour to ascertain anew the general principles by which they ought to be governed. The cases to which we refer are, of course, those decided either in the Court of Chancery or in the Albert arbitration, as to the rights of annuitants and policyholders in amalgamated companies, and which, it is said, establish as a general rule, "that where, on the amalgamation of two companies, notice is given to a policyholder of that fact, and in substance notice is given to him that he has his election whether he will

choose to take a policy or liability of the new company, in lieu and instead of the policy of the original company who were liable to him, even although he does not, in terms, assent to the novation, by taking out a new policy, or by having it indorsed, or by entering into an express agreement; yet, if he acts upon it, and takes the benefits which he could only be entitled to receive upon the assumption that he had assented to it, that will be evidence on which the Court may find, and unless there is something to contradict it, ought to find, that he has agreed to take the liability of the new company in substitution for that of the old one."

Such cases are not strictly novations as known to the civil law, since two requisites for a novation, namely, a second legally existing obligation, and the *animus novandi* here exist from inference alone. The new obligation must have been a solemn contract, a stipulation, and the intention of dissolving the old one must have been clear, otherwise both remained in force, and so strongly was the difficulty of depending upon mere presumption felt, that we find it laid down in the Institutes, that on this account a constitution of the emperor was published providing that novation should only take place when the contracting parties expressly declared that their object in making the new contract was to extinguish the old one, otherwise, the former obligation was to remain binding while the second was superadded to it.\*

It is, moreover, to be noted that the doctrine of novation is a doctrine of the common law, and not an equitable principle to be applied in the Court of Chancery alone. The cases which until recently have been considered as dealing with it have been cases at law and not in equity, and the question has been one of fact to be decided by a jury, as, for example, whether, after a change in a partnership of bankers or merchants, a creditor dealing with the new firm after notice has not accepted it in the place of the old one. No one of these cases has, however, been more than the transfer of a debt, and although the responsibility of one man may be more valuable than that of another, the new security has been always one of equal degree with the former. In the case of the policyholder, the circumstances are very different; the security is a complex one; it is usually under seal, and amounts to a covenant to pay the sum assured or the annuity out of a particular fund, so far as such fund will extend, namely, out of the accumulated assets and unpaid capital of the company. It is a rule of law that a contract can be discharged in the same manner only in which it was created. A deed under seal cannot be released by a mere memorandum, or an agreement in writing by a verbal

\* Just, Lib. III. tit. 29, Sandars, 485, Gaius (Tomkins & Lemond, 535)



assent. *Nihil tam conveniens est naturali equitati unum quodque dissolvio ea ligamine quo ligatum est* (Shep. Touch., 323). The rule is a somewhat rusty one, but abstractedly true, and not obsolete,\* and is here valuable as deciding the form in which the question must be considered, showing that at law, at least, the idea of the abrogation of a formal instrument, such as a policy, by a verbal agreement, much more by mere implication from the acts of the parties, which may be susceptible of various constructions, is quite inadmissible. Hence, as recently observed by Lord Cairns, the cases which we have to consider "are not correctly termed novations," but are rather dependent for their decision upon equitable principles. From these, then, we might expect some harmonious system, which should give the most complete effect to the rights and responsibilities of those who are to be affected by it, releasing no duty, but never giving vindictive damages or creating liabilities beyond the true measure of the contracts undertaken. It is, therefore, then not a little disappointing to find that upon the minds of the unlearned, who are ignorant of law civil, canon or common, except so far as a knowledge of the last may be assumed by a playful legal fiction to exist in every average Englishman, the result is an impression of the most lively injustice.

Persons who have effected policies with companies of whose solvency they never felt any doubt, and who have not expressly agreed to release their insurers and accept a substituted security, will never be satisfied to receive a miserable dividend from some other company not of their own selection, and to see the shareholders with whom they have contracted escape scot free from their undertakings. In such a society as the European we have the business of some forty companies collected under the guarantees of an equal number of subscribed capitals, for if there was a mutual assurance society amongst them, its existence may be here ignored for the sake of the argument. Of these forty capitals, if full scope is to be given to the novation theory, as has been done in the Albert arbitration, thirty-nine are in effect to be released, and upon one as the scapegoat are to be thrown the liabilities of the whole. Neither is it treated as important how shadowy this ultimate security may prove. The capitals released may be of the most substantial kind, and the interests of the assured in the former deeds of settlement hedged round by every possible precautionary provision, forbidding the transfer of shares to men of straw, or the liability of the shareholders may be even unlimited. In the new company the provisions of the deed may be entirely in favour of the shareholder—the liability

\* *Nash v. Armstrong*, 7. Jur., N.S., 1060. *Barker v. St. Quintin*, 12 M. & W., 446.

may be expressly confined to the shareholders existing at the time that a claim is made, and the power of transferring shares may be so entirely at the will of the shareholder, that upon a suspicion of insolvency on the part of the company, he may be able to release himself with the most perfect ease. When suspicion becomes a certainty and a panic arises, if a winding-up order can be fought off for a couple of years, the share-list may become almost valueless, the principal proprietors being found among artisans, dock or farm labourers, clerks, domestic servants, and such like capitalists. That some such transfers may be liable to be impeached as colourable, or on the ground of collusion, or *mala fides*, may be much to be desired, but does not alter the case, and the current of the decisions is in the opposite direction. When the operations of the companies have been among the lower orders, it may be said that the policyholders have looked to "the company," and may have thought that one company was as good as another, and that they were quite ready to be transferred. But this is a mere assumption; the poor and the ignorant may not be able to define their rights, but are far more tenacious of them than others, and it is certain would never give up anything without a very full equivalent, if the proposition that they should do so were fairly put to them. The outcry will be loud and deep when it is brought home to them that an enormous business, collected under the shadow of great and numerous aggregated capitals, is to be thrown upon the security alone of one insolvent company, which in a course of proceedings open, to say the least, to very grave remarks, has been ready to undertake the liability of the whole.

Again, to tell such people who have been transferred from company to company, and who inquire in what manner they are to put in their claims, that this must depend upon the doctrine of novation, is a mere mockery. Even to a lawyer fully instructed, whose policy may have been passed, say, from the British Commercial to the British Nation, and from the British Nation to the European, and who may have hoped that the next step might be to the Globe, to be told that instead of claiming against his original company, with the benefit of the successive contracts of indemnity given by the two other companies, his claim must depend upon his having accepted or not one or other substituted security, the difficulty is embarrassing; but to a layman, who may be unable to weigh the legal effect imputed to his acts, even if he could remember them, it appears insuperable. Against which company is he to claim? Where is the liability? Why the pea upon Epsom Downs is not more difficult to discover.

The cases appear to divide themselves into two classes, the first comprising those which occur in companies in which the

amalgamation or transfer has been carried out in accordance with and by virtue of the provisions in the deeds of settlement. The second, those in which the companies have assumed powers which they did not possess.

In the case of the Times Life Assurance and Guarantee Company\* we have an instance of such provisions in the deeds of settlement of amalgamated companies, and of powers to dissolve and divide the assets not required to meet liabilities, when we find it expressly provided "that the directors were, if possible, to procure for some other company an undertaking to pay and satisfy the remainder of the claims and demands arising from assurance and annuity contracts, and to cause to be transferred to the trustees of such other company so much of the funds as should be agreed upon by the contracting parties as sufficient, with the premiums, to become payable on the respective policies, to comply with such undertaking;" and that any surplus funds remaining should be divided amongst the shareholders. And by a further provision it was declared that, notwithstanding the dissolution, the powers, privileges, rights, and duties of the shareholders, including power to call up unpaid capital, should continue in force until all claims and demands should have been satisfied, and until the final decision of the residue.

The power to take the transfer of the business by the amalgamating company is not set out, but in another similar society it appears to have been in the following terms:—

"That it shall be lawful for the board of directors, specially called for the purpose, to contract for and complete the purchase or acquisition, upon such terms, for such considerations, and in such manner generally as to the said board shall seem expedient, of the goodwill and business, and all or any part of the stock, assets, or property, of any other company or companies established for any purposes or objects, the same as, or resembling all or any of the objects or purposes of the company herein set forth; and thereupon to undertake to pay or perform all or any of the existing assurances, annuities, endowments, guarantees, or other engagements or liabilities whatsoever of such other company or companies, and to enter into and execute all such agreements and indemnities, acts, deeds, and things whatsoever as shall be necessary, or be deemed expedient for the purpose of effectuating such acquisition."

Having these powers, the two companies enter into an agreement that the one shall dissolve, and that the other, in consideration of certain funds or securities, shall take upon itself the liabilities of the former, and shall pay the claims or

\*5 Ch. Ap., 382. *In re the Waterloo L.A.C.*, 33 B., 542. *In re the Saxon L.A.C.*, 1 De G., J. & S., 29.

policies as they fall due, and indemnify the transferring company and its members; and it is one of the terms of the agreement that the future premiums shall be paid to the indemnifying company. It is also generally provided that the indemnifying company shall issue new policies to such policyholders as will accept them, or indorse their existing policies, with an admission of its liability.

Under these circumstances, what is the position of the policyholder? He has probably no notice of the arrangement until his premium falls due, and he has no voice whatsoever in it. Short of actual fraud, the contract between the two companies is conclusive against him to this extent, that he cannot restrain the managers of his own company from carrying it into effect, however unsatisfactory that arrangement may be to him. On the transfer of the Waterloo to the British Nation,\* only half a year's premium income was paid to the indemnifying company; and on the indemnified company being wound up, a policyholder declined to be transferred, and claimed to prove for the value of his policy, or the loss incurred by him in having to insure elsewhere at an advanced rate of premium, but the proof was disallowed. There was no evidence of bad faith, or that the indemnity was insufficient, and the policyholder was concluded by the terms of his contract. The hardship upon him was, however, proved by the event. The Waterloo, although afterwards wound up in Chancery, had, we are informed, a strong and solvent body of shareholders, and the British Nation was probably then insolvent, and is now in liquidation, while the consideration for the transfer was ludicrously small. Had his life become uninsurable, and he had been obliged to continue his insurance, his case would have been hard indeed, if he had been compelled to claim exclusively upon the British Nation or any other company (the European, as it turned out) to whom his policy might have been ultimately transferred. The company in such cases has acted in accordance with its deed, and as the policy invariably refers to the deed of settlement, and is made subject to its provisions, the policyholder is as much bound by it as if every word of that deed had been written *in extenso* in his policy. What, then, is his position? It is clear that he must stand in one of two alternatives: he has either been transferred, *volens volens*, to the amalgamating company, or he retains his claim against the old company, and in the latter event he either is entitled in equity to the benefit of the indemnity given to it, or he is not. It is submitted that this must depend upon the construction of the deed. It seems to have been thought,

\* 33 B., 542.

in some of the novation cases, that the claimant must make his election as to which he will hold liable; but this, in the case under consideration, depends upon the true construction of these clauses. They entitle the company to dissolve and to part with its funds, on receiving an indemnity or contract to satisfy its undertakings, and these may be very convenient powers.

A company may have a languishing business; the profit of which may be questionable, and the cost great. Its transactions may have entailed a loss, and the managers may fear to enter upon new ones. It may, on the other hand, have realized a profit which it may desire to divide, or it may be able to sell its business as a going concern on advantageous terms. Without such powers it could not carry out such a transaction as the transfer which it has agreed upon. It is not, it is true, compelled to carry on its business either to earn bonuses, or for any other purpose, at the demand of the policyholders,\* but it cannot enter into a wholesale bargain, and transfer its funds to another company agreeing to indemnify it against its liabilities.† The clauses, therefore, have a definite object, namely, to enable the company to sell its goodwill and transfer its funds to another company willing to perform its obligations, and indemnify it against them. They have a still further operation: they constitute it the sole judge of the responsibility of the other company to give effect to its indemnity, and of the amount of funds to be transferred as sufficient, with the future premiums, to enable it to do so. They, in fact, enable the company to close its business, and reassure its outstanding risks. But to contend that they have the further effect of enabling it not only to say to the policyholders, "Stand back; this is our bargain, with which you have nothing to do;" but, "having made this bargain; you have no longer any claim upon us, but must look only to the Albert, or European, or any other company which we have selected," is something so monstrous, as not probably capable of having been anticipated by a conveyancer. Had such been the intention, it cannot be doubted but that it would have been clearly expressed in an appropriate provision; and in addition to all other arguments, the absence of any such provision seems conclusive against supplying it by implication, on the principle of the maxim, *verba chartarum fortius accipiuntur contra proferentem*. So far as inference and presumption go, these clauses are all in favour of the policyholder, for they do not profess to authorize the transfer of his policy; and by providing not only for the payment of the claims, but *an indemnity* in respect of them by the new company, they assume that the

\* *King v. The Accumulative*, L.A.C. 3 C.B., N.S., 161.

† *Kearns v. Leaf*, 1 H. & M., 681.

claims will continue in force against the old one. It may also be observed that the dissolution of the company cannot operate as a release to the shareholders, unless the company be a corporation, which is rarely, if ever, the case with insurance offices. A company or partnership may dissolve, but it only thereby more firmly fixes the liability for its existing contracts upon its members at the time. Thus far, indeed, there can be little difference of opinion, and the recent decision in Lock's case in the Albert arbitration (*Solicitors' Journal*, May 4, 1872),\* appears an authority to this effect. But then it is said that the policyholder may assent to the transfer, and thereby release the old company, by entering into a new contract with the indemnifying company, or so acting that such a contract must be implied, and this is termed a novation. It is, however, difficult to see why anything done by him in conformity with the agreement which is binding on him should have any such effect. Any man can, of course, release or agree to modify a contract; but when there is no express agreement, it is submitted that none such ought to be supplied when the circumstances admit of a different construction. Three particular acts have, however, been considered as signs of having novated, the payment of premiums to the new company; the sending in the policy for indorsement; accepting a bonus from or dealing with the new company for any modification of the terms of the policy. Let us, then, consider the effect of the first of these. The policyholder is bound to pay his premium, or forfeit his policy, so that he is not a volunteer in the matter; and if he pays it in conformity with the agreement, he does nothing to alter his right, because he is simply complying with a duty which is binding upon him exactly as if prescribed by the policy itself. It is, however, scarcely necessary to go back to the doctrine of powers to prove this, for the proposition must be admitted as good law, that if A owes money to B, a payment by A to C, by the direction or at the request of B, is equivalent to a payment to B. Whether, technically, a payment to B, or his agent, it is beyond doubt a satisfaction of the debt, and might be so pleaded; and if so, the payment to the indemnifying company would stop the indemnified company from objecting that the premium had not been paid. In equity, an agreement between the two companies that the one should receive the future premiums, is of course an assignment of them, and consequently payments in conformity discharge the obligation to the indemnified company. It does not then appear possible for the last company to contend that the

\* This case is not an authority as to novation. The report omits to mention the important fact that the consideration for the grant of the policy had been a single premium, and no annual premiums were payable.

policy is void for nonpayment of the premium. It is submitted that far too much weight has been given to this act in some of the decided cases. It has been said that directly it is shown that the policyholder has paid a premium to the new company, the onus is thrown upon him of proving that he has not accepted it in place of the old one; but if he pays it in accordance with the terms of his policy, or, which is the same thing, of the deed of settlement and agreement founded upon it, his answer must be to point to those instruments, and inquire under what clause binding upon him his right of action is released. And this appears the ultimate decision of Lord Justice James, in Griffith's case, 6 Ch. Ap., 374, when he says:—

“Whatever may be the effect of continuing to pay premiums for a great number of years, although I am not disposed to attach very much importance to such payments! in any case, the payment of premiums for any number of years, *where there is a particular contract between the two companies*, cannot have the slightest operation.”

We will next consider the effect of an indorsement placed upon the policy with the consent of the holder. If, instead of an indorsement, the policy is exchanged for a fresh one, in the indemnifying company (Bowring's case),\* no disputes can, of course, arise: the original company is released, and the transfer is complete; but when there is a mere indorsement, the effect must depend upon its terms. In Dale's case,† the words of the indorsement were, “In consideration of the assured having agreed to the transfer of the within-written policy to the Metropolitan Counties Company, such company doth agree to perform the stipulations in the policy, in the place of the St. George's Company.” Here we have a clear agreement for the transfer, which, when assented to, must bind the assured.

In Griffith's case,‡ the managers of the Albert were not content to rely upon an indorsement placed by them upon the policy, but applied to the policyholder, instead, to sign the following agreement or certificate:—“In consideration of A B (the policyholder) having agreed to the transfer to the Albert of the liability under the policy granted by the Medical, we, on behalf of the Albert, hereby agree to perform the stipulations contained in the policy on the part of the Medical.” This instrument the policyholder declined to execute, but paid his premium, from 1865 to 1869, to the Albert, and it was held that there was no novation. Had he signed it, the transfer would, of course, have been complete against him.

\* Albert Arbitration, *Solicitors' Journal*, Feb. 24, 1872.

† *Ibid.*, Oct. 14, 1871.

‡ 6 Ch. Ap., 374.

When, however, an indorsement, instead of providing for a transfer of the liability from one company to another, simply affirms that the policy is entitled to the benefit of the security of the new company, this being in strict conformity with the amalgamation agreement and the terms of the deed of settlement, it is difficult to contend that it has any novating effect. The following is an example of such a form, which has been largely used, and than which it would appear impossible to employ one more innocent of any effects derogatory to the rights of the policyholder.

"Memorandum.—It is hereby declared that, subject to the proviso hereunder stated, the funds and property of the B Society, as provided by the deed of settlement of the said society, shall be liable for the due payment of the sum of (with or without profits), assured by the within policy of the A Society, to the person or persons legally entitled to receive the same. Provided always, that the future premiums payable in respect of the said policy be duly paid in the said B Society, at the time and in the manner set forth in the said policy."

In all these cases there is a strong recommendation from the office to the policyholders to convert, for the managers know well that by this means, that is, by accepting the new security in the place of the old one, the latter is released. This insidious advice in the interest of the shareholder and to the prejudice of the policyholder, should, we submit, be narrowly scrutinized, so that no effect ought to be given to the proposal unless it appears to have been clearly explained and assented to.

The acceptance of a bonus from the new company has been considered a strong evidence of the acceptance of the substituted liability; but here, again, the inquiry must be, what was the intention of the parties? If the policyholder has notice that it is a term of the amalgamation agreement, that those who either accept new policies or submit to the indorsement of their policies, with the view of transferring the liability, shall alone be entitled to participate in the profits of the new or amalgamated company, he will rightly be held to have agreed to the transfer by accepting the bonus, and he will have received a valuable consideration for so doing. But, on the other hand, if nothing is said as to releasing the original company, and the amalgamation agreement provides that the policies shall share in the profits, it is difficult to see why the accepting a bonus should have any greater effect than the payment of the premium; the amalgamation is simply a reinsurance with profits; and if the true effect of the powers to transfer is that of powers to reassure and to part with the funds of the company *en masse* for that purpose, and that for the



convenience of the amalgamated company, there is nothing in the allotment of the profits among the policyholders which should seem to require that any special effect be given to that act. It is, indeed, only the natural equity of the case that they should have them; otherwise, the amalgamated company having issued a large number of policies at high rates of premium in consideration of their participating in profits, might reassure the whole of those policies at non-profit rates, and confiscate the difference. If the company refrains from an act which would be very like a fraud, it is strange that such a limited amount of virtue should have the effort of entitling it to set its policyholders at defiance, and tell them that it is discharged from all obligations towards them. Even in the case of an express agreement, if the indemnifying company, as in the case of the *Albert*, was in fact insolvent, and the bonus is declared out of capital, it seems hard to give any effect to the acceptance of so treacherous a gift. And a further question is then raised, whether these powers to amalgamate or reassure do not in equity, from the very nature of the case, imply a duty and a trust as well as a privilege, and whether it is not incumbent on those who claim a release by virtue of them, to show that the amalgamation was such as prudent men would reasonably assent to, namely, that the consideration or fund transferred was reasonably sufficient to enable the indemnifying company to perform its agreement, and that its affairs had been proved at the time to be in a sound condition. Directors of a public company fulfilling in many respects the position of managing partners, are in others rightly described as trustees for the shareholders.\* In the exercise of such powers as we are considering, it appears proper to conclude that, from the nature of the case, they are trustees for the policyholders also.

Again, it is said that the policyholder cannot be allowed to lie by, and be guided by the event, against which company he shall claim, and the unfortunate policyholder has been treated as a wrong-doer, in fact, as scarcely honest, and has been mulcted in costs when recurring to the parties with whom he originally contracted. It is, however, submitted that in the case that we are considering, he is entitled in equity to claim against both. He is entitled to claim against his original company by virtue of his contract. Although the assurance fund may have been transferred, the subscribed capital is an asset within the terms of his policy, and the indemnity is a valuable security to be enforced for his benefit. He is entitled to claim against the new company in equity, not only because it has agreed to pay his claim by

\* *Chambers v. Gaskell*, 5 Jur. N.S., 52. *The Shrewsbury & B. Railway Co. v. L. & N. W. Railway Co.*, 4 De Gex, M. & G., 115.

an instrument recognised by his original contract, but because the indemnity is the fruit of assets in which he was interested as cestui-que trust, so far at least as to give him a *locus standi* in a court of equity to prevent any unauthorized dealing with them. If the transfer had been a breach of trust, he might be entitled either to follow the assets, or to elect to take the benefit of the contract for which it had been made; but if no objection can be raised to it, he must be at least entitled to the second alternative. A policyholder cannot, of course, be usually described as a cestui-que trust of the assurance fund, on which he has only a general and not a particular lien; but when in accordance with the provisions of the deed of settlement all other claims have been paid, or expressly provided for, and a particular fund is set aside as applicable to satisfy the claims of himself and his fellows alone, it seems reasonable to consider that an express trust has been created. The two companies do not stand in the relation of principal and surety to the policyholder, neither does it seem necessary that he should exhaust the one before he recurs to the other.\* If we are required to find an analogous case, his position is rather that of a creditor whose debtor has agreed to make an assignment for the benefit of his creditors. If after entering into such a contract the debtor converts part of the assets, and invests them in some different security, there can be no doubt but that the substituted security will be equally bound by the contracts, and in equity the creditors will be entitled to it.

What, then, in the case of indemnified and indemnifying companies, the constituents of a great compound company, such as the Albert or European, what, on the assumption that the transfers effected have been made in pursuance of the powers contained in their deeds of settlement, is the true position in a liquidation of the shareholders and policyholders?

It may be assumed that all the companies are in liquidation, and before the same branch of the Court, and it would be shocking to suppose that the Court cannot at once do complete justice in the administration of the assets. It is submitted that their position is analogous to that of past shareholders in any insolvent company, and that their liability ought to be worked out in the same way.† In that event the liability of the last indemnifying company being ascertained and exhausted, the deficiency, as regards policies in which there had been no novation, would be supplied by the indemnified companies to the extent of their subscribed capitals in regular order, and as in turn they assumed the character of indemnifying instead of indemnified companies.

\* *In re Albert, ex-parte Western*, 11 Eq. Ca., 164.

† *Morris's case*, 7 Ch. Ap., 200.

A liquidation would not then be so disastrous to the policyholders as it now appears likely to be, and the shareholders would have no right to complain of being held to their own obligations. The only case of hardship would be that of a shareholder who, having passed through a dozen amalgamations, has taken shares in each successive company without ever obtaining a release from the preceding ones, and has thereby incurred a liability upon the whole of the successive allotments of shares; but the hardship here is the necessary effect of his own acts, and from these he must suffer in common with the rest of mankind, however much we may commiserate him.

The second class of amalgamations are those in which no such powers as those which we have been discussing are contained in the deeds of settlement. And here it must be admitted that many difficulties arise in laying down rules which shall govern all cases. The Court may consider that the general powers of management implied these particular powers assumed, as in the *Era Company's* case;\* or that their assumption must be held binding in equity when the companies have received the consideration, or benefits mutually stipulated for, and that they cannot subsequently repudiate their agreements as between each other.†

To bind the policyholders is, however, quite a different question. If they are told that an amalgamation has taken place, they have a right to assume that it has been legally effected; and if no notice can be proved against them of the illegality of an arrangement which they now desire to repudiate, it is difficult to see how they can be bound by acquiescence. If the contracts of assurance, for which they are to be assumed to have exchanged their original policies, never had any lawful existence, they cannot be estopped by them. If, for example, the indemnifying company had no power to undertake the business of the indemnified company, what is to prevent the policyholder, on ascertaining that fact, from claiming to be remitted to his original position?‡ In the case of shareholders there is abundance of authority to this effect, and there seems little difference in principle between the imposition of an onerous liability and an insufficient security. Express authority, however, is not wanting, to the extent of a dictum of the Lord Chancellor, in *General Pott's* case,§ which, as it was the first, so it remains the leading authority on this subject.

"I have assumed," observed his lordship, "that all the proceedings between the companies were warranted by their respective deeds, and there is no necessity for me to raise any doubt upon

\* 1 De Gex, J. & S., 33.

† "Law of Life Assurance," p. 169.

‡ *Bank of Hindostan v. Alison*, L.R., 6 C.P., 227, Exchr. Ch.

§ 5 Ch. Ap., 118.

the subject, as my decision is independent of that question. In order to prove the acquiescence of the creditor to the change of his debtor, he must be assumed to have satisfied himself that the substitution could be legitimately made, an assumption in the highest degree improbable."

This is very different to the suggestion that the policyholder, if he learnt that the shareholders were about to *alter their position*, and give up business when they had got the policyholders to go to another office, must be bound by his silence to an arrangement, as illegal as it has turned out injurious to him, when, for all that he knew, the arrangement might be both legal and beneficial to him; or that he must be bound, unless he investigates the whole matter, spending more upon it than the possible value of his interest in the concern; and then does what—file his bill? No; he is not to be compelled to plunge into a Chancery suit, but he is to find out some talented attorney, who is to frame for him a continual protest, which will protect him, if it is sufficiently strong, but not otherwise. It is difficult to say how such a curious doctrine can have been invented. Is it a weapon from the antiquated and obsolete conveyancer's armoury, our old friend, "continual claim," resuscitated in a new department of the law? or is this a new rule of equity, far in advance of any conceivable statute of limitations to bar a right of action before it arises?

It may, however, happen that the companies may be bound *inter se* upon grounds which we have suggested, and that as between them powers to carry out the agreements ought to be implied, while the policyholders cannot be so bound, since they have been no parties to them; that, nevertheless, it may be the right of the policyholders as well as their interest to confirm them, and to this extent, at least, to claim the benefit of the indemnities, for which the transfer of the assurance fund was the consideration. In that event it would seem that the liabilities ought to be worked out in equity in the same way as if all the amalgamations had been legally effected, and the result must be the same as in the first class of cases which we have had under consideration. It is impossible to over-estimate the importance of this question, whether it is weighed by the money value of the interests at stake, or the number of the persons who are affected by it. It is much to be desired that it should be reconsidered upon first principles, for it must be admitted that general rules have yet to be laid down which can be considered as satisfactory to the profession, and many of the decisions which have been given upon this subject, which we have intentionally avoided citing, are irreconcilable with each other.

## VII.—MR. FORSYTH'S LECTURE ON ANCIENT MSS.\*

WE have before us Mr. Forsyth's interesting and able lecture on the History of Ancient Manuscripts. We intend, as the best compliment we can pay the author, and as the most satisfactory course we can pursue towards our readers, to make copious quotations from it. When we have done so, the latter will probably agree that the Masters of the Bench of the Inner Temple deserve the thanks of the profession and the public for having requested Mr. Forsyth to print the lecture.

The author commences by asking what authority there exists for the belief in the authenticity of the text of books which have come down to us from a time prior to the invention of printing. Only a few fragments of MSS. older than the Christian era now survive. So formidable are the difficulties in the way of the preservation of MS. through a long period, that some have come to the conclusion that no remains of such MS. exist. The Abbé Hardouin believed, for example, that the so-called works of the classic writers of Greece and Rome were nothing but forgeries of the monks. Of course, this is a belief which will not bear the test of examination. There are cases no doubt of forgery, such as the pretended Donation of Constantine, forged in the eighth century, the Isidorian Decretals of the ninth, and Gratian's Decretum in the twelfth, but each of these contained internal evidence which induced critics at a very early period to decide against their authenticity. In the case of works which have enjoyed a considerable reputation, Mr. Forsyth points out that we have two distinct kinds of evidence in their favour; first, the comparison of quotations. As an illustration of this may be taken the fact that though the Institutes of Gaius were lost to Europe as a whole until the famous discovery by Niebuhr, yet there were scattered up and down the *corpus juris* of Justinian and other collections of Roman law, quotations from Gaius which afforded convincing proof of the genuineness of the MS. which the famous German historian called attention to. Then, second, there is usually a number of manuscripts, all purporting to contain the same identical work, so that we can by collating these together, come to a tolerably just conclusion. As Mr. Forsyth observes, "It is inconceivable that

\* A History of Ancient Manuscripts: a Lecture delivered in the Hall of the Inner Temple. By William Forsyth, Esq., Q.C., LL.D., Treasurer of the Inn, and printed at the request of the Masters of the Bench. London: John Murray, Albemarle Street. 1872.

there should be simultaneous forgeries of the same work at different places widely separated from each other, and equally inconceivable that the quotations from a particular work in other manuscripts, which treat of different subjects, should agree, unless the writers had access to the same documents—or at all events documents of which each was a correct copy of one original.”

De Quincy raises a curious question, which is alluded to by Mr. Forsyth, when he asserts that printing was discovered by the ancients, but that the great want was that of paper. He says: “It had been discovered repeatedly. The art which multiplied the legends upon a coin or medal had, in effect, anticipated the art of printing. It was an art, this typographic mystery, which awoke and went to sleep many times over from mere defect of materials. Not the defect of typography as an art, but the defect of *paper* as a material for keeping this art in motion. There lies the reason, as Dr. Whately most truly observes, why printed books had no existence amongst the Greeks of Pericles, or afterwards amongst the Romans of Cicero. And why was there no paper? The common reason, applying to both countries, was the want of linen rags, and that want arose from the universal habit of wearing woollen garments. . . . How desperate, he continues, must have been the bankruptcy at Athens in all materials for receiving the records of thoughts, when we find a polished people having no better tickets or cards for conveying their sentiments to the public than shells.”

On this last sentence Mr. Forsyth remarks: “From this we all know came the word *ostracism*, for civil banishment, because the votes were marked on an *ostrakon* or shell. And I may mention that there are in the British Museum tickets of admission to the gladiatorial shows just like tickets of admission to our theatres, only they consist of little oblong pieces of lead, some of which, at the request of Professor Schlitzl, I had impressed on india-rubber and sent to him at Bonn, as he wished to use them for his great work on the ‘History of the Latin Language.’ For this trifling service he has paid me, in his Latin preface, a very undeserved compliment; but he said that he was much puzzled to know how to designate me as Queen’s Counsel in that language.

“Great expectations were raised when the buried cities of Herculaneum and Pompeii were disinterred after their sleep of seventeen centuries, and a discovery was made of manuscript papyri at Herculaneum. These were calcined by fire and massed together, just as we see the leaves of a book which has been subject to the action of the flames. In fact, they were little more than cinders; but by means of a most ingenious process, which I believe was the use of an ex-

quisitely thin circular saw, the leaves were separated, and the letters came out black, on the black but unshining paper. Sir Humphry Davy thought that he had discovered a chymical process by which the burnt leaves might be rendered legible; but after repeated experiments he was obliged to pronounce it a failure, owing to the injured state of the manuscripts.

"Another process was to fasten to the outer edge of a MS. some threads of silk, which were wound round pegs in a small frame, and these pegs were turned with the utmost precaution until the whole MS. [*volumen*] was unrolled. I remember reading in Dr. Wolff's journey to Bokhara that he describes a very similar process by which long worms that had burrowed their way into his feet were gradually extracted; the danger being lest any of them should break, which would have brought on inflammation, and possibly death.

"The results, however, have not been satisfactory. A treatise of Philodemus on Music, written in Greek, although the author was a Roman and a contemporary of Cicero, was recovered, and a few fragments of other works; but I am not aware that any part of the lost writings of the great authors of Greece or Rome has as yet been found, either in Herculaneum or Pompeii. In vain has the learned world sighed for a discovery of the lost books of Livy and Polybius, and apparently it must continue to sigh in vain.

"I believe that scholars are by no means agreed as to which is the oldest known MS. in the world; but it may safely be said that it will be found amongst the papyri recovered from the Egyptian tombs, dating as far back as the times of the Pharaohs.

"Montfaucon, indeed, believed that no MS. can be shown to be of an older date than a Greek MS. which is in the Imperial Library at Vienna. The date of this is, happily, placed beyond controversy by a subscription affixed to it, stating that it was written by the order of the Empress Juliana Anicia, B.C. 505, and amongst the embellishments there is a portrait of the Empress.

"But putting aside the few fragments that are supposed to be older than the Christian era, there can be no doubt that amongst the very oldest manuscripts in the world, must be placed those of Virgil and Terence in the Vatican. These are considered to be of even earlier date than the MS. of Dioscorides, and they have been generally ascribed to the fifth century."

Probably the difficulties in deciding on the age of a manuscript are not less great than those in determining on the genuineness of a picture. There are some curious stories about as to some of the paintings which have been recently sold. \* Sam Slick tells how a cute Yankee refused in Paris to

have any of the brown old rubbish by a lot of old Italian fellows palmed off upon him as being worth large sums, and how he bought some bright shiney ones which the dealers produced, when he had given them to understand that he came from too far west to have any tricks of that kind played off upon him. But all this has been changed. The taste now is everywhere for old pictures, and a saint with his head on one side, or a cherub with water on the brain, the whole being barely discernible, but being labelled with the name of some Italian of reputation, will always command a far higher price than an equally good modern picture. Of course this demand for old pictures has created a supply, and certain artists are constantly engaged in their reproduction. The possibility of this imposture going on depends on the difficulty of recognising what is a genuine old work. There are no doubt certain indications which purchasers look for, but most of them may be counterfeited, and the best test which can be applied is, of course, the character of the work itself, when it is stated to be by any of the great masters. In the same way in the determining of the age of a MS., though there are certain criteria of age which are familiar to the initiated, the antiquary is often guided rather by instinct than by rules which he would be able to make intelligible to those who are not familiar with these dusty records.

Among the numerous causes of the destruction of ancient valuable manuscripts may be enumerated fire, war, wilful mischief, fair wear and tear, and the thousand accidents to which things of such a kind were liable, damp, destruction by insects, and the like. Mr. Forsyth mentions that there is another cause of this destruction. "I dare say that many of you have noticed, as I have often done, that if the leather cover of an old book becomes torn or rotten, there appears beneath a piece of parchment covered in writing. The truth is, that the binders used without mercy old manuscripts for the purpose, and they bought them by wholesale, knowing and caring little whether they contained some wretched monkish legend, or the lost books of the History of Livy.

"One of the ablest critics of the last century, Oberlin, discovered several curious fragments in the covers of old books in the library of the University of Strasburg, of which he was the keeper. Amongst these were leaves of Virgil, Horace, Ovid, Lucian, and Priscian; some ancient Dutch poems (not very valuable, I should think), and the German romances of Tristan and Barlaam. In a similar manner were found, in the library of the Abbey of St. Germain des Prés, fourteen leaves of the Greek Epistles of St. Paul, now in the Bibliothèque at Paris, or rather there are only twelve, for two were destroyed or lost during the fire in the library of the Abbey in August,



1794. The original MS. of Magna Charta was rescued by Sir Robert Cotton, from a tailor, who was on the point of cutting it up for measures: and a story somewhat apocryphal is told of the titles of the 8th, 10th, and 11th Decades of Livy, being found on some racket-bats at Saumur.

"Pope Gregory I. is said to have burned all the MS. copies of Livy upon which he could lay his hands; and the same work of destruction is attributed to Pope Gregory VII., with respect to the works of Varro, lest Augustine, who had copied from that author a part of his treatise, '*De Civitate Dei*,' should be convicted of plagiarism. But two of the greatest calamities which befel the remains of classic literature were the fires which destroyed the library in the Basilica of the Greek emperors at Constantinople, and the library of Alexandria, if we may credit tradition; but with respect to the latter, Gibbon says, 'I am strongly tempted to deny both the fact and the consequences.'"

The following are some of the abbreviations which render the reading even of old Latin commentators difficult:—"The letter S stands for several words, such as *Salutem*, *Signum*, *Sigillum*; P for *pater*, *pontifex*, *papa*; F for *frater*, *filius*, and so forth. A.M. means *Ave Maria*; B.M. *Beata Maria*; D.B., *Dux Britannia*; E.R., *Ecclesia Romana*; J.C., *Juris Consultus*; O.S.B., *Ordo Societatis Benedicti*; S.M.E., *Sancta Mater Ecclesia*. Double letters are used to indicate the plural, as A.N.N. for a *anni*; D.N.N. for *Domini*; O.O. for *omnes*; P.P. for *patres*, *papæ*. With these, however, must not be confounded the F.F. to signify the *Pandects*, the origin of which is different.

"The contractions also are numerous and embarrassing. Thus we have *ms* for *minus*; *dr* for *dicitur*; *mo* for *modo*; *st* for *sunt*; *tc* for *tunc*, and a host of others."

The old monks took special care that their manuscripts should not be stolen. It was not an uncommon practice to anathematise any person who might steal a MS. or remove it from the house. Thus we find written in Latin, in a MS. of some of the works of Augustine and Ambrose, in the Bodleian Library at Oxford:

"This book belongs to St. Mary of Robertsbridge: whoever shall steal it, or sell it, or in any way alienate it from the house or mutilate it, let him be anathema-maranatha. Amen."

And underneath is written also in Latin by another hand:

"I, John, Bishop of Exeter, know not where the aforesaid house is, nor have I stolen this book, but I have acquired it in a lawful way."

Another of such subscriptions ends thus:

"Whosoever removes this volume from this same mentioned

convent, may the anger of the Lord overtake him in this world and in the next to all eternity. Amen."

The account of the mode in which manuscripts were compiled in the old monasteries is very curious. "Attached to each monastery of any magnitude was a *Scriptorium*, or writing-room, in which the monks belonging to the house sat to copy whatever was given them by their superiors: not unlike the law-stationers at the present day. Some of the Anglo-Saxon monks were celebrated for their skill in penmanship, and amongst them Dunstan, of whom William of Malmesbury says that he was remarkably clever in writing and illuminating. A few charters in his handwriting now exist in the Bodleian Library at Oxford. Boniface on one occasion requested the Abbess Eadburga to cause a copy of the Gospels to be written in letters of gold and sent to him in Germany, that his converts might be impressed with a reverence for the Holy Scriptures. And a MS., written in letters of gold on purple vellum, was bestowed on York Minster by Wilfrid.

"Artificial light from lamps or candles was not allowed in the *Scriptorium*, lest oil or grease or any other accident should damage the manuscripts, and stringent rules were in force to prevent idleness or inattention. Special artists were employed to insert the rubrics and design the embellishments, and all who have examined ancient manuscripts must have been struck with the extraordinary beauty of the workmanship of many of them.

"In the *Scriptorium*, the rule of absolute silence prevailed, and there is a chapter in Martene the Benedictine, headed *De Silentio et Signis*, which gives the Regulations on the subject. Instead of speaking, the monks were to use certain signals. Thus, if one of them wanted a Missal or the Gospels, he was to make a sign of the cross; but if he wanted a pagan work, he was to scratch his ear with his hand like a dog, to show contempt for the infidels. The sign for a tract was to lay one hand on the abdomen, and the other on the mouth, and for a Psalter, to place the hands on the head in the form of a crown."

Mr. Forsyth then speaks of the labours of the old monks, to whom he gives great credit for their industry and the conscientious way in which their work was done. From his account manuscript hunting must be almost as exciting and interesting as following on the trail of more lively game. The Hon. Robert Curzon, however, found that "so thoroughly had the ancient libraries of the convents of Egypt, Palestine, and Mount Athos been explored in the fifteenth century, that no unknown classic author has been discovered, nor any MS. of great antiquity than some already known in the British Museum and other libraries.

"One valuable MS. indeed, containing some of the lost

works of Eusebius, Mr. Curzon did see in a convent of Abyssinian monks at Souriani amidst the Natron Lakes. But unfortunately for him he did not at the time know what it was, and as his saddle-bags were full of Coptic and Syriac manuscripts, fished out of the oil cellar, he left it behind. Since then, however, the whole of the manuscripts of the library of this convent has been purchased for the British Museum, and amongst them the MS. of part of the works of Eusebius in Syriac, the date of which is the beginning of the fifth century, has been published at Cambridge by Dr. Lee."

On the subject of palimpsests, the lecture supplies much curious information. The term signifies "twice-rubbed." And it is applied to a MS. to signify that it has been twice cleaned or twice written—in fact, *rescribed*. The term was not unknown to the ancients, but it was generally used by them in a different sense from that in which we use it now. They applied it to leaves or books which were so prepared that one writing could be easily expunged to make room for another. But the modern use of the term is restricted to manuscripts upon which the original writing has been rubbed out to make room for a different work altogether, which, like an upper stratum, overlies the other, and on the application of acid, the older writing becomes faintly visible. Some critics, however, with good reason, think that the ancients did treat their MSS. very much as the monks did, and that palimpsests in the modern sense of the term, were perfectly well known to them.

The ink generally used by the ancients was made of lamp-black, mixed with gum. It was extremely black, and of great durability; but it did not sink into the paper or parchment and so could be easily washed off by a wet sponge or cloth. We can readily imagine how this opened a door to forgery and fraud; and Pliny tells us that it was usual in his time to mix vinegar with the ink, in order to make it combine chemically with the paper. This, he says, in some degree answered its purpose; but afterwards vitriolic ink was substituted, which possessed the quality of sinking into the paper, but has the disadvantage of becoming paler and paler as time goes on, until, as the MS. grows yellow with age, it disappears altogether. Afterwards a compound kind of ink was made use of, in which the later and freshest-looking manuscripts were written. The palimpsest manuscripts must have been written chiefly with vitriolic ink, for the words that had been rubbed out and written over are rendered legible by the application of an infusion of galls. It is possible that some manuscripts still exist which were originally written with the old carbonic ink, and contained precious remains of lost classics; but the writing in that ink was replaced by

writing in vitriolic ink, and this again has been effaced by the pumice stone, and its place is occupied by the writing which now appears.

Mr. Forsyth says that for those who have not seen a real palimpsest it is difficult to form an idea of the almost hopeless obscurity which shrouds and conceals the original MS. After describing some of the first investigations of this new ground, he does justice to the illustrious Cardinal Angelo Mai, and gives a quotation from the late Cardinal Wiseman, showing not merely how Mai worked, but what wonderful success attended his labours.

Of course, the most interesting discovery in the way of palimpsests for our professional readers, and probably worth all the rest of them put together, is that of the Institutes of Gaius. Here is Mr. Forsyth's account of it.

"In the year 1816, the profoundly learned scholar Niebuhr was on his way through Italy as ambassador to the Papal See, and as he passed through Vienna, he strolled into the Chapter Library there, and began curiously to examine some of the manuscripts. Amongst these, was one in which had been copied part of the writings of St. Jerome; but Niebuhr detected traces of an older writing beneath the lines, and was able to make out some words which satisfied him that they belonged to the work of a Roman Juris-Consult. He could only devote two days to the task, but in that time, with the lightning quickness of his critical intellect, he felt assured that the MS. was a palimpsest containing the lost work of Gaius. He immediately wrote to Savigny at Berlin, and communicated to him his discovery, the result of which we have now in a tolerably perfect edition of the Institutes of Gaius. The chemical agents employed brought out the original writing with sufficient clearness, but unfortunately the transcriber of the works of St. Jerome, who had used the old parchment for the purpose, had in several places erased words and passages with a knife, so that complete restoration was hopeless. I hold in my hand Lachmann's edition of the work, at the end of which are some *fac-similes* of the palimpsest."

The concluding portion of the lecture is taken up with an account of Biblical manuscripts. The lecturer begins with the MSS. of the Old Testament. Before doing so he gives an explanation of the word *Masorah* often seen in the margin of the sacred volume.

"The Masorites were Jewish grammarians or literati, who lived after the commencement of the Christian era. They counted all the verses, words, and letters of the twenty-four books of the Old Testament. They distinguished the verses where they thought something had been forgotten, the words

which they believed were changed, the letters they thought superfluous, the repetitions of the same verses, the number of times that the same word is found in the beginning, middle, and end of a verse. All these they counted, and made an accurate enumeration of them, so that, if it is possible for human ingenuity to secure accuracy in the text of manuscripts it was secured by the crawling industry of the Masorites."

The history of the Biblical manuscripts is so singularly interesting, and set forth in such an interesting fashion by Mr. Forsyth, that we make no apology for presenting the following extracts from the lecture :—

"Now, as to the comparative ages of the existing Hebrew manuscripts of the Bible. I dare not speak positively on a question about which many learned men differ, and I can only indicate the general opinion. One MS., which is a Pentateuch roll, unpointed, was brought from Derben or Daghestan, and if we may believe the subscription, was written previously to the year A.D. 580, and if so, it is the oldest known Biblical Hebrew MS. in existence. But consider this: the year 580 after Christ is the first starting point we have for an existing record. Beyond that all is darkness and void, so far as regards Hebrew properly so called.

"The Hebrew manuscripts of the Bible are divided into two classes. (1) Rolls used in the synagogue; and (2) Square ones, which are to be found in private collections. All the best manuscripts are derived from five, which are considered standards. (1) The Codex of Hillel, of unknown antiquity; (2) The Codex of Ben Asher; (3) The Codex of Ben Naphtali; (4) The Codex of Jericho; (5) The Codex of Sinai, which, however, must not be confounded with the Codex Sinaiticus of Tischendorf, of which I shall speak presently. The rules laid down by the Jews with respect to their manuscripts are curious. They are to be written upon parchment, made from the skin of a clean animal, and tied together by strings of a similar substance. Each skin is to contain a certain number of columns of a precise length and breadth, with a certain number of words. They are to be written with the purest ink, and no word is to be written by heart, or with points; and they are first to be orally pronounced by the copyist. Before he writes the name of God, he is to wash his pen. In the synagogue rolls, no sort of illumination is allowed, but such embellishments are permitted in manuscripts for private use.

"The Samaritan copy of the Pentateuch, written in capital letters in the peculiar character of Samaria, was discovered in the early part of the seventeenth century, having been lost for more than 1000 years. It is referred to by some of the Christian fathers, and amongst others by Origen and Jerome, but after the time of the last-named father no trace of its existence

can be found until the year 1616 A.D., when Petrus a Vallé bought a complete copy of the MS. at Damascus, and it was sent to the library of the Oratory in Paris. Between, however, the years 1620 and 1630, Archbishop Usher obtained from the East six additional copies of this Pentateuch.

“There are more than 400 old manuscripts scattered over Europe and the East, which contain more or less of the Greek text—that is, the Septuagint translation of the Old Testament; but not ten of these contain the whole. Some of them comprise both the Old and the New Testaments; and amongst them precedence, in point of antiquity, must now be given to the Codex Sinaiticus, which was obtained by Tischendorf from the Convent of St. Catherine on Mount Sinai, in 1859. It contains a great part of the Old Testament, the whole of the New Testament, the Epistle of Barnabas, and part of the Shepherd of Hermas, and is assigned to the fourth century. The account which Tischendorf gives of this, his most important discovery, is so interesting that with your permission I will read a few passages.

“It was in April, 1844, that I embarked at Leghorn for Egypt. The desire which I felt to discover some precious remains of any manuscripts, more especially Biblical, of a date which would carry us back to the early times of Christianity, was realised beyond my expectations. I was at the foot of Mount Sinai, in the Convent of St. Catherine, that I discovered the pearl of all my researches. In visiting the library of the monastery, in the month of May, 1844, I perceived in the middle of the great hall a large and wide basket full of old parchments, and the librarian, who was a man of information, told me that two heaps of papers like this, mouldered by time, had been already committed to the flames. What was my surprise to find amid this heap of papers a considerable number of sheets of a copy of the Old Testament in Greek, which seemed to me to be one of the most ancient that I had ever seen. The authorities of the convent allowed me to possess myself of a third of these parchments, or about forty-five sheets, all the more readily as they were destined for the fire. But I could not get them to yield up possession of the remainder. The too lively satisfaction which I had displayed, had aroused their suspicions as to the value of this manuscript. I transcribed a page of the text of Isaiah and Jeremiah, and enjoined on the monks to take religious care of all such remains which might fall in their way.

“I resolved, therefore, to return to the East to copy this priceless manuscript. Having set out from Leipzig in January, 1853, I embarked at Trieste for Egypt, and in the month of February I stood, for the second time, in the Convent of Sinai. This second journey was more successful even than the first,

from the discoveries that I made of rare Biblical manuscripts ; but I was not able to discover any further traces of the treasure of 1844. I forget: I found in a roll of papers a little fragment which, written over on both sides, contained eleven short lines of the first book of Moses, which convinced me that the manuscript originally contained the entire Old Testament, but that the greater part had been long since destroyed.

“By the end of the month of January I had reached the Convent of Mount Sinai. The mission with which I was entrusted entitled me to expect every consideration and attention. The prior, on saluting me, expressed a wish that I might succeed in discovering fresh supports for the truth. His kind expression of goodwill was verified even beyond his expectations.

“After having devoted a few days in turning over the manuscripts of the convent, not without alighting here and there on some precious parchment or other, I told my Bedouins, on the 4th February, to hold themselves in readiness to set out with their dromedaries for Cairo on the 7th, when an entirely fortuitous circumstance carried me at once to the goal of all my desires. On the afternoon of this day, I was taking a walk with the steward of the convent in the neighbourhood, and as we returned towards sunset he begged me to take some refreshment with him in his cell. Scarcely had he entered the room, when, resuming our former subject of conversation, he said, “And I, too, have read a Septuagint, *i.e.*, a copy of the Greek translation made by the Seventy;” and so saying, he took down from the corner of the room a bulky kind of volume wrapped up in a red cloth, and laid it before me. I unrolled the cover, and discovered, to my great surprise, not only those very fragments which, fifteen years before, I had taken out of the basket, but also other parts of the Old Testament, the New Testament complete, and, in addition, the Epistle of Barnabas, and a part of the Pastor of Hermas. Full of joy, which this time I had the self-command to conceal from the steward and the rest of the community, I asked, as if in a careless way, for permission to take the manuscript into my sleeping chamber to look over it more at leisure. There by myself I could give way to the transport of joy which I felt. I knew that I held in my hand the most precious Biblical treasure in existence—a document whose age and importance exceeded that of all the manuscripts which I had ever examined during twenty years’ study of the subject. I cannot now, I confess, recall all the emotions which I felt in that exciting moment with such a diamond in my possession. Though my lamp was dim and the night cold, I sat down at once to transcribe the Epistle of Barnabas. For two centuries

search has been made in vain for the original Greek of the first part of this Epistle, which has been only known through a very faulty Latin translation.

“ . . . On the 27th of September I returned to Cairo. The monks and archbishop then warmly expressed their thanks for my zealous efforts in their cause, and the following day I received from them, under the form of a loan, the Sinaitic Bible, to carry it to St. Petersburg, and there to have it copied as accurately as possible. . . .

“ In the month of October, 1862, I repaired to St. Petersburg to present this addition to their Majesties. The Emperor, who had liberally provided for the cost, and who approved the proposal of this superb MS. appearing on the celebration of the Millenary Jubilee of the Russian monarchy, has distributed impressions of it throughout the Christian world, which, without distinction of creed, have expressed their recognition of its value. Even the Pope, in an autograph letter, has sent to the editor his congratulations and admiration. It is only a few months ago that the two most celebrated Universities of England, Cambridge and Oxford, desired to show me honour by conferring on me their highest academic degree. “ I would rather,” said an old man—himself of the highest distinction for learning—“ I would rather have discovered this Sinaitic manuscript than the Koh-i-noor of the Queen of England.”

“ But that which I think more highly of than all these flattering distinctions, is the conviction that Providence has given to our age, in which attacks on Christianity are so common, the Sinaitic Bible, to be to us a full and clear light as to what is the Word written by God, and to assist us in defending the truth by establishing its authentic form.’

“ The MS. is now in the Library at St. Petersburg. Next to this ranks the Codex Alexandrinus in the British Museum, of which we have in the Temple Church printed copies, with a valuable preface by Mr. Cowper, giving an account of it.

“ This MS. formerly belonged to Cyril Lucar, at one time Patriarch of Alexandria, afterwards of Constantinople, where he was put to death by the Sultan. He presented it to our King, Charles I., in 1629, and it is now in the British Museum. The portion containing the New Testament is a volume measuring rather more than ten inches high and fourteen inches wide. The material is thin, fine, beautiful vellum, and the writing is in uncial letters. The great age of the MS. has, in parts, caused the characters to fade to such a degree that they cannot be read without the aid of lens and in a strong light, and the ferruginous nature of the ink has caused an infinite number of minute holes in the parchment, which give it the appearance of lace work. The first few pages are



missing, and the existing MS. commences with the 6th verse of the 25th chapter of St. Matthew. There is no regular division of words, and the punctuation is, to a great extent, arbitrary, and there are neither accents nor aspirates. It exhibits traces of varieties of penmanship, as though it had been transcribed by different hands, and it is the opinion of eminent critics that it was copied from several manuscripts, each containing a portion of the original text.

"Next to the Codex Alexandrinus is the Codex Vaticanus, which has been in the Library of the Vatican since the middle of the fifteenth century. It contains the Old and the New Testaments; but after the 9th chapter of Hebrews, the rest of the books have been added at a somewhat later date.

"Tischendorf assigns the Codex Vaticanus to a period earlier than St. Jerome; that is, earlier than the latter part of the fourth century.

"The fourth in order, which I shall notice, is the Codex Ephrem, in what used to be called the Royal or Imperial Library of Paris. It is a palimpsest; and contains fragments of the Septuagint and of every part of the New Testament. In the twelfth century the original writing was effaced, and some Greek writings of Ephrem Syrus were put over it. It was brought from the East to Florence at the beginning of the sixteenth century, and was carried to Paris by Catherine de Medici, famous, or rather infamous, for the Massacre of St. Bartholomew."

With this quotation we must take leave of Mr. Forsyth's lecture. We can only say that the Benchers of the Inner Temple have set an excellent example in reviving this plan of occasional lectures, and that they have been exceedingly fortunate in inducing their learned treasurer to treat of a subject of which he is so entirely master.

## VIII.—LEGISLATION ON THE SALE OF LIQUOR.\*

**T**HE law regarding the sale of intoxicating liquors has a great many reformers. There are, in the first place, those philanthropists to whom the problem how to enforce sobriety

\* The various Bills which have been introduced into Parliament during the Session are as follow:—Permissive Prohibitory Liquor Bill (Sir Wilfred Lawson); Spirituous Liquors (Retail) Bill (Sir H. Selwin-Ibbetson); Sale of Liquors on Sunday Bill (Mr. Birley); Intoxicating Liquors (Amendment) Bill (Sir R. Anstruther); Intoxicating Liquors (Licensing) Bill [H. L.] (The Earl of Kimberley).

is the philosophers' stone of the day\*, which, when discovered, is to turn the nineteenth century into a golden era. About the particular nostrum to be used the philanthropists disagree almost as much as the alchemists, except that the thing is to be done by suppressing the trade in liquor. There are, besides, other reformers who, agreeing in the desirability of sobriety, are sceptical as to the philosophers' stone, but who think, nevertheless, that the law under which intoxicating liquors are retailed might be very much improved. Classified according to their objects, the reformers are of two kinds: the advocates of suppression, either total or partial, and the advocates of regulation; while some reformers declare for both suppression and regulation at the same time.

With regard to the means by which these objects are to be carried out, no reformer, however extreme in his desire for suppression, has as yet been bold enough to propose making it "felony to drink small beer," in the opposite sense to Jack Cade's famous proclamation. The recognised mode of suppression is to authorize the ratepayers to get rid of all the public-houses in their district by a sort of local statute, passed by means of a plebiscite. This machinery is intelligible enough as a means to an end, so long as it is confined in its application to suppression, for which it was originally intended. But some of those reformers who desire both to suppress and to regulate at the same time unfortunately propose to adapt to both purposes a machinery which is only fitted for suppression. Sir H. Selwin-Ibbetson, though a reformer of that class, does not make this mistake. His suppression, or rather repression, is done by a distinct legislative enactment. Public-houses are not to be more numerous for the future than one for every three hundred inhabitants, and their regulation is to be in the hands of the magistrates. But Sir Robert Anstruther this year, and Mr. Bruce last year, in declaring both for regulation and local suppression, adopted the machinery of the Permissive Bill, which is applicable to suppression alone. For the regulation of the sale of liquor by a system of licences, a judicial machinery, which can inquire into facts and weigh arguments, is absolutely necessary. The forcible suppression of drinking, on the other hand, if it is to be carried out at all, must be carried out by a legislative Act.

About Mr. Bruce's original plan of combining regulation with suppression, by allowing the ratepayers to adjudicate on the granting of a licence to a particular house, the less said now the better, as he has in the new Bill prepared by him, and introduced by Lord Kimberley into the House of Lords, entirely recanted the opinions he originally held on the licensing question. The licensing board suggested by another Bill to be elected by the ratepayers, with plenary powers both of

suppression and regulation, continues in a milder form the Home Secretary's abandoned error. The result of such an election would be an amphibious authority : legislative, as being the representative of the locality ; and judicial, as being small enough to hear and consult, but possessing no other judicial quality. If the Lord Chancellor were to propose to make the House of Commons the Supreme Court of Appeal in the country, he would only be capping the scheme in Sir Robert Anstruther's Bill of an elective board for the granting of licences.

This consideration, however, though it disposes of one of the many measures before Parliament—backed up as it is by the National Association for Amending the Liquor Laws, and a long array of bishops, ecclesiastical authorities of all kinds, and other familiar names—is only on the fringe of a difficult question. Are the two objects referred to both proper objects for the Legislature to pursue ? The object of suppression has its most unequivocal exponent in the Permissive Bill, which, however well meant, is a bad measure of the worst kind. It is a sumptuary law, and a sumptuary law for one parish and not for the next, and a sumptuary law for the poor and not for the rich. Relieved of its worst characteristics, it is total abstinence enforced throughout the country by Act of Parliament. If a Bill were introduced enacting that after a certain date any person drinking intoxicating liquor should be liable to penalties, or that any person making or introducing into the country intoxicating liquor should be punishable, which would be the Permissive Bill reduced to an intelligible principle, the proposal would have very few supporters. Yet if the principle that a man may dictate to his neighbour what he is to drink be admitted at all, it is much more reasonable that the majority should lay down the rule uniformly for the whole country, than that one parish should be allowed to adopt it, and the next reject it.

In justification of this and similar schemes there seems to be a vague idea current that popular control, as it is called, may be justified on the ground that the householders in the neighbourhood of a proposed public-house ought to know whether a public-house is wanted ; and if they decide against it, there is no hardship on the publican, because his trade would not have succeeded. Assuming that the ordinary self-acting principle of demand and supply does not apply to the case, the size of the proposed districts gives no countenance to the justification. No doubt a public-house, however respectably conducted, is not generally considered a pleasant neighbour, and it might be reasonable enough to allow the householders within a hundred yards of the site of a proposed licensed house to have some voice in the granting of a licence.

But this is no justification of a proposal which would give power to a householder four or five miles from a public-house to decide whether it should be closed or not.

Of the proposal to proportion the number of licences to the number of the population, Sir H. Selwin-Ibbetson must now be considered the chief supporter. Mr. Bruce, whose Bill of last year allowed one house to fifteen hundred inhabitants, has in this respect also undergone a change of opinion, and abandoned suppression. Sir H. Selwin-Ibbetson would allow one house to three hundred inhabitants, a proportion too small to seriously reduce the temptations to drink, and large enough to produce all the evils of monopoly. If paternal legislation is to be the order of the day, let the principle be carried out fearlessly and thoroughly. If the United Kingdom Alliance can persuade the world that it is best for us that intoxicating liquors should be put out of our reach, let every shop in the kingdom be closed. If one shop for every two thousand persons is not too much for weak human nature, let that shop be kept by the State. But to mingle political economy and paternal legislation in a judicious compromise is to make sure of the evils of both, and the good things of neither.

It is not wonderful that Sir H. Selwin-Ibbetson's Bill should be a favourite with the licensed victuallers. The creation of a monopoly is sure to find favour at least with the proposed monopolists. It is probable that the measure of Mr. Birley, who proposes the total closing of public-houses on Sundays, may also be not unpalatable to some of them for less selfish reasons. Mr. Birley's Bill is not open to the criticisms as to form which have been bestowed on the other measures. It is not permissive or local, and it may be supported on a very intelligible principle. Few respectable publicans would object to closing their houses on Sunday if their rivals in the trade were obliged to do so too. Intoxicating liquors are a commodity which may be bought on Saturday for consumption on Sunday almost as well as on Sunday itself. Neither the trader nor the consumer would be substantially injured, and the potboy and the barmaid would get a holiday. So far all goes well. But public-houses are not merely shops, but clubs, and there lies the real difficulty. Of course, they are easily distinguishable from clubs. In the club proper, every member is in a certain sense a proprietor, and no one is interested in the undue consumption of liquor. But where is the working man to spend his Sunday if the public-house is closed against him? If Mr. Birley's Bill contained a clause compelling the opening of public museums, picture-galleries, and other such places on Sundays, it would be more plain that his measure was based on sound considerations of public policy, and was not intended to drive the working man to church, where it is not desirable

that men should be driven. Even then the Bill would be open to the insuperable objection that it is a law for the poor and not for the rich. It will be time enough to think of suppressing Sunday trading in liquor when working men's clubs are to be found throughout the country, and are thoroughly appreciated by the working man.

The Government Licensing Bill of 1872 is a very unambitious Bill after its forerunner of last Session. The ratepayer altogether disappears, and suppression is abandoned, while no attempt is made to codify the law into one enactment. The most useful part of the Bill, as it originally stood, related to the appointment of inspectors, which was to be compulsory, and not permissive—the pest of modern legislation. It is much to be regretted that this clause should have disappeared from the Bill, being rejected by a majority of 17 in a House of 89. The appointment of public-house inspectors has thus received a check in favour of the publican, and the teetotallers do not care enough for it to make an effort to restore it to the Bill. The clause being only in the interest of the general public is unfortunately not likely to have many very ardent supporters. Adulteration, however, is firmly treated, though to compel an occasional analysis of the liquor in every house would be a more effective check upon the evil. In the main particular of granting licences the Government Bill differs from all the others, and it is difficult to see how Sir H. Selwin-Ibbetson, who, adopting the well-known metaphor of Macaulay, professed to see his child in the gipsy camp, can recognise it except by some such strawberry-mark as the clauses providing for the registration of licences. Both measures aim at producing uniformity in the exercise of the magistrates' jurisdiction. Sir H. Selwin-Ibbetson would make the discretion more defined than at present. Mr. Bruce would secure uniformity by requiring every license to be confirmed by the Secretary of State, as well as by a committee of magistrates for each county. The idea of confirmation by the Secretary of State is borrowed from the Suspensory Act of last year, which is said to have worked satisfactorily. It is remarkable that at a time when there are schemes before the public for relieving the Secretary of State of the appellate jurisdiction which the exercise of the prerogative of mercy gives him, a Government Bill should propose to confer on him a very similar jurisdiction with regard to another matter. All the arguments of the impropriety of an informal tribunal, and the unsatisfactory evidence of memorials urged against the Home Secretary's power in criminal cases, apply to the present proposal with greater force, because he will have here no judge who knows the facts to assist him. If a central control of licences is necessary, a stipendiary magistrate, like Sir Thomas

Henry, who would do the work in a judicial manner, would be the proper authority to appoint. It is probable, however, that the House of Lords, when they induced Lord Kimberley to withdraw this part of the Bill, objected altogether to the existence of a third obstacle to the obtaining of a licence quite as much as to the character of the obstacle proposed by him, and therefore we shall hear no more of a central authority.

It is very likely that the other stile over which the applicant will have to leap—the licensing committee—escaped the same fate from a feeling that such a body might work well as a court of appeal. If composed of a permanent number of magistrates experienced in licensing matters, it would probably be more effective, and at least more uniform in its decisions, than the Court of Quarter Sessions, which is a constantly shifting body. But the Government Bill does not make the licensing committee the court of appeal in licensing matters. As the law now stands, if a licence is refused, the applicant may appeal to Quarter Sessions. The Bill requires licences that are granted by the magistrates to be confirmed by the committee, and does not repeal the right to appeal to the Quarter Sessions, nor transfer it to the committee. We shall have, therefore, appeals against the grant of a licence decided by one tribunal, and appeals against the refusal of a licence by another—an odd result, if the clause is really intended to secure uniformity. If, as would seem, it merely places a senseless obstacle in the way of getting a licence, the Commons will probably do with the licensing committee as the Lords have done with the Secretary of State.

It was natural that the Lords should object to disqualifying the public-house in certain cases where an offence is committed in it, as well as the publican, but it is curious to observe the way in which they made the objection. By clause 16 a public-house kept as a disorderly house is disqualified for five years; and by clause 20 a house in which a second offence of adulterating is committed is liable to be disqualified for two years; yet that part of clause 16 was struck out, while no objection was made to clause 20. It would seem, however, that a disorderly house can only be effectually put down by disqualifying the premises, while adulteration is not an offence of a local nature, but altogether personal to the offender. Lord Salisbury foretold that a tenant who had received notice to quit would take his revenge by turning his house into a disorderly house, and disqualifying it for a licence for the future. This would seem to be rather a microscopic danger, suggested by an inordinate desire to protect the landed interest; but with regard to the offence to which the Lords did not object as disqualifying the house it is within the bounds of possibility that an exasperated tenant might con-

trive to get himself convicted of adulterating before his term expires, and so disqualify the house.

It is impossible to say how far the Bill intends to consolidate the law, until it is known what the Government intends to repeal. That the law requires consolidation is quite clear from the fact that there are more than a dozen Acts at present regulating the subject. Their provisions are in many cases vexatiously varied, when there is no reason why they should not be identical. One instance will be sufficient. By 9 Geo. IV. c. 61, s. 20, when any riot happens or is expected to happen two justices may close the houses licensed under that Act. By 1 Wm. IV. c. 64, s. 11, one justice, when the riot is actually happening, and two justices, when it is expected to happen, have the same power. So that in case a riot is anticipated, one justice may close a "beer-house," but it takes two to close an "ale-house." The 24th clause of Lord Kimberley's Bill requires two justices to act in every case of closing a licensed house. The picture of a zealous magistrate, who in the face of a general strike of operatives desires to close the public-houses and wine-shops in his district, poring over the statutes in his endeavour to find out whether he can act by himself or must send five miles for a brother magistrate may yet be realized. Perhaps he takes jurisdiction on himself: in which case the keeper of the ale-house brings an action against him, while the beer-housekeeper has nothing he can complain of. We presume that Lord Kimberley means to repeal the two sections referred to, but the substituted section would have been better if it gave jurisdiction to a single magistrate in case of actual riot. If no repeal is intended, the present confusion will be worse confounded.

The oversight of forgetting that Ibbetson's Beer-house Act is not a perpetual statute, to which the Government pleaded guilty, is almost equalled in carelessness by an oversight which they have probably not yet discovered. The Beer-house Act gave certain privileges to the holders of licences on the 1st of May, 1869. The Suspensory Act (1871) recites that doubts have arisen whether these privileges belong to persons who held licences at that date, which have from any cause since lapsed, and proceeds to enact that the privileges in question are not to apply to those persons. It was probably thought at the time that a temporary Act like the Beer-house Act (1869) might well be amended by an Act itself temporary. But if the Beer-house Act is to be made perpetual, which is the only way of getting out of the original error, the third section of the Suspensory Act must be re-enacted; otherwise, there will be this curious result, that the doubts will revive on the expiring of the Suspensory Act, and the third section being no longer on the Statute Book will have no power to remove

them. When it is added that the doubts referred to are grave doubts, and that there is every probability of the Beer-house Act being construed in the opposite sense to the amending section of the Suspensory Act, the importance of the omission is manifest. There are other instances of carelessness in the Bill, which should be looked to on the Report. For instance, the inquirer will look in vain for the clauses restricting the hours of sale on week days, on which Lord Kimberley laid so much stress, until he stumbles upon them under the heading, "*Closing of licensed premises on Sundays and holidays.*" Again, to allow any person by order of the justices to use force for closing a house in case of riot "without being responsible for the consequences resulting from the use of force"—a phrase which occurs more than once in the Bill—is very loose drafting, which would justify the use of a revolver or a swordstick.

When the Government Bill goes down to the House of Commons, it will find Sir H. Selwin-Ibbetson's Bill already in the field. The chief point of antagonism between the two will be whether the discretion of the magistrates is to remain absolute, or whether it should be limited, as Sir H. Selwin-Ibbetson would limit it, in order to secure uniformity. The licence according to his Bill is to be refused if it is shown that there is no want of "further accommodation in the neighbourhood"—a question which might very well be left to decide itself. The fact is, that absolute discretion is a great power in the hands of the magistrates for securing orderly houses. Its very vagueness is effective, and prevents the commission of acts which are not absolutely illegal, but which might influence the discretion of the magistrate against the holders of a licence. What is wanted is not to tie down the discretion of the magistrates to certain hard rules, but to make sure that they exercise a judicial and not a capricious discretion. To grant or refuse licences, on the assumption that there ought to be no houses at all, or that there cannot be too many houses, would be to exercise a capricious discretion. To refuse to allow a house to be opened at the end of a row of dwelling-houses, the inhabitants of which object to the grant, when there is a row of shops near where the house might be opened without objection, might be a reasonable and judicious exercise of the discretion. Considering the difficulty of defining the discretion, it is probable that Mr. Bruce is on the whole wiser in leaving it alone, than Sir H. Selwin-Ibbetson, who attempts a definition. Whichever gains the confidence of the House of Commons, it is to be hoped that the matter will be set at rest this Session, that no slur may be cast on the capacity of Parliament to pass so simple but necessary a law.

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## LEGAL GOSSIP.

Sir C. O'Loughlen anticipates that the Solicitor-General, whose rise is one of the most rapid of recent times, will not be content until the woolsack is within his reach. We hope not, and therefore are not in the least sorry that the question has been raised, whether a Jew can be Lord Chancellor. The answer of the Attorney-General was what any one would have anticipated. Several of our contemporaries have found fault with Sir C. O'Loughlen for raising the question. The *Law Journal*, for example, in a careful note on the subject, says that before the time comes when a Jew comes forward with irresistible claims to the office, the question is of no more genuine importance to the nation, than whether a horse could be consul was to the Roman world before the mad emperor hit upon that happy method of decorating his favourite steed. But apart from the interest of the merely legal question which our contemporary acknowledges, it is well that the law should be settled before the time arrives when it is to be executed. At present, no lawyer would hesitate to say that the question is one on which it would be difficult to decide. Our own opinion is, that a Jew can be Lord Chancellor, and that the only oaths he will have to take (if the question is simply one of oaths) are those required by 31 & 32 Vict. c. 72. But let the question become a party one, and we should have the unedifying spectacle of the great mass of the Liberal party taking one view, and the great mass of the Conservatives another. For our own part, we should be glad to see a declaratory Act passed allowing a Jew to hold the office of Lord Chancellor in England, and a Roman Catholic that of the Lord-Lieutenant in Ireland. In religious toleration, so far as public appointments are concerned, we are behind most continental nations. The Protestant Beust was premier even of Catholic Austria.

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The Law Amendment Society is to be congratulated on having secured the services of the Attorney-General as its president for the ensuing year. The *Saturday Review* said, some time ago, that the Jurisprudence Department was the salt of the Social Science Association, and with such an address last year—one by-the-bye to which complete justice has yet to be done—by Mr. Vernon Harcourt, and such a one as Sir John D. Coleridge cannot help giving, no one can say that the salt has lost its savour.

In the case of a marine insurance policy, *Lenneck v. Larkworthy*, which came before the Court of Error last week, the Lord Chief Justice observed that mercantile men often complained of the "uncertainty of the law," but such cases as this showed that the uncertainty arose from the ambiguity of language and the difficulty of construing agreements. Mr. Justice Lush said, the parties expect us to tell what they mean, and they themselves cannot make us understand what their meaning is. It is natural, but hardly dignified, so to complain. In most instances, the meaning may be gathered from the contract, and the facts proven; and is one of two meanings distinctly alleged by the parties. And where the contract is silent or ambiguous, and custom not decisive, the lesson administered to the litigants is almost invariably a severe one, and points directly to the advantage of more care in future. If all contracts were clear, and made in contemplation of all the subsequent relations of the parties, judges would be little required, and less highly paid and placed. And much of the uncertainty of the law is in practice traceable to the undoubted—though perhaps unavoidable—ignorance of judges of the usages of trade, and their consequent incapacity to appreciate their effect when proved.

The examination into the official conduct of the New York judges has finally ended, and the Committee of the New York Bar Association has made its report to the Association. What the report of the Legislative Committee and the action of the legislature in the matter will be is, of course, mere conjecture at present. The report of the Bar Committee does not seem to be very sanguine. They state that the evidence taken will fill two thousand octavo pages, and that it shows conclusively moral grounds of impeachment. The committee express their opinion that any judge who violates the law of right towards a suitor, knowingly and wilfully, is corrupt, no matter what may be the consideration. But the Bar Association and the legislature will doubtless apprehend the fact that where so much is left discretionary with the judge, and where so much is matter of opinion, there will be great difficulty in sustaining a charge of corruption and venality, short of proof of absolute bribery. The only remedy which our American brethren can adopt is, to pay their judges better, and let them hold office for life. So long as it is far more profitable in every way to be a dealer in second-hand clothes, or to keep a second-rate tradesman's shop than to be a judge, so long will complaints of corruption be heard. In this benighted and used-up country, we pay our superior judges a minimum

of 5000*l.* a year, give our Lord Chancellor 10,000*l.*, let them all have considerable patronage and power; clothe them with big wigs and wonderful gowns, the former at least ugly and uncomfortable; give them titles of honour; and when they go on circuit, surround them with the state of a king, with trumpeters, halbertmen, assize service, sheriff's carriage, and all sorts of paraphernalia; all of which is eminently stupid from one point of view, since justice could be quite as well administered by any of the judges in his shirt sleeves; but all of which makes our administration of law pure, and makes it what, according to Bentham, is of more importance, seem pure; makes our judges entirely independent, and makes the office so highly valued, that the best men in the profession are willing to take it.

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Some time ago, when it was rumoured that Mr. Russell Gurney, the Recorder of London, was about to be raised to the peerage, several candidates were immediately in the field for the Common Serjeantship, which it was stated would become vacant by the promotion of Sir Thomas Chambers to the Recordship. The presumption was, of course, that on his elevation, Mr. Gurney would vacate his post as Recorder. Such a circumstance, though probable, is by no means necessary. It would not be at all incompatible with the dignity of a peerage to retain the Recordship, and we suspect that the subject is one entirely for the decision of Mr. Gurney himself. Everybody would regret, and not least the legal profession, the loss of his services at the Old Bailey. As to the expediency of doing so, we may be allowed to observe that, if the services of this excellent judge are to be utilized in future as much as of late years by the Government, we would recommend that a successor be appointed. Mr. Gurney has held various commissions from the Government, not only from that party to which he leans in politics, but from the Liberal Government. In 1854 he was appointed to act as judge on the Oxford Circuit, after the sudden death of Sir Thomas Noon Talfourd. In 1862 he was appointed a commissioner to inquire into the operation of the Acts relating to transportation and penal servitude. In January, 1866, he accepted the appointment of Commissioner to inquire into the disturbances in Jamaica; and this last year Commissioner on behalf of Great Britain, for the settlement of British and American claims, under the treaty of Washington, of May, 1871. These, of course, are in addition to his parliamentary labours.

The Juries Bill introduced by Mr. Attorney-General contains a number of important changes. The qualifications of

both common and special jurymen are to be raised. The profession will probably approve of the change. The old practice of having special juries has grown enormously, of late years, owing to the desire of the Bar to have before them a superior tribunal than that afforded by the common jury. Members of the profession are exempted from serving. Clergymen are not. Sixty-five is to be the age of exemption. The machinery for framing the lists remains clumsy. The task would be done much more easily if left in the hands of the revising barristers. In trials for murder, the number is to remain twelve. The County Court jury is not to be interfered with. In all other cases, however, whether civil or criminal, seven jurors, of whom two shall be special, and five common jurors are to be impanelled and sworn. We confess to grave doubts as to the invidious mixture of the two classes. Hitherto, there has been equality in the jury-box. Unanimity is still to be required, although the reduction of the number to seven is a step, and a right one too, towards taking the verdict of a majority. Special juries will be allowed as heretofore. They may also be employed in criminal trials, at the option of either party. Juries are to be allowed fire and refreshment when locked up, and may be released in criminal trials during adjournments. The jury *de ventre inspiciendo* is to be abolished; but nothing is proposed in lieu of it. Why not have a jury of three medical men? Surely it is, to say the least, unseemly that the question to be decided should be left to the determination of the nearest divisional surgeon of police.

Attention has lately been called through the *Times* to the subject of heriots, and to the practical inconvenience and injustice which they occasion. The right of the lord to demand a heriot on the death of the tenant in cases of copyholds is looked upon, by many professional men even, as being rather an interesting curiosity of land tenure than a practical grievance. The recent letters on the subject show a different state of things. When a man may have the Derby favourite seized, the question is more than one of antiquarian interest. A correspondent mentions that he recently had the right of seizing two valuable farm-horses, but let off the tenant with the payment of 20*l.* for each horse; a sum much below their value. Mr. H. W. Freeland points out one singular difficulty arising from the division of copyholds, and the consequent multiplication of heriots, where the custom of claiming heriots exists. If a copyhold tenement has been divided by sale or otherwise into say two or ten parts prior to enfranchisement, not one but two or ten heriots may be seized, and so upon each successive subdivision. The custom arose in this way:—Since you cannot divide a heriot, if it be of the

best beast, the lord must on subdivision get two heriots, or ten, or none, and so on. If, however, the whole ten subdivisions of the tenement reunite in one copyholder, then on the authority of *Garland v. Jekyll*, 2 Bing., 273, the lord gets not ten heriots but one only. The reason of the thing and the necessity of the case have ceased, and with it the oppressive custom ceases. But here arises another difficulty. The steward of the manor says, if you buy all the parts save one, say nine parts out of ten, nine heriots and one are still to be seized as against you and the owner of the remaining one-tenth part. To get rid of this grievance, Mr. Freeland, in an excellent letter to the *Times*, proposes to have a Declaratory Act, which he has drafted in these words:—

**MULTIPLICATION OF HERIOTS.—PROPOSED DECLARATORY ACT.**  
—Whereas it is expedient that the multiplication of copies and heriots arising on the first severance, or subsequent severances, of any copyhold tenement, held originally by a single copy of court roll, and liable to a single heriot, should not be carried farther than the necessity of the case and the reason of the thing require. And whereas doubts have arisen whether in any case in which, after any such severance, or severances as aforesaid, two or more of the parts originally held by a single copy become by descent, exchange, or purchase either at one and the same time, or partly at one time and partly at another, reunited in one copyholder, the lord is not entitled on death, alienation, or enfranchisement, to claim more than the single heriot to which he would have been entitled in respect of the said tenement prior to such severance or severances as aforesaid; and it is expedient that such doubts shall be removed. Now it is hereby enacted and declared, &c.

That where before or after the passing of this Act any two or more of the parts of any copyhold tenement, held originally by a single copy of court roll, and liable on death, alienation, or enfranchisement, to the payment of one heriot only, and since subdivided, shall have been, or shall become, by descent, exchange, or purchase, either at one and the same time, or partly at one time and partly at another, reunited in one copyholder, such two or more parts so reunited shall for all intents and purposes, including admission, constitute a single copyhold tenement, and shall not on any death, admission, alienation, or enfranchisement, be liable to, or to the payment of, or compensation for, more than one heriot, or to the payment of, or compensation for, more in any case than one set of customary steward's fees, any custom or manorial usage to the contrary in any wise notwithstanding.

The Mayor of Brighton seems to be much annoyed at the course taken by Mr. Bruce, in sending down to Brighton two medical gentlemen, to make inquiries as to the possibility of the insanity of Miss Edmunds, when she mixed the poison with the sweetmeats. Smarting under the heavy expense to the town for the prosecution of the accused, he thinks it unfair of

the Home Secretary that he should take such a step without consultation with the authorities of the town, besides "setting aside altogether the procedure at law—which declared her guilty—and making her out insane, without giving us the slightest opportunity whatever of judging of the correctness or incorrectness of their opinions." Having paid for the prosecution and conviction of the prisoner of the capital offence, the mayor is indignant that the culprit should escape death without his permission; and asks, "Are the opinions of the judge and jury to be put on one side in this way by the *ipse dixit* of two men, and are we to be saddled, as long as Miss Edmunds lives, with the expense of her maintenance!" There is this much justice in the mayor's complaint, not that the prisoner should be denied the benefit of a doubt, and certainly not that the local authorities had not been communicated with, but that there should exist a court of criminal appeal of so unsatisfactory a character. On report of two medical gentlemen, whose evidence is not received on oath, the verdict of the jury, after a long and patient inquiry, is set aside. In our opinion, the case adds to those almost daily occurring, which show the want of a properly constituted court of criminal appeal.

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The man who calls himself Sir Roger Tichborne is now stumping the country in order to raise subscriptions for his defence. He is apparently meeting with considerable success. In numbers of public-houses and beer-shops there are announcements that collecting-boxes are placed there on his behalf. The case points to a difficulty, to which all public prosecutions in England have been liable. We allude to the fact that the sympathy of the mass of the community always goes—and always will go, so long as it is uneducated—to the side of the accused, when the accusers are rich and powerful, or have with them the support of Government. To the uneducated, Government is still, even though represented in the common policeman only, something *opposed* to them, not something appointed by them and for them, to do their work and to protect them, but a power always on the alert against them. When, therefore, the State seems to be using its influence against an individual, the majority for that reason alone sympathize with him. The right or wrong of the case vanishes altogether. It was so in the case of John Wilkes. The Government of our grandfathers are said to have spent 100,000*l.* against him, and with no other result than to make him for a while the idol of the London mob. This state of things exists in other countries besides England. In France the public prosecutor is regarded as a man who will do his utmost to get a conviction at any cost. Having said thus much, we can only say that we have no remedy to suggest.

The newspapers have done their duty in the matter, and by asking people to leave the issue in the hands of a jury, and deprecating anything like clamour on one side or the other, have thrown as much cold water on the agitation as ought to extinguish it.

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We have had our attention called to the unsatisfactory state of the law in regard to imprisonment for debt, in the few cases where such imprisonment is still continued. According to the Debtors Act of 1869, the burden of proof that a debtor has means and will not pay is thrown upon the creditor; that is to say, when a person has obtained goods for which he is unwilling to pay, and when the creditor has brought him before the court and obtained judgment against him, when the court has ordered him to pay, the court will not compel the defendant to execute its own orders unless the plaintiff can show that the defendant has sufficient means so to do. Of course, this must always be a most difficult task to the plaintiff, and a much more easy one to the defendant. Fancy this state of things existing in regard to the income-tax! Throw upon the State the burden of proving that each man in the community has means. We certainly think that the burden of proof of inability to pay ought to be upon the defendant instead of the plaintiff.

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The tendency of the age, though wisely in favour of shorter hours and general holidays, is as clearly against class holidays or mere Church days. Prior to 1833, the observance of holidays in the Common Law, Chancery, and Public Offices was frequent. Movable feasts and festivals and fixed festivals of the Church were all days for some or all of law offices to close. Since that date the suspension of business on these occasions has almost entirely fallen into disuse among the business and legal community. The House of Commons, during the past month, negatived the motion to observe Ascension-day, which owing, we believe, to the ecclesiastical weaknesses of Mr. Gladstone, has for some years been put among the sacred days. For our part, we can only say that they seem to have acted wisely. They would have acted equally well if they had defeated the annual motion to adjourn for the Derby-day. An infinitely small portion of the community go to church on Ascension-day, or wish to go; and though no doubt a very much larger portion of the inhabitants of the metropolis attend the Derby, yet they are by no means sufficiently numerous to make it desirable to suspend the national business on that day. There remains, however, one other day on which the tradition of arbitrary intolerance still keeps hold—Ash-Wednesday. The Act of 6 & 7 Vict. c. 68, for the regulation of theatres, gives

the Lord Chamberlain the powers to order any theatre licensed by him to be closed on such public occasions as to his lordship shall seem fit. Ash-Wednesday can hardly now be deemed a "public occasion," in the common acceptance of the words. It is clear that no very great importance is attached to the order, inasmuch as, though dramatic performances are suppressed, the proprietor of the theatre is not debarred from giving entertainments on that day on his stage of a kind which makes a distinction without much difference. There is also a serious anomaly connected with this display of authority, inasmuch as the provincial theatres licensed by the magistrates are exempt from such provision. We would advise the Lord Chamberlain to accept the precedent furnished by the House of Commons in this matter, and as sackcloth and ashes have now only become a matter of history, to put an end for ever to a rule which seems only to irritate and annoy.

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It is with regret that we ever differ with our learned judges in their manner of administering the law; but we must enter our protest against the decision of Mr. Justice Byles, in dealing with the man Hurry and his wife, for causing the death of their child, by neglecting to procure for it medical advice whilst suffering from small-pox. The grand jury, in finding true bills, annexed to the indictments a presentment, in which they stated that the case of the "Peculiar People," who ignored the application of medical science in cases of sickness, appeared to call for attention on public grounds, as, while the local authorities were bearing the expense of providing medical officers for the purpose of attending to sanitary matters, and making use of disinfectants, the "Peculiar People" did not appear, even in the case of small-pox, to call in medical assistance, or take means to prevent the spread of the disease, and that such a practice as that was dangerous to the public at large. Two other deaths from small-pox have occurred in the family of Hurry, and the coroner mentioned at the inquest that all the cases of small-pox which had occurred in the neighbourhood were traceable to the mistaken conduct of these fanatics. The prisoners' only defence was their interpretation of the Bible, and they promised obedience to the law if it were necessary. The female prisoner was acquitted as acting under the influence of her husband, and the learned judge, believing that the male prisoner's life had not only been innocent but exemplary, thought he would be justified in simply requiring him to come up for judgment if called upon, upon his own recognizances. Three lives lost through wilful negligence, and the prisoner found guilty of causing one, walks out of the dock a free man!

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It is some comfort and consolation to railway travellers to contemplate that, should a reckless driver or drowsy pointsman commit a breach of duty resulting in a smash, the breakage of limbs, and possible loss of life, they have some claim to have their wants attended to at the next inn, at least so far as regards the railway company's liability, if the landlord undertakes, at the instance of the servants of the company, to furnish accommodation. To place it in the power of innkeepers to refuse assistance and attention in such cases of emergency, merely because of the possibility, under the peculiar circumstances of the case, of accepting a charge incurring personal liability without clearly seeing the way to payment, would be cruel indeed of public companies, and show a great want of sympathy for the unfortunate sufferers from, it may be, gross negligence on their part of their servants. The Court of Queen's Bench gave judgment last week in a case involving this point. It was an action by the landlady of an inn at Horsley Heath, to recover from the company a sum of 100*l.* for the board and lodging of three persons injured in the Horsley-fields Junction accident, which happened in December, 1870. The question was whether the company should pay the bill. They contended that their officers had no authority to pledge their credit. The Lord Chief Justice, however, thought it was a case of agency from necessity, and the other judges concurred in giving judgment for the plaintiff. Everybody who is not a railway director will agree with this decision.

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Some years ago it was proposed by Mr. Blanchard Jerrold to bring out, in periodical numbers, a national work illustrative of the laws we live under, at a low price, and for the use of the community at large. The work, which was announced in a speech made by Lord Brougham at a Social Science Congress, has been unavoidably delayed. "It was most important," said his lordship, "to make known to all classes in a popular form—but especially to the middle and humbler classes—the laws to which they owe obedience, and which in return afford them protection." This design, formidable enough, and almost sufficient to take away the breath of a barrister who is content to know something after years of study of one branch of the profession, is to be carried into effect, and the work is to be brought out by the National Printing and Publishing Company.

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The Select Committee on the Patent Laws have agreed to certain resolutions, which they will recommend as the basis of legislation on the subject. They state that the privilege conferred by letters patent promotes the progress of manufactures

by causing many important inventions to be introduced and developed more rapidly than would otherwise be the case; and it does not appear to them that the granting of pecuniary rewards could be substituted with advantage to the public interest for the temporary privilege conferred by letters patent. At the same time, the existing laws are defective and require improvement; and the committee think that protection for a limited period and dating back to the time at which it was applied for, should only be granted for an invention on its nature and particular points of novelty being clearly described in a provisional specification, and upon the report of a competent authority that such invention, so far as can be ascertained by such authority, is new, and is a manufacture within the meaning of the law. They further consider that all letters patent should be subject to the condition that the manufacture should be carried on within the United Kingdom, and that it shall be carried into effective operation within a reasonable time from the granting of the patent by the patentee or his licensees.

The Attorney-General will preside at the fortieth anniversary dinner of the United Law Clerks' Society, to be held at the Freemasons' Tavern, on the 8th inst. The society have the patronage of law-lords, judges, and a large number of the leading practitioners in both branches of the profession. We earnestly recommend the objects of the society. The establishment of such a society in connection with every profession and trade would be a step in the right direction. As long as the profession lasts, there will always be good and indifferent clerks, clerks well paid and badly paid, employers lenient and harsh, the hours of work light in some cases, long and laborious in others. These varying circumstances render it the more necessary that advantage should be taken of such an institution by beginners. A statement made by a solicitor's copying clerk, at a meeting of clerks held last week, as an instance, would show the necessity for such provision, and the claim clerks have to the benevolence of their employers. This clerk said, he received a salary of twenty-three shillings a week, and worked from 9 to 7, and computed that he earned his employer 500*l.* a year. Sickness and deaths in families cannot be averted, and will come, whether provision is or is not made for it. Lucky the individual, in such a case, clothed with the protection of a benefit society; and we think we are not asking too much when we appeal to the profession to lend a hand to help the less fortunate members, who toil at the mechanical part of that pursuit which, as a body, we follow ourselves. We understand that a solicitor, of Lincoln's Inn Fields, has intimated his willingness

to give the sum of 50*l.* to the United Law Clerks' Society, on condition that nineteen other persons will each give that sum, in order that 2000*l.* may be raised for the purpose of erecting a few almshouses for infirm members; and also, if the committee will allow the following rule to be added to the rules of the society, *i.e.*, "That any member, having paid his subscription to the society for a term of twenty-five years, shall be entitled to receive a pension of 1*l.* per week, provided that such member shall be of the age of sixty-five years, and not permanently employed in any situation."

The following Queen's Council have been invited to the Bench of the Honourable Society of Lincoln's Inn:—Thomas Charles Renshaw, Esq.; Leofric Temple, Esq.; Charles William Wood, Esq.; William John Bovill, Esq.; Joseph Napier Higgins, Esq.; Thomas H. Fischer, Esq.; Theodore Aston, Esq.; Alexander Edward Miller, Esq.; Charles Arthur Russell, Esq.; Farrer Herschell, Esq.

A congress of law students was held at Birmingham, under the presidency of Messrs. T. C. Saunders and Arthur Ryland, on the 21st and 22nd ult. Delegates attended from various parts, and papers were read on different subjects coming under the scope of the meeting, and discussed.

The Vice-Chancellor of Cambridge has announced that the Professorship of Latin in that University will be vacant at Michaelmas, by the resignation of Professor Munro.

#### IRELAND.

ON Friday, May 17, the Court of Chancery Appeal in Ireland was the scene of another of those enlivening outbursts of Lord Justice Christian—a collision between him and the Lord Chancellor—which are beginning to render that court celebrated. An appeal from a decree of the Lord Chancellor, in *Johnston v. Marquis of Hertford*—a suit by a tenant against his landlord for specific performance of an agreement for a lease—dismissing the bill, without costs, afforded the Lord Justice an opportunity to notice the extraordinary attack made on him (in the Collier debate) by Mr. Gladstone, and to hurl his defiance at the Prime Minister. The dismissal of the Lord Chancellor was affirmed by the Court of Appeal, but the Lord Justice was of opinion that the bill should have been dismissed *with costs*, and took occasion as well to denounce the half-heartedness and timidity of the Lord Chancellor as to allude to the severity of recent legislation on the landlords, although it might be the very height of "transcendental statesmanship." Of the

Land Act of 1870, he stated that he still retained the opinion he had previously expressed (in his celebrated judgment in the Marquis of Waterford's case), and if ever it came before him again, he trusted he would not be afraid to deal with it as he had dealt with every case which came before him during the fourteen years he occupied a seat upon the Bench, "unmoved by menace—menace of 'hostile notice,' 'severe reproof,' and he did not know what other correctives, which it seemed to be thought that the Ministers of the Crown had a right to hold suspended *in terrorem* over the heads of judges, to be let fall on any who might be rash enough to criticise unfavourably some privileged measure with which the prestige of some powerful Minister might possibly be identified." He justly characterized as new-fangled and unconstitutional this assumption of a right of censorship in the Executive Government, or in any member of it, over the judgments which the judges delivered in their courts.

Mr. Justice Fitzgerald agreed with the Lord Chancellor in dismissing the bill without costs, as there had been a *bonâ fide* error or misunderstanding, and said that much of what the Lord Justice had said was irrelevant to the case before them, and, indeed, to him incomprehensible.

The Lord Chancellor, in affirming his own decision, said he thought he would best consult the dignity of the Court in following the example of Mr. Justice Fitzgerald in confining himself to the case immediately before the Court.

The Lord Justice objected to be lectured by the Lord Chancellor as to what was due to the dignity of the Court, and the form of procedure. He did not commence to learn the practice of the Court when he became a judge of the Court. He had spent the best years of his life practising in it, and had been trained under such models as Sugden, Blackburne, and Abraham Brewster.

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A Bill has been introduced into Parliament by Sir Colman O'Loughlen, to render unnecessary the keeping of terms in England by students for the Irish Bar. The Benchers of King's Inn, Dublin, have expressed their disapproval of this measure, and it finds little favour with the Irish Bar or Irish public.

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The death of Mr. Bartholomew Clifford Lloyd, Q.C., Chairman of Quarter Sessions of the county Waterford, has placed another county judgeship at the disposal of the Government. They have rewarded the political services of Mr. George Waters, Q.C., M.P. for Mallow, a consistent supporter of the Gladstonian administration, and a connection, we believe,

of the Lord Chancellor, by appointing him to the vacant chairmanship. The deceased chairman was called to the Bar in Hilary Term, 1830, and appointed to Waterford in 1865.

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There are no less than fourteen gentlemen called to the Irish Bar this term. There were no calls last term.

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#### SCOTLAND.

IN times not long gone past our courts of justice were considered to be as sacred as the sanctuaries of religion. The audience in either observed a solemn silence due to the declarations of truth and justice. The admission of the public was anciently considered essential as a check on hasty or rash procedure. But the public never formed any portion of the judicial machinery. The need for the admission of the public has now lost much of its force. The presence of the reporters is much more efficient. The cheap and daily press admits to the court not merely the dwellers of the locality, but the whole empire; nay, it may be said, the world. The proceedings of each day in our courts of justice are read and animadverted on next morning from Dan to Beersheba of the land. The Tichborne case for many months became the relish of every morning's breakfast. But with the rapid spread of judicial intelligence, there has arisen a power which bids fair to overwhelm the judicial tribunals. The factors, in disposing of all cases, whether civil or criminal, are no longer the Bench and jury-box as of yore. A far more potent Minister of Justice has arisen in the gallery. Now that department not only watches but guides the progress of the case. Every step of procedure is marked with approbation or the reverse. Each successive witness leaves the box with an ovation of favour or a demonstration of censure. The orations of counsel are dealt with in a similar manner, and it is to be feared that counsel will find it of greater advantage to their client to address the gallery than the jury-box. We have had reason to regret this innovation in England, but whether it arises from the proverbial *perfidium* of our Scotch copatriots we know not, but true it is, that we never read a report of a criminal trial in Scotland, without the interjection of "loud cheers and applause." At one time such procedure was instantly checked by the judge, and we have known the court at once cleared, where the smooth course of justice was rudely interrupted. In our last number (p. 313), we find recorded that when an oration of a celebrated serjeant was applauded by the gallery, Baron Alderson at once said, "I will not go on until I clear the court, if this interruption goes on. I will have a decent and

orderly administration of justice." Our notice has recently been directed to the proceedings of the assizes at Aberdeen. Several persons were put on trial for riot, assault, and breach of the peace. A parochial board for the administration of the Poor Law had been convened to meet at the fishing village of Buckie. It was intended to change the incidence of the rates so as to make them fall heavier on the urban population to the advantage of the farmers. A public demonstration was called, and for the day the fishing-boats were forbidden to go to sea. The members who were known, or thought, to be favourable to the change were mobbed and assaulted, and the meeting was thus prevented.

This affair, so disgraceful to public order, was noticed in the House of Commons, and the Lord Advocate indicted the rioters. The trial took place in Aberdeen. The gallery was packed by sympathisers, and as the seat of the court was at a considerable distance from the locality of the crime, it shows clearly that sympathy is contagious, and to have spread to the cool-headed plebeians of the granite city. The rioters were defended by an eminent advocate. According to the newspapers, he appeared to have no small difficulty in continuing his oration by the frequent interruptions of applause, and he sat down amid a perfect peal of approbation. Such was more fitted for the theatre or concert-room, and if this style of procedure is continued we may expect a hearty *encore*, which the favoured counsel will require to obey.

But this is not all. The judge, one of the most genial that ever adorned any Bench, charged the jury rather favourably for the accused parties, and as might be expected he received his meed of approbatory applause from the gods of the gallery. Under such circumstances it is not matter of surprise that the jury speedily found a verdict for the accused, or rather for the gallery. They, too, received their reward of applause, and in court and out of court the fortunate parties were loaded with congratulations at their victory. Such and similar results of criminal trials must excite the general public to consider who are the proper administrators of law, and whether judge and jury are merely the ornamental, though costly, instruments of recording the preconceived opinions and homologating the preconcerted wishes of the galleries. One remarkable feature of this modern element in the administration of justice is that all the sympathy is on the side of the criminal, and there is none to spare for the sufferer. Even cases of most atrocious murder form no exception to this indiscriminate feeling. Where it cannot be successfully exercised then the plea of insanity is the ready mantle to cover crime, and the deeper the criminality, the denser the mental imbecility. One result from this clamant interference with

justice must soon be reached, if, indeed, it has not in some cases already appeared. If the self-constituted tribunals are entitled and indulged in loudly demonstrating their approbation by applause, it follows they are entitled equally to mark their dissent by contrary sounds.

Another case in the same assize was also remarkable. A naval officer was charged with the crime of perjury, in having sworn falsely in a small debt case before the sheriff. No record was taken of his statement on oath, but it was amply proved by several witnesses. The falsity of the statement, or rather his knowledge of its being false, was, perhaps, not so clearly established. Here, too, a verdict of acquittal was given, and as in the case of the Buckie rioters, it received the homologation of the gallery. But it was obvious as the accused belonged to the patrician class, the approbation was neither so marked nor hearty as where the accused men were of the pleebian rank. This case also has been brought under the notice of the House of Commons. This, however, raises a very important question, which will speedily attract the attention of the profession, as well as of the public. If the decisions of our courts, civil and criminal, in the three kingdoms, are thus to be made matter of debate and investigation in the Commons, there is an end to the boasted independence of our judges, and the purity of justice. By the life tenure of the judges, they were made independent of the Crown, but a far greater evil will arise, if thus, between the interference of the gallery and of the people's House their independence of judgment and freedom of action is impeded and controlled. The rule of the constitution is salutary, that where a judge commits an offence which disqualifies him from the discharge of judicial functions, he may be removed from office, on an address from the Commons. But if every discontented party cast into courts, criminal or civil, is straightway by petition or question in the Commons, to obtain an investigation of his case, and a reverse of the judgment, there will be an end of everything like the steady and true administration of justice. The House has been recently favoured with numerous such appeals from private parties, and, if encouraged, there will remain little time for their important functions of legislation. The recent enquiry into the accuracy of the well-matured judgment of the Court of Session, in the accounting of forty years of a bridge toll in Scotland, is a prominent instance how the House of Commons may be made to assume the judicial functions and become the final court of review.

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## BOOK NOTICES.

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

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The Law and Practice of Injunctions. By William Joyce, Esq., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Haynes, Bell Yard, Temple Bar. 1872.

THIS is a work which rivals in dimensions the well-known work of Mr. Lindley on Partnership. It aims at an exhaustive treatment of the whole law and practice of injunctions; and from the very cursory inspection which we have been able as yet to make of it, it certainly fulfils its purpose. It is distinguished alike by assiduous compilation and by methodical disposition. Upwards of 3500 cases are cited in it, and the majority of these are even stated as well in their material facts as also in the particular principles which they have illustrated or established. The author has also wisely given to his work the quality of authenticity, having observed the very words of the reports in stating them.

The multiplicity of details is necessarily very great; but it is not oppressive. The author has, in fact, relieved it very much by his adoption of a simple plan throughout; and having, moreover, carefully separated not only in the text, but in the indexes, all that part of the law and practice of injunctions which relate to equity from that part of the same which relates to law, he has, in our opinion, by the facility of reference which thereby arises, added very much to the value of the work, which is pre-eminently one of reference for practitioners.

We are naturally disposed to speak very highly of Mr. Joyce's work, its more apparent features being so excellent, and the author having unquestionably expended many years of labour in its composition. But for the present we commend it under some reserve, and in our next issue shall discuss it with a better knowledge of its contents, and with a consequently better power of adjudicating on its merits. Certainly in the few portions of it we have referred to, we have found its statement of the law both clear and accurate; for example, in the case of *Knight v. Mosley* (Amb. 176); but we have not discovered that Mr. Joyce has stated, much less has criticized, that part of the very recent case of *Sowerby v. Fryer* (L.R., 8. Equ. Ca., 417), in which Lord Justice James drew a most needful distinction in the principle of *Knight v. Mosley*. And again, the somewhat lengthy note in which Mr. Joyce compares or rather contrasts the Roman *interdicta* with the English *injunction* is faulty in many points, both of fact and style. Necessarily, therefore, we



commend the work with reserve, the more especially as if it should prove substantially good, it will become a standard work upon the subject.

**The Crofton Prison System.** By Miss Carpenter. London: Longmans. 1872.

THE proposal to hold in London an international prison congress in July next has suggested to various persons the desirability of having a description of the prison systems existing in these kingdoms. Of these systems that which has most reputation abroad, and that most highly esteemed among those who have special knowledge on these subjects at home, is the one established by the Right Hon. Sir Walter Crofton. It is usually spoken of as the Irish Prison System. Miss Carpenter here very properly gives to it the name of its founder. She has undertaken to give an account of it, and every one who is acquainted with her writings or her work will at once recognize that the task could not have fallen into more energetic or competent hands. Following the example of the veteran teacher on criminal treatment, Mr. M. D. Hill, Q.C., Miss Carpenter places before her three principles of secondary punishment—the application of pain, incapacitation, and the reformatory principle. It was on these principles that Sir Walter Crofton worked in the Irish convict system. Miss Carpenter claims for it that it is the only one known in which all these principles have been fully developed. When Sir Walter, then Captain, Crofton went to the Irish convict prisons, they were in a thoroughly unsatisfactory state. The two problems to be solved by him were, now that transportation had been abolished, to fit the man for society, and to persuade society that he was so fitted. Under the Crofton system, the prisoner was confined separately in a cellular prison for eight or nine months. The shortening of this period depended on the prisoner's own conduct. For the first half of this time he is kept on short allowance of food. In this first stage much time is devoted to secular and religious instruction. He learns the whole method of the Irish convict system "by means of scholastic instruction;" that he can only reach the intermediate prisons (a special feature and a third stage in the system) through his own exertions, measured by marks in the second stage. His final liberation depends on the date of his admission to the third stage, so that it is the interest of the offender to behave well. The peculiar feature in the second stage is the institution of marks to govern the classification. In the third stage there are no marks. The result of the self-discipline effected by their attainment is here to be tested before the liberation of the convict.

We have no intention, however, of treating the subject at length. Miss Carpenter's work is not merely a faithful statement of the Crofton system, but it is singularly interesting, and we very heartily commend it to our readers.

#### BOOKS RECEIVED.

NOTICES of the following works are in type, but, owing to the length of our articles, we find on going to press that they must stand over until next issue:—"The Constitutions of the British Empire." By

Sir E. Creasy (Longmans). "Oke's Magisterial Synopsis." (Butterworths). "Laws of Marriage and Divorce." By Ernest Browning (Haynes). "Spike's Law of Master and Servant." By C. H. Bromby (Shaw & Sons). "Lorimer's Institutes of Law." By Professor Lorimer (Clark, Edinburgh). "Burgh Laws of Dundee." By A. J. Wharton (Longmans). "Prevention of Crimes Act, 1871, &c." By J. A. Foot (Shaw & Sons). "A Treatise on the Conflict of Laws, or Private International Law." By Francis Wharton, LL.D. (Kay & Brother, Philadelphia). "Catalogue of the Mendham Library Collection." "Comic Questions and Answers." (Hutton & Sons.)

## CALLS TO THE BAR.

*Easter Term, 1872.*

*Inner Temple*:—Arthur Bold Hamilton, Esq., LL.B., Cambridge; Arthur Frederick Geesley Stirling, Esq., B.A., Oxford; the Hon. William Francis Littleton, B.A., Oxford; Robert Reid, Esq., B.A., Oxford; Edward Cecil Winchcombe Austin, Esq., M.A., B.C.L., Oxford; Frank Heal, Esq., B.A., Oxford; Frederick Haynes M'Calmont, Esq., B.A., B.C.L., Oxford; John Leo Watkins, Esq., B.A., Cambridge; Mitchell Templeton, Esq., B.A., Cambridge; Richard Owen Stewart Morgan, Esq.; Roderick John Wilson, Esq., B.A., Oxford; Dennis Fitzpatrick, Esq., B.A., Dublin; and Joseph William Comyns Carr, Esq., University of London, holder of an Exhibition awarded in July, 1871.

*Middle Temple*:—Daniel O'Connell French, Esq., Certificate of Honour, Trinity Term, 1871; Matthew Seton, Esq.; Charles Willie Mathews, Esq.; John James Eugène O'Callagan, Esq., B.A., Trinity College, Dublin; William Edward Thompson Clarke, Esq.; James Forrest Fulton, Esq., B.A., University of London; Alfred Percival Handley, Esq.; James Dingwall Fordyce, Esq.; Frederic White, Esq.; Nicholas Charles Lawrence Biale, Esq.; William Adams Purves, Esq., B.A. and LL.B., University of Sidney; George Edward Lyon, Esq.; and Richard Cleghorn Miller, Esq.

*Lincoln's Inn*:—Charles Lancelot Shadwell, Esq., M.A., Oxford; André Blasini Knox, Esq., M.A., Cambridge; William Donaldson Rawlins, Esq., M.A., Cambridge, Fellow of Trinity College; Richard Brooke Michell, Esq., M.A., Oxford; Edward Somes Saxon, Esq., B.A., Cambridge, Scholar of St. John's College; George Howard Darwin, Esq., M.A., Cambridge, Fellow of Trinity College; Richard Baggallay, Esq., B.A., Cambridge; Frank Watson, Esq., B.A., Cambridge; Arthur Octavius Prickard, Esq., M.A., Oxford, Fellow of New College; John Hertslet Wainewright, Esq., B.A., Oxford; Lord Francis Hervey, B.A., Oxford, late Scholar of Balliol College; John Buckley, Esq.; Edward Nash, Esq., B.A. and LL.B., Cambridge; Ralph Neville, Esq., B.A., Cambridge; Henry Awdry Beachcroft, Esq., B.A., Cambridge; John Maurice Edward Lloyd, Esq., B.A., Oxford; Anderson Souttar, Esq., University of Aberdeen; Charles Wallwyn Radcliffe Cook, Esq., of Emmanuel College,

Cambridge; Seyd Mohammed Mahmood, Esq., of Christ's College, Cambridge, and of the Calcutta University; John Billing Pope, Esq., B.A., Oxford; and John Frederic Lowder, Esq., Her Majesty's Consul in Japan.

*Gray's Inn*:—Richard Dampier-Child, Esq. (heretofore called Richard Child).

## APPOINTMENTS.

THE honour of knighthood has been conferred on Mr. Justice Quain; Mr. Charles Bowen has been appointed Recorder of Penzance; Mr. William Waldren Ravenhill, Recorder of Andover; Mr. Charles S. Perceval, Secretary to the Commissioners of Lunacy; Mr. G. D. Engleheart, Clerk of the Council and Registrar of the Duchy of Lancaster; Mr. G. De Courcy Peele, Clerk of the Peace for the County of Salop; Mr. Henry D. Robinson, Registrar of the Settle County Court; Mr. Francis Shilliton, Solicitor, Coroner for the Hitchin district of Hertfordshire. The Rev. Henry Ware has been elected to the Chaplaincy of Lincoln's Inn.

IRELAND.—Mr. George Waters, Q.C., M.P., has been appointed Chairman of the County of Waterford; Mr. Hugh Doyle, one of the Assistant Registrars of the Court of Bankruptcy and Insolvency; and Mr. W. Alexander Cosgrave, Clerk of the Peace for the County of Longford.

SCOTLAND.—Mr. George T. Munro, Solicitor, has been appointed Clerk of the Peace for the Counties of Ross and Cromarty; Mr. Nathaniel Farquhar, Advocate, Assistant Procurator-Fiscal for the Counties of Aberdeen and Kincardine.

## OBITUARY.

### *April.*

- 17th. TAYLOR, R. Wager, Esq., Solicitor, aged 68.
- 23rd. HARVEY, T. Hingston, Esq., Solicitor.
- 23rd. REDFERN, William G., Esq., Barrister-at-Law, aged 71.
- 24th. HURRILL, Aaron, Esq., Barrister-at-Law, aged 79.
- 26th. BARKER, Henry J., Esq., Solicitor, aged 67.
- 27th. LEWIS, F. Augustus, Esq., Solicitor.

### *May.*

- 2nd. WROTTESLEY, Hon. Walter, Barrister-at-Law, aged 61.
- 11th. STRONGHILL, Charles, Esq., Solicitor, aged 51.
- 13th. OWEN, William, Esq., Solicitor, aged 71.
- 13th. MELLOR, W. Henry, Esq., Barrister-at-Law, aged 46.
- 14th. M'CULLOCH, Samuel, Esq., Barrister-at-Law.
- 16th. TODD, J. Kenny, Esq., Solicitor, aged 68.
- 16th. MARSHALL, William, Esq., Barrister-at-Law, aged 75.
- 18th. ROGERS, James, Esq., Solicitor, aged 71.
- 20th. PHILBRICK, Egerton, Esq., Solicitor, aged 32.

# THE LAW MAGAZINE AND REVIEW.

No. VI.—JULY 1, 1872.

## I.—CRIMINAL TRIALS IN THE QUEEN'S BENCH.

By W. F. FINLASON, Editor of "Reeve's History of the English Law."

IN the Tichborne case, a point of great interest was lately raised, whether there could be a special jury in a case of felony. It arose thus: The Attorney-General removed an indictment for forgery into the Queen's Bench, in order that it might be tried by a special jury; and the Master of the Crown Office declared that it could not be so tried. The judges appeared to be of a different opinion, and no one will be surprised to find that they were right. The occasion has afforded an illustration of the tendency of mere practice to mislead, and the necessity for some learning, and especially a knowledge of legal history, in order to supply guidance in matters of law and procedure.

There is no subject of greater interest than that of trial by jury, and none upon which there is, through defects of historical knowledge, greater ignorance and prejudice. Most people imagine that the essence of it is taking men at hazard from the mass of the community. It is so, no doubt generally, in fact, and as such it is eulogized by Paley and ridiculed by Bentham. But so it is not in law, nor ought it to be in practice, and that it is so is owing partly to ignorance, and partly to abuse. Its essence is *choice*, not chance; careful nomination, not indiscriminate and careless election. The history of the subject makes this clear, and affords a plain and easy solution of its recent difficulty.

The jury arose out of the County Court, originally the only ordinary tribunal of civil or criminal jurisdiction. And even

in the County Court, in the Saxon age, it was laid down that it ought not to be composed of the whole body of the freeholders, and that none ought to be members of it who were in a poor and ignoble position, *viles et inopes personæ*,\* but only the principal holders of land, *barones come talies*,† of approved character for intelligence and integrity; *probitatis idonei*.‡ After the Conquest it was found necessary, in order to attain this object, to make a selection for the trial of any particular case of importance; the general body of the freeholders, assembled at a court, being far too mixed for judicial purposes. And of course the merely taking a given number from the whole body by chance, in any casual way, would not in the least have met the evil. Hence, from the earliest dawn of our legal history we find that juries were nominated and chosen. Thus, in the assizes, the sheriff, for each case, chose and nominated a jury. The ancient writs clearly show this, and show that the sheriff was ordered and directed by the court in each case to do so: that is, to return for the trial of the case a certain number of good men, *boni homines*, whom he was to select and nominate to try it. The writs in Glanville or in Bracton clearly show this. And upon the formation of our judicial system, under Edward I., the Legislature took great care to promote that object, and passed several statutes to carry it out. The whole scope of these statutes was to secure a good jury, and the eulogists of trial by jury would be startled at the strength of the language in which the Legislature denounced the mischief arising from the ignorance, prejudice, or corruption of the general body of the jurors. The object of all these statutes was to compel the sheriffs to perform their duty of careful choice and selection of jurors, a duty which, for 500 years, the Legislature has endeavoured to enforce, but to this hour in vain.

In the time of Edward I. Parliament denounced the abuse, of which sheriffs were then guilty, of neglecting to summon the better class of men as jurors, and retaining only the inferior class, who, as the Legislature again and again pointed out, were more open to corruption, or undue influence, or prejudice (13 Ed. I. s. 3; 21 Ed. I. s. 2). Parliament required that the jurors summoned should be the "most sufficient and least suspicious," that is, the most substantial and the least open to suspicion (28 Ed. I. s. 9). Statute after statute was passed to repress the abuse of bribery or embracing of jurors (34 Ed. III. s. 3; 38 Ed. III. s. 12). In order to restrain these abuses, juries were liable to the highly penal but cumbrous process of attain. Towards the close of the fifteenth century, when this ancient process was beginning to grow obsolete, the Star

\* *Leges Henrici Primi. c.g.*† *Ibid.*‡ *Ibid.*

Chamber was established by Parliament, in a great measure to repress these abuses of sheriffs and jurors (2 Hen. VII. s. 1). And historians admit that these abuses were so gross and grievous as to excuse in some measure the exercise of its severe and arbitrary jurisdiction (Bacon iii. 224). And as an ancient writer says, "Infinite were the punishments of jurors and of those who have embraced juries" (*Collectanea Juridica* I. 93), and the instances he adduces show the necessity for the jurisdiction, and justify the scorn with which he speaks of "the heady current of burgesses and meaner men, who run too often in a stream of passion after their own or other men's private affections" (*Ibid.* 113). In some cases it appeared that juries had agreed to acquit a man before he had come to trial (93), and such instances, which were by no means rare, go far to account for such statutes as that which provided that the judges might reform the jury panels returned by the sheriffs in criminal cases (3 Hen. VIII. s. 12). This statute required the sheriff to return the panels so reformed, in other words, to return as jurors the men nominated by the court, or at all events to nominate them of the class and degree indicated by the court; and this statute may be taken as a legislative recognition of the ancient right and power of the court to direct "good" juries to be impannelled, that is, juries composed of the better instead of the inferior class. "Substantial" juries were directed to be summoned in capital cases, or in civil\* cases of importance in trials "at bar."† Traces of the exercise of this power may be observed all through the State trials of that and the subsequent reigns, and though its abuse was complained of, the power was never questioned. Thus, in the case of Throgmorton, who defended himself in the reign of Mary with such tact, spirit, and success, though he loudly complained of Cholmly, one of the judges, for unfairly packing the jury, in selecting men he thought likely to convict, he did not in the least question the power of the court to direct the sheriff to return a "good" jury, that is, one composed of substantial respectable men of the higher class. On the contrary, this would clearly be for the interest of the prisoner, as well as of the Crown, as such men were likely to be more intelligent and independent. And accordingly, from such accounts as we have of the juries in those days in the King's Bench or other criminal courts, in cases of any interest, we may observe that the juries were always men of the better class.‡ That they were unfairly chosen in many cases, perhaps in most, there is too much reason to fear. But that only makes it all the clearer that the power of

\* Cro. Eliz.

† Coke's Rep.

‡ On the trial of Raleigh there were four knights.

nomination must have existed, since, notwithstanding its abuse, it was never questioned.

It is to be observed that in ancient times every jury was a special jury; that is, summoned for the trial of the particular case by a special writ (35 Hen. VIII. c. 6). But this would be nothing if the names were taken indiscriminately from the general jury lists, carelessly made up. And the great object both of the judiciary and the Legislature was to secure the choice of good, *i.e.* substantial, men. This object could only be attained, since the sheriffs were so careless in making up the jury lists, by directing the sheriff specially, in any case of importance, to return a good jury. This was the origin of the practice of ordering a good jury, which was only, in fact, directing the sheriff, in the particular case, to do his duty. And the order was always made when the trial was in any of the superior courts, as in the King's Bench. It is to be observed, again, that in ancient times all cases in the superior courts were tried at bar, that is, before the full court; and even long after statutes passed, in the 16th century, to enable the Chief Justice alone to try cases, the ancient practice still continued even in civil cases, and still more in criminal cases. It is not too much to say that no criminal case was tried in the King's Bench except at bar, or before the whole court, until long after the Revolution; at least down to the middle of the last century cases were tried at bar, even from the country, and thus in the reign of Elizabeth it was provided by statute in case of jurors, that no jury need appear at Westminster for a trial whenever the offence was committed thirty miles off, unless the Attorney-General required it (18 Eliz. c. 27). It was the right of the Attorney-General to require a trial at bar in any case in which the Crown was interested, and whenever the trial was at bar, the court always directed the sheriff to return a "good" jury, for the very obvious reason that if the case was worth trying before the whole court, it was one which ought to be tried by a "good" jury, a jury of more than ordinary independence and intelligence. The court before the trial made the order to return such a jury. When by the statutes a single judge was enabled to try cases, the court could, unless expressly deprived of their ancient power as to juries, still retain it. But the power was expressly reserved by those statutes, and has been, we shall see, expressly reserved in all the statutes upon the subject down to our own time. It continued to be exercised down to the Revolution, and the first general Jury Act passed after the Revolution (7 & 8 Will. III. c. 32) did not in any way interfere with it.

Until the reign of Elizabeth, all trials in the superior courts at Westminster took place at bar, *i.e.* before the full court, and it was not until 1576 that an Act passed which allowed

the Chief Justice to sit to try civil cases. This Act, however, was not taken to apply to criminal cases, and at all events for two centuries afterwards criminal cases continued to be tried at the King's Bench, at "the bar" of the court, that is, before the full court (18 Eliz. c. 2).

And the Act expressly provided that sheriffs and other officers were to give their attendance on the Chief Justice or other judge of the court who might be trying the case, in order to summon juries and do all other things belonging to the sheriff's office in trials by jury, so that when a single judge sat to try criminal cases he would have all the powers of the full court with respect to juries, and the full court could, as before, direct a good jury to be summoned before a single judge, just as in a trial at bar before the full court itself.\* The reason is plain—that they were the whole court, and that the court, as a superior court, had power to direct how a jury should be summoned, provided they did not contravene any statute nor deprive the prisoner or the party of any common law right of challenge. And the same reason could equally apply to enable the full court to make such an order in a trial, to take place under the authority of the statute, before a single judge at *nisi prius*, for it would equally be an order of the full court, and by the statutes the sheriff was to give equal obedience to their orders in the case of a trial before a single judge as before the whole court. So long as trials continued to take place at bar or before the full court, as, in criminal cases of any consequence, they continued to be for two centuries, there was no doubt even raised as to the authority of the court to order a good or a special jury to be summoned and impannelled, though in criminal cases it was necessary to carry out the object in some way which should provide for the exercise of the prisoners' right of challenge, which, in capital cases, was peremptory up to a certain number, thirty-five.

At some time, it is not known when, but certainly in times comparatively modern, though before the Restoration, it had become the practice in trials at bar, in civil cases, or cases not capital, for the officer of the court, the master, to make out a list of forty-eight qualified persons fit and proper to serve as jurors, and then for each party to strike off twelve, and the remaining twenty-four to be returned as the jury, a course of proceedings obviously inapplicable to capital cases, and, therefore, to most felonies; and in that age almost all felonies were capital. Hence, it was held that this course was not admissible in such cases, as it would deprive the prisoner of his challenges. The original practice, as to special juries, appears to have arisen out of, and to have been really identical with,

\* See 12 Geo. I.



the practice of electing a good jury on a trial at bar, that is, the court made an order on the sheriff to *nominate* forty-eight freeholders, whose names were returned to the court, just as in an ordinary case, civil or criminal, a panel of twenty-four would be returned. So the practice was stated in a book of practice, in the reign of Charles II. (Lilly's Practical Register, 155, 23 Charles II.) This practice, it is obvious, would allow of a reasonable or probable number of challenges for cause, and, therefore, would be applicable to criminal as well as civil cases, provided they were not capital; but it would not be applicable to capital cases in which the prisoner had a right to peremptory challenges to the number of thirty-five. Before the Revolution the practice was that each party should attend the master and strike off twelve, so that the number returned on the special jury panel was only twenty-four (Rule of Court, 8 Will. III. c. 7). This, of course, rendered the practice still less suited to cases of felony, which were almost always capital.

In the reign of Charles II. it was accordingly doubted whether in a capital case a special jury could be struck by the Master, as in misdemeanours and civil cases, and it was ultimately settled that it could *not* be done (Farrington's case, Kelyng's Reports). The reason is obvious, that the prisoner would lose his right to thirty-five peremptory challenges, a reason only applicable to capital cases, and therefore restricting the rule thereto. Indeed, in all cases, the striking of a special jury before the Master theoretically interfered with the prisoner's right of challenge, for it restricted him to striking off twelve out of the forty-eight. And therefore in criminal cases (not capital), even in trials at bar, the court, though it could without consent direct a special jury to be struck before the officer, yet it could not deprive the prisoner of his legal right of challenge for cause (*The King v. Keffen*, 3 Keble's Reports, 740, a case of forgery). Still, even in such cases, the court, that is, the full court, could direct a jury to be struck in that way. Beyond all doubt that power still continued to be exercised, even in capital cases. Any one who reads the reports of the criminal trials of that age will find that the jurors, in cases in which the Crown prosecuted, and desired to secure a satisfactory administration of justice, were always of the better class. Thus, on the trial of Count Koningsmark for the murder of Mr. Thynne, they were all of that class, their names and descriptions are given, and though the prisoner exercised freely his right of challenge, so that a great many were called, they seem to have been all of that class.

The Jury Act, which was passed soon after the Revolution (7 & 8 Will. III. c. 32), did not extend to criminal cases, and therefore did not affect the power of the court in criminal trials to direct the sheriff to return a good jury. Criminal

cases were from time to time tried in the King's Bench, "at bar," and there is every reason to believe that the old practice still continued of impannelling good juries in such cases. After the Revolution the practice continued of directing the sheriff to return what was called a "good" jury, that is, a jury of gentlemen, which often comprised persons in the commission of the peace (1 Strange's Reports, 265). This practice would apply to trials at bar, in which the jury would be summoned for the particular case under the direction of the court, and in which "good" juries would certainly be desired.

That the only reason why in capital cases the Master could not strike a special jury, was that thereby the prisoner would lose his challenge, was distinctly stated by the court after the Revolution, where it was laid down that in a case of misdemeanour the Master might so strike a jury by consent, "but not in capital cases, for then the prisoner would lose his challenge" (*The King v. Duncombe*, 12 Modern Rep. temp. Will. III.), that is, his peremptory challenges, for it had already been settled that he would not, by such a mode of striking a jury, lose his right of challenge for a case, so that the reason was confined to capital cases. And though the particular case was one of misdemeanour, yet the rule would equally allow of striking special juries by the Master in cases—if there were any—of felonies not capital; and the only reason why it is difficult to find an instance of felony, is that there were hardly any felonies not capital. So, although the consent of the party is spoken of, that was not a legal condition of the right of the court to make the order, but only because in point of fact it was almost always by consent, as it was for the manifest advantage of both parties. No doubt, in capital cases the jury could not be struck by the Master so as to deprive the prisoner of his challenges (12 Mod., 224), but in all cases a good jury could be ordered to be summoned (8 Mod., 240), and it was held that the right to a special jury did not depend upon the statute, but that it was grantable at common law (Andrew's Rep., 52), that is, in lieu of a good jury.

As regards the striking of special juries by the Master, doubts indeed arose after the Revolution as to the power of the court to direct them without consent. But the doubt was raised only by the officers of the court, and upon a ground entirely fallacious, and very characteristic of the infirmity of mere practice as a guide. For practice, as the very term implies, indicates only what is usual, and if for any accidental reason a certain course has happened to be usual, and any other case within living memory unknown, the disposition of the officer, or the mere practitioner, guided only by the practice, is to take for granted that the practice indicates and limits the

law, and that the law is limited within the narrow boundaries of the actual practice. Thus in the reign of George I., on a question arising as to the power of the court to direct a special jury in a criminal case at *nisi prius* (no doubt existing as to trials at bar), upon a search for precedents, it was found that no special jury at *nisi prius* had been granted for thirty years without consent, and for that reason the officer and one of the judges doubted whether at *nisi prius* it could be done without consent (*Rex v. Burridge*, 2 Roy., 1369, 1 Stra.).

The Lord Chief Justice (Pratt), however, held otherwise, and there it is manifest that the mere fact that in almost all cases it was done by consent, being for the mutual advantage of both parties, did not show that it could not be done by the court without consent, and by its own authority, while legal principle and analogy abundantly showed that it could be. Accordingly, although in the next reign a statute passed to settle the doubt, it was by declaring the law to be as the Chief Justice had asserted it to be.

In the second of George II. a capital case was tried at bar in the King's Bench (Johnson's case, Sir J. Strange's Reports), and the very next year an Act was passed (3 Geo. II. c. 5) reciting, no doubt, with reference to that case, and the rule formerly established as to capital cases, that doubts had arisen as to the power of the courts at Westminster to order juries to be struck before the Master, *unless the cases were to be tried at bar* (in which case it was clear there was no doubt), and declaring that in cases of misdemeanour and in civil cases juries might be struck as special juries had been usually struck in trials at bar, that is, before the Master by reducing a list of forty-eight. Nothing was said as to cases of felony, which therefore were left as they were at common law, subject to the right of the court to direct a good jury to be summoned, so as not to interfere, in capital cases, with the prisoner's right of challenge, and therefore it could not affect felonies not capital; nor could it affect the practice of directing good jurors to be summoned, of a sufficient number, to allow of the prisoner's challenge, and still to secure that the jury should be a good jury. Thus it was held in Vane's case, that with that object the court could, at a criminal trial, direct any number to be summoned, and no one can doubt that they were "good" jurors. It is manifest that the courts still retained that right, for though the Act provided for a general jury panel in ordinary trials, it expressly excepted trials at bar, as well as trials by special juries. In trials at bar, therefore, juries were left to be summoned for the particular case; and they might still be directed to be good jurors, provided there was a sufficient number to allow, in capital cases, for the prisoner's right of peremptory challenge.

In other cases of felony there could only be challenges for cause, and it would still be admissible to direct a good jury of twenty-four to be summoned, so as to make sure that allowing for challenges for cause, and for casual failures to attend, there should be a jury of twelve, all good men. Beyond all doubt in trials at bar, even in capital cases, after this Act, the court continued to exercise their ancient right of directing juries to be summoned for a particular case, even *instantanter*. And after the statute in 1737, the whole court declared, with the full assent of the other court, that though it was not usual before the Act to grant special juries without consent, yet in some instances, and for special causes, it was and might be done (*Wilks v. Lawes*, Andrew's Reports, 57). This may show how groundless the doubt of practitioners founded upon mere practice may be, and how little a mere acquaintance with practice assists to a real knowledge of the law. Yet with the carelessness with which rules were often hastily generalised, this rule got into the books of practice as if it were a general rule that there could be no special juries in cases of felony, whereas all it amounted to was, that a special jury could not be struck in a particular way in capital cases, so as to deprive the prisoner of his right to peremptory challenges. The rule went no further. This statute, it will be observed, did not affect trials at bar, in which, therefore, the sheriff could be directed by the court to return a jury for the particular case, subject in capital cases to peremptory challenge. And thus in 1746, in the case of the unfortunate Radcliffe, tried at bar in the King's Bench, the under-sheriff was directed by the court to summon a jury *instantanter* (1 Sir Wm. Blackstone's Reports), and no one can doubt that it was a good jury, *i.e.* a jury of gentlemen. This was the ancient practice in such cases, no statute law interfered with it, and there is no reason to suppose it was departed from. Thus in the middle of the last century criminal cases were tried at bar in the King's Bench, and even in capital cases the court directed the sheriff to return a special jury panel for the particular case, of course sufficient in number to allow of the prisoner's challenges, and there is every reason to believe that the court in such cases directed the sheriff to return a good jury.

This brings down the history of the practice on the subject to the middle of the last century, and there is no difficulty in tracing it from that period down to our own time. About that time the practice of trying cases at bar began to decline (although it has never been quite discontinued), and the trial of criminal cases in the King's Bench became very much less frequent, until, except in occasional cases of misdemeanour, they became extremely rare. And thus, as the practice on the subject became unfamiliar, it became less known, and to be

stated loosely in the books of practice that in cases of felony there could be no special juries. All that was meant by this, and certainly all that was correct in the statement, was that special juries, in cases of felony, which, be it observed, still continued, for the most part, capital, could not be struck in the ordinary way. And as the only cases tried were either civil cases or misdemeanours, (felonies going to the Old Bailey,) and in these cases special juries were struck in the modern way, the memory of the ancient practice as to good juries in criminal cases perished in the minds of officers and practitioners, though in some classes of civil cases the ancient practice still continued, and at this day continues to exist. In criminal cases, not capital, the modern practice subsisted. In 1817 a special jury case was struck in the King's Bench before the Master, for the trial of an indictment for libel, in which the defendant has only his challenges for cause, as in ordinary felonies not capital; and though the Master's nomination of jurors in the particular case was objected to as unfair, no objection was made to the striking of a special jury in that way. And but for a subsequent express enactment in the Jury Act, a few years later, that mode might still have been adopted in the trial of felonies not capital, as in cases of misdemeanour. On that occasion affidavits were made of the practice for more than twenty years previous as to the special jury lists, from which it appeared that the usual mode of nominating special juries in London was by the nomination of forty-eight persons, described as "merchants" in the books of the sheriff, and that the usual mode in counties was by the nomination of persons designated as "esquires" or other higher titles, in the sheriff's book of freeholders. The practice as to the list was, it appeared, to obtain the names of all persons qualified to serve, including those of higher as well as of lower degree, which is already shown was the only legal mode, and then from these general lists the jurors of the better class were selected. And Lord Ellenborough, on that occasion, said that the officer had a right to select, fairly and honestly, with a view to attain the object, that is, to obtain persons who, in his judgment, were, from their better education and superior intelligence, calculated to decide upon questions of difficulty, and that with this object he was right in rejecting persons who, from their description and position, were not likely to be possessed of the superior degree of intelligence and education required.\*

A few years afterwards, the principles of the law on the subject received a full exposition in a case in the Court of King's Bench, in which also, not being a criminal case, but one of misdemeanour, the special jury had been struck before

\* *The King v. Wooler*, 1 B. & Alderson, 207.

the Master in the ordinary way. The Court laid down broadly the general principle that the essence of the institution of the jury was nomination of fit and proper persons; and on that principle vindicated the ancient practice of directing the sheriff to return a good jury, and the modern practice of directing the Master to strike a jury: in both cases from the same class. The Court said, "Jurymen have always been named by the discretion of some person—the sheriff, or coroner. In special juries, before the statute (9 Geo. II.), they were named by the officer of the court. It is the object of a special jury to obtain the return of persons of a somewhat higher station in society than those who are ordinarily summoned to attend as jurymen; and a similar practice has long prevailed, even in the execution of writs of inquiry of damages before the sheriff, when the party obtains, on application, an order of the court, in obedience to which the sheriff summons persons of a somewhat higher class than those who ordinarily attend."\*

A year or two afterwards, in 1825, the Jury Act (6 Geo. IV. c. 50) passed, which followed the Act of Geo. II. on proceeding for a jury panel in ordinary cases, expressly excepting trials at bar, and special juries directed by the court; and expressly reserving to the Court of King's Bench, as a criminal court, the same power and authority "they had before exercised in making any order for the return of a jury" (s. 20), which of course would include the same power to direct special juries in criminal cases *not* capital, and "good" juries in all criminal cases whatever.

It is true that the clause in the Act relating to special juries provides, "except cases of treason and felony;" but then it only applies to the striking of special juries in the manner usual in such cases; which, for reasons already mentioned, especially as most felonies still continued capital (for Peel's Acts were a few years later) was unfitted for cases of felony; as it deprived a prisoner of the right of peremptory challenge, which he could have in all capital cases. But the Act in no way affected, and expressly reserved, the right to appoint a good jury.

It is to be observed, that by the Act it was expressly provided that the jury lists should include *all* persons qualified to serve; which would of course include the class generally drawn on special juries; and the sheriff, in making up a jury panel, was left quite at liberty to use his discretion in the nomination of the jurors: all that was required being, that he is to nominate a competent number of the persons qualified; that is, including special jurors, or persons of the better class; and it would be competent to him, in any case, to return the

\* *Re King v. Edmonds*, 4 B. & Ald., 471.

whole panel of that class. It would be *obligatory* upon him to return a *proportion* of them; and it has been repeatedly declared that it is a great neglect of duty on the part of the sheriff's officers that they do *not* return persons of the higher class as well as of the common class upon the jury panels. The Common Law Commissioners of 1850 strongly reprobated the prevalent practice of returning none of the better class upon the common or general jury panel. It has been held, within the last twenty years, that it is competent to the sheriff to make up a jury panel, not by taking names indiscriminately from the whole county, but from a particular hundred; in which they might all be gentlemen of property and position (*Taylor v. Loft*, 8 Exch. Reports, 278). The Late Lord Chief Baron said in that case: "The sheriff had an unlimited discretion given to him; and, like a wise man, has exercised it in the more convenient way." That was a case in which the sheriff had to summon a jury for a particular case; and where a jury is to be summoned for the trial of a case of felony, in the King's Bench, especially when prosecuted by the Crown, it would be natural and proper that he should summon a jury panel for that case. At all events, it would be natural and proper that the Court should direct him to choose one; and it would be only in accordance with ancient practice to do so.

The same reasons which led to the removal of the case into the King's Bench would require that it should be tried by a jury of greater than common intelligence, and of better position than the ordinary run of common jurors, who, be it observed, are taken from jury panels illegally, or at least improperly, made up; and not including, as they ought to do, persons of the better class. The direction of the Court to the sheriff to summon a "good jury" is only a direction to him to do his duty, and to remedy, in a case of importance and difficulty, the inconvenience arising from his own neglect of duty in not providing jury panels including all the classes qualified to serve: the higher, or better class, as well as the more common or inferior class. The power of the Court to grant a "good" jury, and the nature of a good jury, will be found laid down, without doubt, in the latest books of practice. Thus, Mr. Justice Lush, in his "Practice," says:—

"A good jury is composed of persons who are competent to serve on special juries, and whose names are therefore inscribed in the special jurors' book. An order on the sheriff to return such a jury may be obtained by either party, on summons, if the judge thinks fit." (See his "Practice," vol. ii., p. 798, Edition of 1865).

And the learned author cites recent decided cases (*Price v. Williams*, 5 Dowling's Pract. Cases, 161). Last year an

elaborate judgment was delivered in the Common Pleas upon the subject.

In directing, therefore, a good jury to be summoned, the Court would be only acting in accordance with ancient and unbroken usage, approved of by the Legislature over and over again, and expressly reserved in the Jury Act. The Court has never tried, since it was instituted, a case of importance, as any criminal case prosecuted there by the Crown has been assumed to be, without taking means to secure a "good," that is, a superior jury; a jury composed of men of higher than ordinary intelligence. The Attorney-General, therefore, in directing the removal of the case into the Queen's Bench, with a view to attain this object, and to secure a superior jury, was so far right that it could be attained there; though, on the other hand, it could equally have been attained at the Central Criminal Court. And though the Master of the Crown Office was technically and strictly right in one sense, in saying that there could be no special jury in a case of felony, he was right only in this narrow sense, that a special jury could not be struck in such a case, in the way usual in civil cases. The object can be attained in a manner more adapted to the criminal law: that is, by directing the sheriff to summon a panel of the substantial men, sufficient in number to allow the prisoner his challenges. And it may be added, that if the law, as it now exists, were duly carried out, there would be no necessity for any such course, nor for a new Jury Act, which will be as ineffective as the old one so long as the officers are allowed to neglect their duty.

## II.—SUGGESTIONS FOR A SCIENTIFIC ARRANGEMENT OF ACTUAL LAW.

THE social conduct of the citizens of a settled state is, for the most part, in conformity with its municipal law, while this conformity does not usually arise from any conscious effort to act in accordance with a known legal rule. Thus, every system of law actually living and working contains a multitude of rules of conduct, capable of being directly transformed into general, though not absolutely universal, propositions touching the conduct of the citizens. These general propositions are, by every title, subject to rational processes, and should, according to scientific experience, yield, under due treatment, the elements of legal science. Though



not absolutely universal—for, of course, laws are sometimes broken—such propositions are yet sufficiently generally true to justify a classification and arrangement, founded on their provisional truth. Though law-breaking occurs, it presents itself, in an orderly community, as an exceptional social phenomenon, and it is natural to arrange the normal phenomena of orderly conduct, at least provisionally, while leaving examples perceived to be rare and exceptional for separate consideration. And these general propositions concerning social conduct, thus obtained by direct transformation from working law, can be regarded as results of a sound potential induction from observed social conduct.

If we suppose an observer having sufficient time and opportunity to apply the methods of observation and induction to the phenomena of social life, he could not fail to arrive at certain general truths concerning the conduct of human beings which he would call laws, in the sense in which the term is used in physical science. And while laws thus arrived at would include national manners and customs not judicially enforced, yet the perceived action of tribunals could not fail to lead to a classification, separating the laws giving rise to this action from all others. And while the consciousness that laws, so arrived at, fail to explain all phenomena of conduct, should prevent the observer from regarding his results as absolute truths; yet the perception of the great generality of these laws could not fail to give rise to a legitimate provisional classification of the phenomena of conduct.

While the transformation of rules of law into propositions concerning conduct taken to be provisionally true is thus a legitimate step towards a rational arrangement of legal topics, the very process itself of such transformation frees the subject-matter of investigation from many dangerous germs of fallacy. When we force ourselves to say what a law-abiding person is supposed actually to do in a given state of circumstances, no vague, though well-turned, phrase can help us, and a wholesome impatience displaces the indolent satisfaction often occasioned by legal apothegms. Legal terms get sifted, and are forced to disclose such real gold of meaning as they happen to contain.

While, then, the general propositions concerning conduct thus derived from positive law are properly treated as relative truths, it is to be borne in mind that we have no right to expect that they can ever yield us axioms fit for purely speculative treatment. These general propositions may be, and, indeed, must be, classified according to their apparent relations towards each other; but the more general truths thus evolved partake of the relative and provisional character of their elements, and need to be tried at every stage by the

test of actual experience. And the result to be hoped for is not a theory of social life, but rather an arrangement of actual law, as scientific as the nature of the subject-matter permits. Well, then, with these precautions, and keeping always in view the limits set by the conditions of our subject, we may take up the general propositions concerning social conduct obtained from practical law, and apply to them the ordinary rational methods, in the hope of aiding in the work of arranging English law; and we must expect that the results thus to be arrived at have been, to a great extent, already practically anticipated.

A body of law of such natural growth as that of England, must have already, though implicitly, moulded itself so as to have taken, in the main, the forms, and to display the divisions, which the characteristics of its elements would suggest to a careful observer. So that, far from dreading lest our plan of work may lead to any dangerous innovation, we anticipate not new legal categories, but only a clearer perception of those already virtually existing, and a more consistent adherence to the arrangement suggested by them. Thus, the primary classification suggested by a comparison of the propositions concerning conduct derived from practical law is seen to fall in with the arrangement of topics usually adopted by writers of legal text-books, while the method by which it is arrived at enables us to rectify and define the boundaries between the regions of legal study, thus already indicated by writers of practical law books.

Taking the propositions concerning social conduct, derived from working law, as relative or provisional truths, the first step towards a rational arrangement is a comparison of these propositions with each other. This comparison leads to a perception of truths of conduct more general than any obtained by direct transformation of working rules of law. The most general truths thus attainable are legal principles.

Now, all relative truths of conduct obtained from working law have one common characteristic, constituting their title to be admitted as elements in a legal system. They all tacitly imply or expressly refer to the action of some legal tribunal supposed to be charged with the duty of compelling, punishing, or remedying. But the place held in the statement of the relative truth of conduct, thus always occupied by the reference to, or the implication of, the action of the tribunal, varies in such a way as to determine decisively and unquestionably the first demarkation of legal topics.

In one class of truths the reference to the tribunal is tacit, and dropped out of thought, save when we want to see that the proposition we have in hand is truly a legal one. In a second, the tribunal is prominent, and the truth is but a description of

the mode of action of the tribunal. In the third, the reference to the tribunal occupies an intermediate place;—while, for example, it is seen that a rule of evidence is shaped with a view to the powers of investigation possessed by tribunals, yet it is acted on without a view to litigation. And we have separate treatises on “procedure,” on “evidence,” and on branches of law considered to be properly dealt with apart from each of the former. This primary division of legal topics thus suggested by a first comprehensive glance at any body of law is, moreover, ratified by investigation and experience. Indeed, the division is so obvious, that it is adopted at first almost instinctively, and it is only when we see it neglected or forgotten in concrete cases, that we feel the necessity of retracing our steps, and re-defining its lines of demarkation. For every body of law comprises a certain standard of social conduct, constituting its principle of existence. Men must make their conduct conform to the pattern thus set, or else be law-breakers. Conduct must be level with this standard, or else be illegal. This standard of conduct can be thought of as existing without any tribunal to enforce it, but the tribunal exists only to enforce observance of the legal standard of conduct. But while the standard of conduct can thus be thought of without any reference to a legal tribunal, it becomes a legal standard by virtue of the actual or potential intervention of the tribunal. While the legal standard of conduct thus needs the tribunal only to give the standard its legal character, the tribunal and the rules governing its mode of action have evidently no reason of existence in the absence of some standard of conduct to enforce.

Again, rules of evidence take shape in order to help the tribunal in its investigations into facts, or else to cut short hopeless inquiries; while the formalities introduced with these objects in view are adopted in the doing of certain non-contentious legal acts. Thus the primary classification of legal topics, suggested by a comparison of legal truths and confirmed by practical experience, presents itself in this shape—

The Standard of Conduct   |   Procedure   |   Evidence.

Conscious of legitimate parentage, and by no means apprehending rejection as an innovation, though perhaps risking to be neglected as a barren truism. A truism has at least the advantage of being true, while its reproach is barrenness. If both true and fruitful, the truthfulness is a gain, however apparently easy the truth may be, while the reproach vanishes. Now this common division of legal topics suggests considerations by no means unfruitful. It is in the departments of law where rules of procedure and of evidence have been placed in

the background, that legists have most confidence in their science, and find scientific processes most applicable. And a careful consideration of this natural pre-eminence of the legal standard of conduct reveals the reason of the scientific precedence due to this branch of law, and leads to a conviction that our hope of sound legal progress rests on an intelligent observance of a classification, at first adopted almost instinctively.

It is felt that tribunals exist but to enforce some law which we cannot help thinking of as being capable of being intelligibly stated without any reference to the means adopted for the purpose of enforcing its observance. And it is in the exposition of this standard of conduct, as compared with other branches of law, that scientific methods work most readily. The reason of this is not far to seek. The scientific arrangement of the standard of conduct is free from the difficulties, *à priori*, besetting the logical treatment of human actions arising from the practical indeterminateness of volitions. The standard of conduct is but an orderly exposition of the actions of persons known to act in accordance with law, and its principles are but the most general propositions concerning these actions attainable by a careful comparison. Thus, the indeterminateness of the volition is equilibrated by the known conformity to law, and the incommensurable element is eliminated from the formulæ with which we have to deal. But when, in considering procedure, we have to determine what methods are best calculated to induce or force men to act in conformity with law, the whole complex crowd of motives rushes in, and to complete a scientific theory of procedure, an unattainable knowledge of the springs of human actions seems to be demanded. And, in the department of evidence, the construction of perfectly rational rules must presuppose the possession of a theory of the means and sources of knowledge far more complete than any we are ever likely to attain. No doubt the construction, for the first time, of a perfectly rational standard of conduct is fraught with difficulties far graver than those affecting even procedure and evidence; but no such hopeless task is cast upon the legist.

In this department of his subject he finds the main lines of his work marked out for him by a power lying outside his own field, and he must accept them as he finds them. He uses the conduct of law-abiding persons as a manifestation of the principles which he has not to invent, but only to study and arrange; while in the other departments he is cast back on himself, and has to face the difficulties from which he is relieved in the study of the standard of conduct. And these considerations are quite ratified by practical experience.

The test of scientific success is the generality of the principles attained, coupled with their power of resolving concrete

problems, or, in other words, the simplicity of the principles and the clearness of the deductions by which practical applications are derived from them. Now, in the department of the standard of conduct the principles of

Personal inviolability | Property | Veracity

are easily arrived at, simple, and, with proper modifications, explain all legal rules in this department; they present themselves, moreover, with the authority belonging to rigorous generalizations from observed facts. But no such broad or simple arrangement is attainable in dealing with the rules of procedure and evidence.

In these departments there is no wide field of manifestly orderly conduct inviting systematic study. The erratic or unfortunate persons whose conduct, in departing from the standard, evokes the action of the tribunal present a chaotic spectacle. The possibilities of error leading to stringent rules of evidence are infinite. Yet procedure and evidence, to be of any use, must strive to take some note of the motives acting on law-breakers, and the difficulties that present themselves in the investigation of fact. And these difficulties, which must be faced somehow, cast a tinge of inevitable arbitrariness over all rules of procedure and evidence. It is idle, for example, to suppose that the particular period fixed by rules of court for filing or delivering pleadings can be accounted for by any principle much more general than the rules themselves. The effort to make such rules flexible enough to work perfectly in every case can end only by making them too limp to be of any use in any case.

Again, in the department of evidence, certain rules of limitation are used to cut short hopeless inquiries into facts usually incapable of satisfactory investigation; but no one expects a scientific explanation of the selection of twenty years as the limit beyond which the investigation into one set of facts shall not be carried; why six years is the limit in another class of investigation; why six months is chosen as a legal horizon in a third. The standard of conduct makes the intention of a person determine the destination of a property, defines the terms of a contract according to the intention of the parties. So far we feel that we are dealing with matters entitled to the intellectual respect due to relative truths. But the difficulty of ascertaining the intention, where a dispute arises about it, has led to rules of evidence requiring this intention to be manifested by particular forms, or else to be ignored. Yet no one can expect a scientific explanation of the rules requiring different formalities for different acts. Why a seal is required to manifest certain intentions; why one witness is enough for certain acts; why two are required for others.

In truth, in these departments (procedure and evidence) the best guide is practical sagacity, content with an honest subservience to the main object of enforcing the standard of conduct, while aiming at shaping rules as easy to learn and remember as is possible consistently with their usefulness as means to enforce observance of law.

Thus a clear conception of the legal standard of conduct is a condition precedent to a proper treatment of the rules of procedure and evidence, while a rigorous exclusion of matters conversant with these topics is essential to a scientific exposition of that standard. And while we are glad to find that a comparison of our transformed legal propositions leads to a recognition of a practically adopted division of legal topics—seeing in this at once evidence of the ripeness of our subject matter for scientific treatment, and a confirmation of the views that have led us to the method used—yet we find ourselves forced to rectify, as it were, the frontiers of the provinces of legal study. When we find, for example, a division of contracts into contracts under seal and parol, while the latter include both verbal and written agreements; when we see a suggestion that the division of the future of contracts is into written, and not written, without a hint being given that the older and more modern division both affect the law of evidence only, we cannot fail to perceive that each division assigns to the evidence of the contract a place not to be permitted in a thoroughly scientific treatment of the subject.

Again, we are led to a serious modification of the relative position usually assigned by English legal writers to “criminal law.” Bentham, in placing the penal code before the civil code, inevitably obscures the true relation of criminal to civil law. And Mr. Austen, in adopting the method which regards law as a command, confirms an idea of law, of which a rule sanctioned by a punishment is the clearest type. But once the notion of a legal standard of conduct has taken shape, it is seen that the distinction between a crime and an illegal act not criminal has no place in the exposition of the standard of conduct. The principle of property presents a model of conduct touching the thing owned, according to which the conduct of the owner and of the rest of the community is shaped in relation to that subject matter of ownership. The principle remains the same, whether the departure from the pattern thus set consists of a (morally) innocent trespass or of a heinous crime. It is found sufficient to deal with the less flagrant violations of the principle as civil injuries, while the more heinous are punished as crimes. But this is obviously a matter touching the mode of action of the tribunal, and whatever be the kind or degree of the departure from legality in question, the standard of

legality remains the same. Thus the distinction between a crime and a civil injury is perceived to be a matter purely of procedure.

Taking then the legal standard of conduct to be the first proper field of investigation, the same method which has led to the primary classification suggests here further divisions.

The principles—

Property | Personal inviolability | Veracity

make abstraction of the characteristics of persons. They do not in their most general exposition take note of infancy nor of mental incapacity. And not by blind obedience to the behests of any system, but simply as a matter of easy observation, we perceive that the truths touching what lawyers call incapacities or disabilities must be regarded as independent moments to be classified and dealt with apart. And thus legal writers on contracts state the general rules applicable to their subject-matter, while the effects of infancy, coverture, and insanity present themselves as exceptions to, or modifications of, the more general doctrines. And a similar arrangement prevails in treatises on other legal topics. The same intellectual instinct which has marked out and defined the legal standard of conduct as a separate field of investigation, is found operative in the subdemarcations of that field itself.

And the conception of the legal person presents itself. This person being thought of without reference to the modifications rendered necessary by personal disqualifications. In the exposition of the truths forming the tissue of living law, the natural person—that is, a single human being—appears at first to be the unit and element of society. The primary conception of this unit at first dissolves itself into acts, and is afterwards reconstituted into the legal person.

To the legist, the “person” is the fountain of legal acts, and while an individual human being is the primary type of this legal personality, the type is narrowed so as to exclude persons having certain disqualifying characteristics, while it is extended so as to comprehend certain aggregates of natural persons, and to make conduct predicable of them in their collective capacities. But the doctrines affecting this development of the conception of the person are soon found to be resolvable into applications of the principle of veracity, or else to pass outside the field of municipal law, while the narrowing of the type, arising from disqualifying characteristics of persons, has such a firm hold on every exposition of the standard of conduct as to demand its insertion as a modification of the standard of conduct itself.

Thus a twofold division of the standard of conduct presents itself:—

Fundamental legal principles | Modifications arising from physical facts.

The fundamental principles being those above mentioned, and the physical facts giving rise to modifications, being—infancy—sex—mental incapacity—death. And the usual arrangement of legal treatises quite falls in with this arrangement. For example, it is usual to deal with the doctrines applicable to veracity and property, by first considering the rules applicable when all parties are *sui juris*, and supposed (for legal purposes) to stand altogether on an equal footing, while the especial regulations arising from infancy, coverture, or incapacity, always present themselves as modifications of the doctrines applicable to persons having plenary legal powers and subject to full legal responsibility. Again, the effect of the death of a person on the legal relations centering in him is felt by legists to be so incommensurable with these relations, that a fictional representation is adopted, for the purpose of giving cohesion to the legal relations of survivors, so far as they must depend on those of the deceased person.

Thus far we have been led to outline the main divisions of legal topics, and to touch on the legal conception of a person; but “a person” is not the ultimate unit of legal classification. That ultimate unit is the act, and the classification of acts is the aim of legal science. While every act takes its rise from a person, each person is the spring of multitudinous acts, each having its own special legal relations. The word act, connoting, as it does, something of activity, may seem at first sight inapplicable to pure abstention; and it must be borne in mind that intentional not-doing is, for legal purposes, as much an act as positive doing. But with this explanation it is strictly true that the act is the legal unit. And the completion of the analysis of legal doctrine is the definition of this unit, while, of course, this definition should stand in the front of a synthetic arrangement of law. An act, of course, always takes its origin from the will of a person and extends to and is limited by some event external to that will; but the matter to be considered is, what events taking their origin from or caused by the will are to be comprised within the limits of the act? The only measure of this limit found to be capable of being practically used, is the intention of the person whose will has caused the event. And this is universally recognised. The intention is the test and measure of the legal act, whether that act be a contract, a disposition of property, or any other unit of conduct having a legal relation.

But we are here brought in contact with a class of legal



questions that has, in modern times, given rise to much discussion. The doctrine of "legal negligence" has received much attention of late years, and within the last three years it has, for the first time, been dealt with by English and American legal writers, in treatises devoted to its separate consideration. And the topic is an excellent example of a legal doctrine shaping itself as it were almost under our eyes, little under the influence of Roman jurisprudence, and of uncontrolled and natural growth. And the very nature of the doctrine thus shaping itself indicates that the uncontrolled development of judiciary law has so far advanced as to call for rigorous analysis, and to demand a sound synthetic arrangement as a condition precedent to any further real advance.

Cases in which the question, negligence or no negligence, arises have one common characteristic marking them off as a distinct class. In all of them an event has occurred, clearly a violation of some one or other of the fundamental principles of the legal standard of conduct, if only the event could be called any person's act. Yet the event does not fall within measure of an act marked out by any one's intention; still the defendant, whose act has caused the event, is sought to be made liable for it, as if it were an act of his. Thus a man driving a carriage along a road comes into collision with another passenger and injures him. If the injury is intentional, the driver's liability is clear; if unintentional, then the question, negligence or no negligence, arises; but in the absence of the injury, no question arises (between the driver and the other passenger), though the driver may really have been very careless. Another man owns land and stores water on it in an artificial reservoir. The water escapes and damages a neighbouring property. If the escape of the water is caused with an intention of injuring the neighbouring proprietor, of course the legal liability of the person so designing to injure is clear. If, however, the escape of the water is caused by some unforeseeable occurrence—such as an earthquake in England—it would be impossible to make the owner of the reservoir liable. If the injury arises from an unknown old shaft hidden at the bottom of the reservoir, though the owner knows nothing of it, he is liable. This is enough to indicate the delicacy of the questions presenting themselves in the department of law now under consideration.

When we examine cases like these, as they present themselves in civil proceedings, a temptation arises to enlarge the sphere of the act beyond the limits marked out by the intention. For, in a civil proceeding, when an event is deemed to have been caused by negligence, the legal consequence is, in many cases, precisely the same as would arise from an intentional injury. But the effort to frame any measure of the

limits of an act going outside intention breaks down in consequence of the impossibility of constructing any workable theory of probabilities applicable to such cases. And even in civil actions different measures of damages are used in cases of intentional and wilful wrongs; while, on the criminal side, intention is, for the most part, an essential element of crime.

We have already seen what position belongs to criminal law in a legal synthesis. We find this matter—intention or negligence—giving rise in civil proceedings to a modification of the measure of damages. We have thus a pretty clear indication of the true place of the doctrine of negligence in a scientific arrangement of law. The civil liability arising from negligence, the punishment inflicted when negligence leads to very grave consequences, are excellent means to enforce an observance of the standard of conduct. They call for and should awaken a lively anxious desire to avoid injuring others, far more effectual as a sanction of a standard of conduct than any punishment, however cruel, inflicted for acts intentionally violating law.

But our point here is the true position of this doctrine of negligence in a scientific arrangement of law. That position is partly in the department of procedure, partly in that of evidence. It by no means extends into the standard of conduct. And, while the effort to formulate a rigorous definition of negligence fails, for the same reason that other rules of procedure and evidence resist a thoroughly systematic treatment; the doctrine of negligence itself marks out, defines, and rounds off a phase of legal thought. For while the perception of the radical distinction between the legal pattern of conduct embodied in law and the means used to enforce an observance of the pattern is essential in a rational synthesis of existing law, we must not forget that these legal moments act and react on each other. It is obviously idle to shape a rule of conduct such that deviations from it cannot be discovered. No legislative enactment can live unless it falls in, more or less, with actual customs. And whenever these inevitable conditions of the sphere of legislation are lost sight of in forming new laws, law-makers are too often led to adopt an impotent violence of cruel and ineffectual penalties. But while these considerations are most important in making new laws, they ought not to disturb the arrangement of actual law.

The principles of the standard of legal conduct embodied in actual law—long in forming themselves, but now thoroughly shaped—have for the most part existed and worked so long, that, whatever effects the reaction of other legal moments may have had on them in their formation, these effects must now be regarded as quite accomplished. The past operation of these moments is of antiquarian rather than of legal interest.

Even the order of development of the three doctrines of property, personal inviolability, and veracity, though clear enough to the curious student, is rather an affair of history than a part of the legist's work.

While, from an historical point of view, it seems clear enough that the doctrine of property first took shape, personal inviolability next, and veracity last, yet all three principles have been so long and are so firmly established, that they should now all be regarded by the legal student as co-ordinate. And we should not suffer a perception that these doctrines once were pliable twigs, though they are now strong trees, to hinder us from seeking to train and improve such seedlings as spring up in our time. While we have thus sketched an outline of a legal analysis, ending with a conception of the legal unit, an act, we have not been led to write about justice in the abstract, nor of that legal entity, "a right." These topics must stand over just now.

I. H. M.

### III.—THE ALBERT LIFE ASSURANCE COMPANY ARBITRATION ACT, 1871, 34 Vict. c. 31.

**O**F the bundle of institutions which must exist in every civilized country, that is to say, the legislative machinery, the army, the navy, the administration of justice, the police, &c., and which in their combination (except in countries purely despotic) we perhaps designate when we speak of the constitution of a country, none is more important, none has greater influence on the stability and prosperity of a nation, than the administration of justice. In no country that ever existed has been or is this sentiment more deeply rooted than in England, and hence it is, that during the most violent internal convulsions to which our history bears witness, our courts of justice in their framework and essentials have remained intact, and historians are unanimous in testifying that the epoch of the great Revolution was as fertile as any in learned, wise, and just judicial determinations. We are, in truth, and perhaps by the instinct of race, a law-abiding people, and set more store than any people have ever done, not merely on the equality of all before the law, but on an administration of the law by judges whose capacity and impartiality are guaranteed beyond all suspicion. To this end, they who occupy the judgment seat are ordinarily selected from the most distinguished members of the most distinguished of professions; they are surrounded by every mark of external dignity; they are

remunerated by salaries becoming their social rank; they are irremovable and disabled from embarking on the troubled sea of political agitation; serene in their exalted tranquillity, they command the unbounded respect and the willing obedience of a people not too easily satisfied with any authority to which it may be subject. Political philosophers have not yet explored a mine rich in instruction beyond all others, but it has often occurred to us, when asking ourselves wherein lies the secret of the long-continued stability of English institutions, that the true reply is to be found in the just administration of the laws. The laws in themselves are cumbrous, complicated, and abstruse, almost beyond the measure of the human understanding; their administration is dilatory and ruinously expensive; the tribunals and their various functions are incomprehensible to all but those who have made of them a life's study, and when understood are found to be but a network of incongruities and absurdities; but amidst all, there stands out this one consoling fact, that the judges can be depended on to exercise their high functions without prejudice, favour, or affection, and to the best and utmost of their ability. A people confident in their tribunals as a certain protection and refuge against injustice, will bear with patience the gravest political grievances, and bide their time to remove them.

Let us cast our eyes for a moment across the Channel, and ask ourselves in which of the institutions of France is there the most marked difference between that country and our own, and we unhesitatingly reply, in the administration of justice. On a future occasion we shall enter on this subject more largely. For our present purpose it is sufficient to say, that ever since the great Revolution the judges are salaried so frugally that no one with moderate practice at the Bar could accept the dignity, unless he had other resources; that although irremovable, they are allowed to be returned as deputies to the legislative assemblies; that in consequence it is no unusual thing for even the supreme judge of an imperial court to descend from his judgment seat, and canvass the electors of the district in which he administers justice. When returned, he will generally be found the complaisant supporter of the powers that be, and thus he will engross into his hands the local patronage of the district. Need we say that a judge so situate will be more than human if justice in his hands retains her spotless purity? In any event, most certain it is that no one will feel the least confidence in the fair adjustment of the scales he holds. We know well that no greater evil has affected France during the last half century, than the utter disrespect with which their tribunals,

both civil and criminal, are regarded. Imbecile, unlearned, and ill-paid judges, absorbed in their own advancement, submitted to the influence of political prejudices and passions, without any sense of the dignity of their offices, is it to be wondered at if the mass of the people, undisciplined in justice, sobriety, and moderation, by familiar intercourse with the courts of justice, which ought to be the best school of popular instruction in those social virtues, seek refuge for their grievances in wild and senseless political theories? Corrupt and ignorant tribunals of justice, criminal or civil, are in truth models of immorality, confounding all distinction of right and wrong, disseminating amongst the whole community an indifference to what is true and just, and cankering the very heart of society.

Not less pernicious are the consequences of legislation which violate the principles of justice inherent in the human mind *semper et ubique*. For instance, *ex post facto* legislation has been in every stage of our history odious and repugnant to the British Legislature.

Strictly speaking, every Act of legislation must to a certain extent be retrospective in its operation, and if it be merely an improvement of the mode of procedure, in respect of economy or despatch, the position of existing creditors or debtors may be, nay, must be, materially affected. But the Legislature has never gone so far as to affect the rights of parties by *ex post facto* legislation; and when existing rights might be affected by an Act of Parliament, nothing is more familiar than a provision that the Act shall not affect any rights or liabilities existing before the date fixed for the Act coming into operation. This system harmonizes perfectly with the universal conception of what is just and reasonable, for it is not to be endured that contracts should be entered into, liabilities and obligations incurred, and rights bargained for in a state of circumstances which, pending their maturity, has become materially changed through the caprice of the Legislature, without the consent of or compensation to the parties prejudicially affected. If it were otherwise, confidence in the Legislature would be shaken at its base, and if in this country so disastrous a system of law making were even inaugurated, we might as well enter at once upon the legislation of Communists and Socialists, who recognise no vested rights, no continuity in the institutions of a country, but break down every obstacle that stands in the way of their speculative and experimental theories. However absurd we may be thought by these pretentious philosophers, we, nevertheless, insist that they who make their bargains on the faith of undoubted and existing law, have a right to calculate on the continuance of that law during the entire pendency of the transaction, or to be indemnified if the

law is in the meantime changed, and no one we apprehend with the slightest pretention to be a conservative or constitutionalist could argue otherwise.

With our minds thoroughly impregnated with the foregoing sentiments, we apply ourselves to the Act referred to at the head of this article, and we say unhesitatingly, whether we regard its principles or details, in whatever light we look at it, we devoutly wish it could be torn from the Book of Statutes. We honour our constitutional Legislature, but in this instance it has violated every tradition that has secured the public confidence. We have a profound respect for our legal tribunals, but this Act declares them utterly inefficient for the purposes for which they are created, and for the performance of which they are so liberally remunerated; and at the expense of the suitors themselves improvises a tribunal to discharge judicial duties, on the pretext that the ordinary tribunals are altogether incompetent to dispose of them. We are sensible of the dignity of the Peerage, especially when conferred as the reward of eminent ability and industry; but this Act sanctions the acceptance by a Peer of the realm—who is already a member of the highest judicial tribunal in the country, a Peer who would certainly repudiate with disdain the offer of a puisne judgeship or Vice-Chancellorship—of the humble office of arbitrator for an honorarium to be fixed by himself, but not to be less than 2000*l.*, and to be paid as and when, and by whom, he shall think proper. We have no desire to see our ex-Chancellors converted into hack arbitrators, rivals, and competitors of the junior barristers, to whom the functions of arbitrator have been hitherto usually confided.

The title of the Act sufficiently explains its object. Its history is somewhat singular. The Albert Company was ordered to be wound up on the 17th September, 1869. Liquidators were appointed, and some proceedings taken towards settling the list of contributories and the carrying in of claims, but we cannot ascertain that any real progress was made towards a winding up from the period of the order to the passing of the Act. During this period, however, the solicitors and liquidators received about 5000*l.* out of the assets for their costs and expenses. Efforts were made in the interest of the shareholders of the absorbed and affiliated companies to reconstruct the Albert, and to carry on the business on a new scheme, and a meeting was ultimately held of the policyholders and annuitants, and all others interested, at which it was resolved that a petition should be presented to the Court of Chancery for its sanction to the proposed scheme. It was farcical to suppose that the Court of Chancery could or would compel reluctant shareholders to insure in a company totally different from the one with which they had already con-

tracted; but as Mr. Webster, Q.C., and Mr. Morris, the solicitor in the winding up, both pledged their professional reputations that it would receive the sanction of the Court, the resolution was carried. As any one familiar with the principles of the Court of Chancery might have predicted, the Court refused to make any such order as was asked for, and then it was that the Legislature was resorted to as the most efficient means of solving the difficulties.

A Bill was brought in, and referred to a select committee, of which Mr. Gathorne Hardy was chairman, and it is a wonder to us how that eminent and aspiring constitutionalist could have accepted with such ready acquiescence the provisions of so singular a Bill. As finally settled into an Act, and approved by the Legislature, it recites the order for winding up the Albert, and details the various companies with which the Albert has been amalgamated, or which it had absorbed. By s. 3 Lord Cairns is appointed arbitrator. By s. 4 the matters referred to him are specified, and they comprise every possible question that could require adjustment between all the companies and their respective policyholders, annuitants, and shareholders. Ss. 5, 6, 7, 8, 9, authorise the arbitrator to settle a scheme of compromise, which scheme might be—

“ In the form of a reconstruction or reconstitution of the Albert Company, with or without modification, or the incorporation by registration or otherwise of that company, or the constitution of another company with, in either of those cases, provisions for the continuance and conduct of all or any branch or part of the insurance and other business of the Albert Company, current at the commencement of its liquidation to the natural termination of that business or otherwise, or in the form of a transfer, total or partial, of that business to another company or other companies existing or to be constituted under the directions of any scheme or schemes or otherwise, or in any such other form or manner as the arbitrator, *in his absolute and unfettered discretion thinks expedient*, and any of such forms adopted, may be with or without the payment of surrender values, in all cases in which the arbitrator thinks the same equitable or expedient.”

Then ss. 6, 7, 8, and 9, are directed to giving effect to the scheme, and rendering it compulsory on all persons interested. S. 10 specifies the specific powers of the arbitrator, but they are quite unnecessary, for s. 11 is comprehensive enough to include them all, and much more. It is as follows :—

“ The arbitrator may settle and determine the matters by this Act referred to arbitration, *not only in accordance with the legal or equitable rights of the parties as recognised in the courts of law or equity, but upon such terms and in such manner in all respects as he in his*

*absolute and unfettered discretion may think most fit, equitable, and expedient, and as fully and effectually as could be done by Act of Parliament."*

Was ever in the whole history of our legislation any such tribunal constituted with such unbounded powers? And it must be remembered that it was not a voluntary submission. If it had been, no one could have complained; but so far from it, it was opposed before the committee by a considerable body of policyholders and others interested. Moreover, there must necessarily have been many parties deeply interested who were minors, married women, and others living or being in foreign parts, who could not assent to any extinction or modification of the rights conferred on them by law. Indeed, it stands admitted on the Act that the powers granted to Lord Cairns of disregarding all legal and equitable rights, of nullifying in effect the most solemn contracts, of converting Lord Cairns into an absolute despot over the fortunes of every one connected with these companies, and breaking down every principle of law and equity that stood in the way of "his absolute discretion," could not be carried into effect without the authority of Parliament. If the Act was passed with his lordship's privity—and as a member of the Upper House, it must have been so in one sense at least—he must, we suppose, have been apprehensive that his powers as already cited were not sufficiently extensive; for by s. 21—

"All awards, orders, certificates, or other instruments made by, or proceeding from, the arbitrator, shall be binding and conclusive on all parties to all intents and purposes whatever, and shall not be removed or removable by *certiorari*, or by other writ or process, into any of Her Majesty's courts of law or equity, and the proceedings or acts of the arbitrator shall not be liable to be interfered with by any court of law or equity, by way of *mandamus*, prohibition, injunction, or otherwise; and no such award, order, certificate or other instrument shall be set aside for any irregularity or informality, or by reason of any matter referred being left undecided; and no such award, order, certificate, or other instrument shall be subject to review or appeal, or be liable to be questioned *on any ground* before or after the making the final award in any court of law or equity, or elsewhere, by any proceeding against any of the scheduled or absorbed companies, or against the arbitrator or otherwise."

And by s. 24—

"All awards made by the arbitrator shall from the date thereof respectively be effectual to all interests and purposes, and binding upon all persons and corporations whomsoever, without appeal, and shall have the like effect as if the same had been enacted by Parliament."



This is called an Arbitration Act, but it is far enough from what is ordinarily understood by such a term. It is an Act in reality for the destruction of all rights in relation to any of the companies existing previously to the Act, and the creation of such new rights as the judgment or caprice of Lord Cairns might call into existence. Of *law or equity* nothing remains. These are avowedly and ostentatiously set aside. The farce has been gone through of printing and publishing his lordship's decisions; but of what use as authorities can the decisions of a judge be, who is exempt from the obligation to decide either according to law or equity? One might as well cite the decisions of the Star Chamber or the Roman Curia; and in truth, so far as we have followed those decisions, they need some apology. Not one of them has been or could be appealed from, but in one instance, a case on all fours identical with one that occurred in Waterloo Place, arose in Lincoln's Inn, and his lordship's judgment was departed from without any hesitation. We will say of them generally at present, reserving the whole for future consideration, that every page of them has startled and confounded us. The following is a fair deduction from one of the most important. If A owes B money, and A agrees with C that C shall pay the principal and interest of B's debt, and B afterwards takes some interest from C, even under a protest that he has not discharged A, still, that B shall be held to have adopted C as his debtor and discharged A. It is incredible, but it is a true deduction from what his lordship in Waterloo Place has determined, as we shall at a future time show. The effect has been to throw nearly the whole of the policyholders and annuitants of all the associated companies which had been bought up by the Albert upon that company only, whose effects will not, we believe, after paying the expenses of the so-called arbitration, pay more than a small fraction in the pound of its liabilities. We have perhaps no right to find fault with any of his lordship's decisions, however much they may depart from our notions of law or equity, nor will they, we presume, ever be cited in the Courts, inasmuch as they will always be open to the criticism, that no one can ever tell how far they are to be considered as enunciating legal or equitable principles, or how far his lordship's absolute and uncontrolled discretion.

But where were the constitutional and conservative principles of Mr. Gathorne Hardy and Lord Cairns when they sanctioned such an Act of Parliament? Of all things to be dreaded in the stormy times of a commonwealth is the introduction, *pro re natá*, of special tribunals. They are now in full play and activity at Versailles, and with what

result every day discloses. When once the powers in authority cry out that the ordinary tribunals are too dilatory and too much encumbered by the forms of justice for the purpose required, we may be prepared for rampant tyranny. This affair of the Albert is but a small matter in itself, but it is a grave precedent. The land laws may require serious modifications, and it may require great care to adjust the relative rights and interests of tenants for years of life estates, and heirs in tail, of reversioners, and encumbrancers. It will be an arduous undertaking for whoever may attempt it. But the Albert Arbitration Act has shown a short way out of all the difficulties, and that Act will justify a summary abolition of all existing rights, and the delegation to some rough-handed democrat of a new social arrangement, independent of all the old trammels of law and equity. Or the Church of England in Wales may, *pari ratione*, be handed over in the same manner to the Lord Chief Justice of the Queen's Bench, with the abolition of all existing rights, privileges, endowments, honours, dignities, and property of every description, to be dealt with and disposed of as his lordship shall think best, *pro salute reipublicæ*, without regard to law or equity, where he shall think proper to dispense with the same.

The shocking precedent is bearing fruit while we are writing. A few days since, a Bill of the same nature as the Albert Arbitration Act was brought on for a second or third reading in the House of Commons, and was denounced by Mr. Eykyn and Mr. H. James in severe terms. It was a Bill for winding up the European Insurance Company. We have not seen the Bill; but we understand that Lord Westbury is to be what is called arbitrator, but with an increased honorarium.

But the House of Lords is awake at last to these unconstitutional measures. Mr. Ayrton has brought in a Bill for the settlement of all the difficulties which have arisen respecting the rights of the public and of private properties in Epping Forest. Those difficulties have given rise to numerous suits and actions in equity and law which are now pending. The Bill proposed to stop them all, and to submit to four commissioners the absolute power of disposing of all rights in the forest at their discretion; in short, to exclude from the ordinary tribunals that portion of Her Majesty's dominions which is known as Epping Forest; and all the individuals who on the faith of the British laws had invested their money in the acquisition of land within that territory. Although their lordships, without hesitation by the Albert Arbitration Act, felt no scruple in handing over poor orphans, widows, and annuitants to the mercy of an irresponsible dictator, when a

matter affecting *landed* rights came in question, they were quite of another mind, and refused to pass the Bill, except with the omission of every clause interfering with pending actions or suits. They seem to have become at last aware that to exclude any one from the jurisdiction of the ordinary tribunals which, in truth, are the birthright of every Englishman, and to send him, *volente nolente*, before a strange court, not of his own choosing, and without any redress against error or injustice, is a monstrous tyranny. We shall see how their lordships will now deal with the European Companies Arbitration Act.

But what was the pretext for so violent and arbitrary a measure? It is alleged that the Court of Chancery was utterly incapable of disposing of a matter so complicated and so vast in its details. If that were true, what a bitter satire it would be on our judicial system! In this great commercial country we are, then, without any tribunals which can deal with the largest of all commercial transactions! We are to conclude that the affairs of our great companies are unprovided with any means of liquidation, but by the creation in each case of a special tribunal untrammelled by law or equity, and with absolute and arbitrary powers. If this be so, can there be any more urgent call for the immediate intervention of the Legislature? Happily it is not true, and in this case of the Albert we unhesitatingly say, that with due diligence on the part of those conducting the winding up, the whole might have been disposed of with as much despatch as under the arbitration. A more able, intelligent, or industrious body of men does not exist than the chief clerks of the Vice-Chancellors and the Master of the Rolls; and if delay takes place in their offices, we may rest assured it is not their fault, but the fault of those who have the conduct of the proceedings. They are only too glad when solicitors will promptly and with energy carry out the matters intrusted to their superintendence; but such promptness and energy are too often wanting, and the Court of Chancery has to bear the blame. This leads us to a very pertinent remark. Not one officer of the Court of Chancery was called to substantiate the statement in the Act, that the Act was indispensable for winding up the company. We venture to say, there is not a chief clerk who would not have deposed that it was by no means indispensable, and that the winding up could just as well have been accomplished in their chambers as elsewhere, if the solicitors and liquidators had been as earnest and zealous in accomplishing that end as they might have been. But let us not be too harsh; they must have been very active, far more so than we are aware of, for the cheques for 5000*l.* which were paid them must have represented a vast amount of work of some sort. All we can

say is, that in the interval of more than a year and a half from the order of winding up to the passing of the Act, all that we can find to have been effectually done, was the settlement in some fashion of a list of contributories, a call of 1*l.* per share, and its application to the payment of expenses. Surely the committee should have satisfied themselves by some very conclusive evidence, that so arbitrary and tyrannical an Act was indispensable before they ventured on reporting it to the House. That they were so satisfied we must presume, but upon what evidence we are not able to discover.

We have said thus much in the interest of law and justice. We hold in horror every invasion of the prerogative of our ordinary tribunals to decide every possible dispute that can arise in the body politic, and we see in every attempt at such invasion the germs of disorder, the end of which we cannot foresee. The Act in question violates every tradition which has made the English nation so law-abiding and so easy to govern.

We wish we could stop here, but our respect for the dignity of the Peerage, especially for the *noblesse de la robe*, forbids our being silent on what appears to us seriously to compromise that dignity, and to diminish the respect which is its greatest security.

As a Peer Lord Cairns is a judge in the last resort, a judge in the highest Court of Appeal, and he is also a member of the Judicial Committee of the Privy Council. As a matter of taste, is it desirable that he should descend from his high estate, and for an honorarium perform in a private chamber the humble duties of an arbitrator? Does it not tend to tarnish somewhat the gloss of his robes? And great as may be the relief to an income narrow enough for a Peer of the realm, is it not purchased at too great a sacrifice?

The 28th section of the Act provides that "*the expenses of the arbitration (including a sum not less than 2000*l.* to the arbitrator for his personal trouble)* shall be determined by the arbitrator, and paid in such manner as he shall direct." If the words "not exceeding" had been used instead of "not less," we should have been a little surprised at the amount; and we suppose that most persons reading the Act will presume that 2000*l.* is the honorarium to be paid to the ex-Chancellor for his services. We hope it may prove so; but we must not forget that the amount is unlimited at which he may choose to value himself; that out of the funds he can help himself to as much as he likes, and be paid when, and how he pleases. Truly it is a position of such delicacy, and so exposing the occupier to suspicion, that a sensitive mind would hesitate to accept it. But such is the Act, and such is the confidence reposed in him by the

Act that his lordship may sweep into his pocket the whole funds of all the companies, and no means whatever of redress would exist. In a moral sense it might be glaring and infamous robbery, but it would be according to law, and expressly sanctioned by the Act. Considering that Lord Cairns is authorized under the Act to fix his own honorarium, and to pay himself out of the assets of the companies as much as he pleases, those words "not less than 2000*l.* for his personal trouble" strike us as very odd. If other persons had to fix his remuneration, they would have been intelligible enough; but why was it necessary to impose a limit to his own moderation? Were the promoters afraid that his lordship would estimate himself and his services too cheaply, and found it, therefore, necessary that some compulsion should be put on his coyness and modesty, and that he should be forced, however much against his will, to accept *at least* 2000*l.*

Some malicious people have suggested that 2000*l.* was the least sum that could sharpen his lordship's faculties, and enable him to penetrate the mysteries of the complicated web he has engaged to untie.

What makes a man see all things clear?

Give him two thousand pounds a year.

And see them clearer than before?

Why add to that two thousand more.

But we prefer our own solution of the phenomenon. It does honour to his lordship, to the Committee of the House of Commons, to the Parliament, and adds to our judicial glories. Here is a great judge so disinterested that he will give up weeks and months of his well-earned repose for the benefit of his fellow-creatures, and nothing could prevail on him to accept a remuneration but an Act of Parliament compelling him, whether he would or not, to take *at least* 2000*l.* for his personal trouble! Let it be recorded! Let it be graven on brass!

His lordship was not always so well disposed to arbitrations, when County Court judges, with their modest pretensions and moderate salaries, acted as arbitrators. During his Chanceryship he caused a circular to be sent by his secretary to the County Court judges, stating that he had been informed that some of the judges acted occasionally as arbitrators for fees, and that in his opinion it was contrary to the spirit of the 15 & 16 Vict. c. 54, s. 16, that they should do so. That Act provides that a judge shall not "practise at the Bar, or as a special pleader or equity draftsman," but is silent as to his being an arbitrator.

Now, the County Court judges, although with far less salaries, are just as much functionaries of the State, and with as

good a title to their offices as the Chancellor himself, and have as lively a sense of their dignity and responsibility as any Chancellor ever had. It seemed to many of them somewhat unseemly, that a Chancellor should presume to govern them by circular letters, as if he were their commanding officer; and indeed it is difficult to understand why those judges would not be equally justified in a united remonstrance at this moment to Lord Cairns, against his lordship taking upon himself, although a Peer and a judge in the Privy Council, to do that which he seemed to consider beneath the dignity of a County Court judge.

But the circular was not merely unseemly, but seems to us to have been a most unjudicial act, for by the 9. & 10 Vict. c. 95, s. 18, the Lord Chancellor may remove a judge "for inability or misbehaviour." This, however, he can only do on cause shown in open court, in which he would be called on to exercise his judicial functions in solemn audience. Supposing the only complaint that could be urged against the judge were to be that he had acted as arbitrator for fee or reward, what sort of justice could be expected from a Chancellor who had already committed himself to so decided an expression of opinion?

Some of the judges we know treated the circular with contempt; and their contempt is not likely to be diminished when an existing Chancellor has disposed them to the doctrine, that there is no spirit in any Act but such as is embodied in its words; and when the same lord that issued the circular, without anything like the pretext which a County Court judge might allege, and in the face of reasons of infinite pungency peculiar to himself, does the very thing which in his circular he deprecated. By the spirit of the Act, Lord Cairns meant, we suppose, the intention of the Legislature; but we will not think so hardly of the Legislature as to suppose that it would treat as derogatory to the dignity of a County Court judge, and humiliating to his position, that which it would sanction in a Peer of Parliament and a judge of the Privy Council.

What benefit the unfortunate persons interested in the Albert Insurance Company will get by the Act we are at a loss to conceive. In due time we shall see the results. We have not yet heard of any dividend, or of the prospect of one. We may be able better to estimate the chance of one, if some Member of Parliament will move for a return of all the costs, charges, and expenses that have been incurred and paid, or are payable, out of the funds of the Albert, or any of the absorbed companies, since the date of the order for winding up the Albert, to the arbitrator, the solicitors, or liquidators. A *compte rendu* will have to

be presented one day, and we hope it will not whet the already too eager appetites of legal speculators.

But what most pains us in the whole affair is, to see in the Act itself that absence of all sensitiveness to the high prerogatives of justice which has hitherto been our boast, and is in truth the cement which holds us together as a nation. If our tribunals are insufficient for their objects, in heaven's name let us mend them, increase them, modify them, in any way and at any expense, rather than loosen the bonds of society through a miserable economy. We trust that we have heard the last of these special tribunals. It may be that in many respects our judicial machinery has been by a thriftless parsimony reduced to a state in which it no longer answers the exigencies of the country. But such wretched makeshifts as the Albert Arbitration Act, 1871, will, we doubt not, soon lead ignorant people to suppose that law and equity are impracticable absurdities, and that justice is better measured by the Chancellor's foot, than by reason, learning, or intelligence.

#### .IV.—RESPONSIBILITY AND DISEASE.

By J. H. BALFOUR BROWNE, Barrister-at-Law, author of  
"The Medical Jurisprudence of Insanity."

"Every stupid man, every cowardly man, and every foolish man, is but a less palpable madman."—*Carlyle*.

THE question as to what ought to be the test of insanity in courts of law is of sufficient importance to require a definite answer, and owing to the prominence which has been given to it in connection with certain recent cases, is of sufficient interest to insure its consideration by a great many persons who do not belong either to the medical or legal profession. There seems to be little doubt that, owing to the more thorough training which is bestowed upon members of the medical profession, and owing also to the better scientific methods which have been so largely made use of in our days, a great many persons who were formerly regarded as sane have come to be looked upon as mad. So much so, that there are those who hold that the increase of insanity which has been so persistently asserted in recent times, is in reality only an apparent increase, and that the greater number of known lunatics is to be accounted for rather by an emphasis on the words "number" and "known," than on the words "number"

and "lunatics." This fact, then, may to some extent account for the greater frequency with which the plea of insanity is pleaded in relation to judicial inquiries, it being certain that many persons are now recognised as insane who would formerly have been regarded as in a state of perfect mental health. Some people have thought that that fact alone was a sufficient ground for a condemnation of the existing test of insanity, which is, to all intents and purposes, almost the same which existed before those advances which have raised medical psychology from a body of empirical opinions into a science. They hold, with some show of reason, that law must conform itself to scientific truths. The will of man against the will of nature is like an empty scale, on a hair-balance, against a loaded one. Absolute facts have a grim way of stultifying arbitrary laws. And only time is required to enable true science to assimilate all laws to its rules. There is plausibility in these arguments, but they require to be anatomized before we can say whether they are true or false.

Upon these and other grounds, then, which we shall examine hereafter, medical men have insisted upon a change in the law in respect to insanity, and at the present time a committee, consisting of medical men and lawyers, is being formed, with a view to the amendment of the law in so far as the tests of insanity are concerned. The time is not inopportune. The public has a right to have the case for and against amendment laid before it, and the public is, I am convinced, capable of arriving at as satisfactory a conclusion with reference to this matter as any medical man or lawyer, or as any committee consisting of members of these two learned professions. Medical men, then, assert that insanity is a disease, and a disease of body; and lawyers, so far as I know, are not inclined to deny this assertion. If you assured a lawyer that the intention to enter into a contract was due to certain molecular changes in the grey matter of the brain, it would not affect his theory that the essence of a contract is consent. He has nothing to do with thought as thought, or with the physical basis of thought; he concerns himself only with thought when it becomes act. His province is not mind: that he leaves to the psychologist. His province is not body: that he leaves to the physician. But his province is conduct. Now, just as the etiology of consent does not matter to him in relation to the law of contracts, so to some extent the fact that insanity is a disease is of as little importance to him in relation to medical jurisprudence. This shall be considered at greater length in a subsequent part of this paper. At the present time, I am anxious to place the position of medical men in relation to this question clearly before my readers.



Medical men seem to be under the impression that the object of the law, in all cases in which the question of sanity and insanity is in the cognizance of a court of justice, is to discover whether insanity *really exists or not*, and that impression is erroneous. The object of the law in all such cases is, first, to discover whether insanity can be *proved to exist*; and secondly, to discover whether that insanity is of such a nature as will exempt the individual from the consequences of his criminal act.

The second of these questions is to be answered with reference to that rule of law, or legal test, the satisfactoriness of which we propose to consider; but as a preliminary to that it may be well to consider the error into which large numbers of persons have fallen with regard to the object of all legal processes, and to point out one or two of the consequences of this error. First, then, medical men think that the object of a judicial inquiry, in which sanity is in question, is to discover whether insanity exists or not, the real object being to discover whether insanity can be proved to exist.

Injustice is a necessity of justice. True, omniscience and omnipotence might, if it wished, do absolute justice; but ordinary human tribunals must be content to do some things unjustly that many may be done justly. Friction is what retards a wheel, and yet without it there could be no motion, no expedition. So injustice is what mars our best efforts to do right, and yet without it no justice could be done. I am not looking at it in the large sense. True, the one exists *from* the other, *in* the other, and *through* the other. True, the one is the essential *other* of the other; but even looked at in a peddling governmental way, the existence of the one implies the existence of the other. All government is founded on a maxim which has this thought in it: that to get liberty we must give up liberty. So it is true, to get justice we must suffer injustice. "It is only with renunciation that life, properly speaking, can be said to begin." It may seem very horrible at first sight, to say that the object of all our legal tribunals is the discovery not of truth, but of *proved truth*, which must in some way differ from one another, or the distinction would be unnecessary, but the inevitability will reconcile people to the notion in time. Experience of impossibilities is a great means, nay, the only means, of discovering how to make use of opportunities. That this is inevitable is certain. Thus, suppose a man, who is innocent, to be accused of a crime, and that owing to his likeness to the real perpetrator, he is positively sworn to by several individuals who saw the crime committed. This man may, although perfectly innocent, be unable to prove an *alibi*, unable to establish the fact of his innocence by any witnesses. Now, I ask, how under such

circumstances is a court of justice to arrive at a conclusion, as to the true state of the case? He asserts his innocence as every other prisoner, guilty and innocent, does: he produces no witnesses; and three or four persons, who have no possible reason for speaking untruthfully, swear that they saw him commit the crime of which he is accused. Under such circumstances *it would be right that the innocent man should be punished*. If there was no rule as to evidence, there could be no law; and if there was no law, life would be insecure; and property, upon which life depends so much, would be worthless from the insecurity of its possession. Because one medical man makes a mistake and kills a patient, is the science of medicine worthless? Because law can only do partial justice, are we to have no law and no justice?

Such cases as that stated above have occurred. Innocent men have been, and are being, punished for crimes they did not commit; but under any law in the world that must be the case; and to avoid such dire mistakes you would require, in the first instance, to make human nature perfect before you could get a perfect law; and if you succeeded in perfecting human nature, law would no longer be necessary. That was the case of a sane man; take the case of an insane person. Insanity is a bodily disease; and in one way it may be said that it does not begin at all. What we call predisposing causes, might really be more scientifically called latent insanity. The disease existed in one's grandfather, but it is latent in us, until some exciting cause—for instance, a blow on the head, over fatigue, mental distress—makes it actual. As every body has latent heat, so every organism has latent insanity. But even where insanity manifests itself by external signs, it is often exceedingly difficult to detect. There are what physicians call premonitory symptoms, but no physician can say where sanity ends and insanity begins. At one time they may say "the man is sane," and at another "the man is insane," but it is impossible for any one to say when health ceased and disease commenced. When does the dawn begin? When does twilight end? Does summer really commence on the first of May? Is not health just a state of comparative freedom from disease? All nature's works are tricks of *leger-de-main*. Now, as that is the case, it is evident that we always must make mistakes, and so long as there is a necessity for punishment at all, insane persons will inevitably be punished. What else is possible if medical men cannot say when insanity commences? and even if they could give evidence on this point, many insane persons must, without doubt, suffer punishment, simply because each one of us play a game of chance, and the dice are often loaded. Suppose a person is accused of a crime, and that no medical man sees the

prisoner, or that the medical men who do see him make a mal-diagnosis—which is evidently possible—and pronounce the man sane when he is insane.' Suppose that there is nothing in his past life, or in the nature of the act, to suggest the existence of insanity, and that the plea is never pleaded, although the man is actually insane; under such circumstances, just as in the case of the sane man above alluded to, the prisoner will be rightly convicted and justly punished, simply because he has not been proved to be mad. Can anything be clearer than that such casualties are inevitable? So long as we have government by force such accidents will happen, and we must in a mournful way congratulate ourselves upon their occurrence, as we are persuaded that they are the necessary incidents of good government, and the fair administration of the law. "The restraints upon men as well as their liberties are to be considered their rights," says Burke; and the sacrifice of some persons who are perfectly innocent is not to be regarded as such an unmitigated evil, as counsel, who eloquently assert that it is better a hundred guilty persons should escape than that one innocent person should be punished, would have us believe. That may be as they say; but the counsel who make such statements are generally for the defence. But if it was true it would not affect the argument. If law sacrifices a few innocent, what does nature do? Does she not sacrifice all living things, good and evil, just and unjust, in her own good time, for the benefit of the race? We scarcely think nature barbarous! Consequently, the proposition that judicial inquiries in such cases are for the purpose of discovering who are proved insane may be regarded as true, and the impression that the objects of courts of law in such cases is the discovery of the existence of insanity may be looked upon as erroneous.

I am now in a position to consider the second question which I proposed, and that is the legal test of insanity. For the purposes of law the insane must be distinguished from the sane. It may be true that sanity passes into insanity, and insanity passes into sanity, as gradually as night passes into day, or as day into night. Yet, just as there is a necessity for distinguishing day from night, so there is a necessity to distinguish sanity from insanity. It is not proposed, so far as I know, to treat all sane men who commit crimes in the way that we treat insane men acting in the same way, nor is it proposed to treat insane criminals as we at present treat sane criminals. We are not going to make our gaols asylums, nor our asylums gaols. Hence the necessity that there is for distinguishing between those who are mentally sane, and those who are mentally insane.

Stupidity passes into intelligence by as imperceptible

degrees as those which constitute the progress of health to disease. Men grow in stature with God slowly. A man is not a fool to-day and a sage to-morrow. The growth of intelligence is as gradual as the growth of the body; and as the management of property and affairs pre-supposes the possession of intelligence, the law, to protect men from themselves, found it expedient to say, that unless a man had intelligence he should not have complete power over his property, and it consequently became necessary to draw a line between childhood and manhood, and the law did so saying a man shall come of age at twenty-one. The scientific value of this test of intelligence is evidently very small. It cannot be said that a man is really able to enter into an intelligent bargain to-day which he would have been unable to enter into yesterday. Besides, some men have more intelligence at seventeen than others have at forty-five. The absolute necessity for some such rule, however, and the impossibility of one more conformable to the facts of human development, are sufficient reasons for the existence of this rough test of mental power.

Now, although it is asserted with truth that any definition of insanity is almost an impossibility, those persons who make such an allegation must be prepared, when they ask a court of law to pronounce upon the sanity or insanity of an individual, to expect that it should have some means of finding out what insanity is, and some proof of its existence. I believe that some persons are in the habit of asserting that it is at this point that the law becomes irrational. Those persons argue that it is impossible to draw a line between sanity and insanity, and that, consequently, any test of insanity, as it is not founded upon nature, must be absurd. They would desire that every case should be tried on its own merits, and would, so far as I can understand their argument, desire that the question as to sanity or insanity of an individual should be left to a jury, upon the unsupported opinion of medical witnesses, who are able to recognise but not to define insanity. A trial in which insanity was pleaded would, in that case, be conducted by the examination of medical witnesses on both sides, and the judge would leave the jury to decide upon the question of sane or insane, without telling them any test of insanity, but simply telling them to make up their minds as to which of the medical men was most trustworthy, and to give their verdict on the ground of the reliability of the witnesses. Their reliability would have to be judged of from the way in which they gave their evidence, and not from the internal evidence of the worth or worthlessness of what was said. This method would, it is argued, have many advantages. It is a most difficult thing to make scientific evidence intel-

ligible to an unscientific mind. It is almost impossible by means of question and answer to bring out all the symptoms which indicate the presence of insanity, and to show the significance which only consists in the relation of these symptoms. To a person who does not know the science of mind, the inferences that physicians draw from symptoms and facts would not seem to be legitimate, and consequently the evidence of an expert is held worthless just when it ought to have the greatest weight. If they were only asked to say whether they thought the person sane or insane it would be much better. I believe, these medical gentlemen who argue thus have some objections to cross-examination, and are convinced that some such system as that I have sketched above would be infinitely better than the present legal process. It might be said with some show of reason, that in the case of a man coming of age there should be no fixed rule that each case should be decided on its own merits and on the proved mental capacity of the youth, and that this capacity should be proved by the expression of opinion upon the part of his friends and enemies. I have never heard this argued, but it seems to me as reasonable as the proposed amendment with reference to the abolition of the test of insanity. If any one thinks that better results (and it is by results that laws must be judged) would follow from such a course than those which are attained under the present system, I can only say that I differ from him. If any one imagines that more substantial justice would be done under such a system than under that which adopts a definite test of insanity, I can only say that he is profoundly ignorant of the science of evidence, however well he may be versed in the science of medical psychology. The theory of the law, and it is a theory for which a good deal can be said, is that a witness is summoned into a court of law to speak concerning facts and not to give opinions, and even where witnesses are asked to give opinions, they are at the same time asked to state the facts upon which they are founded, so that the jury may test the worth of their inferences. We have in recent times become enamoured of evidence and disgusted with authority. We have come to respect facts and despise opinion, and we have come to these conclusions with reference to the relative value of the liquor of facts and the froth of opinion which foams upon it, for very sufficient reasons. It is true that a man's personality is sometimes an argument. If we know that personality well it might bulk largely as a fact in many reasonings. Some great men have in virtue of their personalities been mind-compellers, as Jove was a cloud-compeller. True genius is the essence of facts. But experience has taught mankind that the

difficulty of an accurate estimate of the worth of a man's personality is exceedingly great. It has taught us that the counterfeit of worth is so easy, that men have come to the conclusion that in most cases authority when it looks best is most worthless, and that it is well to rely only upon facts: those

Chields that winna ding,  
And canna be disputed.

Under these circumstances it is somewhat extraordinary to find medical men, whose whole science has to do with facts, demanding a judicial recognition of opinions. The thing is not only strange, it is ridiculous. How can a jury be said to arrive at any conclusion with reference to sanity or insanity, when they are asked to decide between the stupid notions of rival practitioners, whose diversity of opinion has become proverbial, and whose apparent incompetence in questions of mental disease is fast becoming a by-word? The thing is simply grotesque. Yet, however worthless an argument may be, it is always worth refuting. There are some persons who seem to have a sort of heart in their heads which leads them to sympathize with weak arguments. For their sake, those impostors of the world of thought, fallacies, ought to be exposed.

The ground of this argument is, that it is impossible to draw any line of demarcation between sanity and insanity; and while I admit the difficulty, I cannot see that the argument in any way supports the theory. Is it easier to draw a line of demarcation between guilt and innocence? That too, like sanity and insanity, is a work of nature. Guilt passes by imperceptible gradations into innocence, as insanity does into sanity. No one can draw the line; but is that a reason for asserting that no legal distinction between these ought to be made? Is it a reason for asserting that every case ought to be decided on its own merits and upon the evidence of philosophers, who have made the human mind their constant study, and who should be asked their opinion as to the guilt or innocence of the accused. Are we to be told that upon such evidence a jury would, after coming to a conclusion as to the trustworthiness of the experts, arrive at a satisfactory conclusion as to the guilt or innocence of the accused? Is it asserted that such a verdict would be satisfactory to law, or in conformity with science? Yet the determination of the questions connected with moral turpitude is quite as difficult as the determination of those which are connected with, so called, moral insanity. The degrees of criminality are infinite, so much so that it would only be truth to assert that no two men who received the same sentence for what appeared to be exactly similar crimes

were ever equally guilty. Search all time and you will not find one offence which was exactly similar in its moral aspects to any other. Are these arguments for such a system as that I have indicated? But the argument may be carried one step farther. Are not truth and falsehood in the same relation as guilt and innocence? Are there not white lies and black lies, and a hundred shades of grey lies? Is there not a science of casuistry? Can any one say where truth ends or falsehood begins? True, many people know a downright lie when they see it, just as many people have no doubt about the presence of mania from the wild broken conduct of a man. But can we draw a line between truth and error? These depend upon nature as much as sanity and insanity, and are, or may be, as much dependent upon organism as mental health or mental disease. Truth is like white light: it is made up of many colours, and the mediums of minds it passes through tincture its rays. Well, if no line can be drawn, should law draw a line, and should such a difficult question as the trustworthiness of philosophers or physicians be left to the decision of a jury? Certainly not! Therefore, if the question of trustworthiness cannot safely be left to a jury, there would be nothing upon which they could decide in the proposed investigation of the opinions of medical men or philosophers. If we withdraw one of these questions, sanity or insanity, guilt or innocence, truth or falsehood, from a jury, we must withdraw all. They are precisely analogous. If we withdraw all there is nothing left for a jury to do, and the proposed tribunal has ceased to exist. Some people may go so far as to assert that if it did it would be no great loss; but it is to be remembered that this *reductio ad absurdum* has been proved only with reference to a court which was to decide upon opinions, and which was formed with that view because of the impossibility of definition. That a trial of criminals is a necessity few will deny, and that all questions of guilt and innocence could be left to an experienced medical assessor for decision, not many will be found to assert. Are these objections answered? It seems absurd to use so much time for so little purpose. Who takes a mitrailleuse to shoot a rook?

Guilt and innocence, then, cannot be clearly distinguished. Even when we have satisfactory proof of the commission of a crime, or of what we call a crime, we cannot be certain that there is any moral turpitude connected with the act. "There is no crime," says Jacobi, "but has sometimes been a virtue." This requires no consideration. The fact is palpable; and yet although that is so, it is not argued that there should be no criminal law; it is not argued that there should be no punishments; it is not argued that the present confessedly rough

method of judging of guilt or innocence is satisfactory. Even those physicians who argue that there is no distinction in nature between crime and insanity, and who blame organism for all errors, do not, so far as I know, assert that there should be no such thing as government. The police is an institution which is still regarded as necessary. That being so, why should any different method of procedure be adopted in relation to the insane, than that which is adopted in relation to the sane? The state exists for the sake of healthy men, and not for the sake of those who are diseased; yet some advocates would have us believe that it is above all things important to protect those who are mad, instead of endeavouring to secure the greatest amount of happiness to those who are sane. Those persons only misunderstand the fundamental principles of the constitution of society. If, then, we are to have a test of guilt, why should we not have a test of insanity? Not because the latter is a disease, because the former is, according to many, a disease likewise. If it is argued that insanity depends almost entirely for its recognition upon medical experience, it is at the same time emphatically denied by those who have had no little experience of mental disease, the present chairman of the Commissioners in Lunacy maintaining, "that persons of common sense, conversant with the world, and having a practical knowledge of mankind, if brought into the presence of a lunatic, would in a short time find out whether he was or was not capable of managing his own affairs." But even if it were granted that we must depend upon physicians for the recognition of insanity, it is surely certain that medical experience is like all other experience, an experience of facts, and that facts are capable of expression by words and of appreciation, after due explanation, by common sense.

The questions which come before a court of law in cases where insanity is not mentioned, are sometimes quite as complicated as any case which involves a question of mental disease. Questions of intention or of patent law are much more abstruse to an ordinary jury than questions of conduct. Yet in all these cases juries are thought competent enough. Take, for instance, a case of poisoning. A common jury know nothing about toxicology. They are not acquainted with the complicated phenomena of death; they do not know anything about symptoms, poisonous doses, and *post-mortem* appearances, and yet, if they have these things stated in evidence, if they hear the symptoms enumerated, the *post-mortem* appearances described, and the other parts of the case laid before them, they can come to a satisfactory conclusion as to the difficult question as to the cause of death, and the guilt or innocence of the accused, and they do



this by means of a legal test. Why should that not be possible in the case of insanity? Only one reason can be suggested why it has not been practised with as satisfactory results, and that is the strange incompetence of medical psychological witnesses, for the most part, who have occupied themselves far more in declaiming about the unsatisfactory state of a law they did not understand, than in becoming acquainted with a disease which they pretended to treat.

So far what I have said only goes the length of proving that there must be a legal test of insanity, and I have not yet dealt with the question as to whether the present test of insanity is satisfactory or not. It is one thing to prove the necessary existence of some law, and another to prove the excellence of the existing rule. We have seen, then, that law cannot be made conformable to accurate science; that uniformity in rule is an advantage which must not be sacrificed to a pseudo exactitude of justice; and it is better that those youths who are capable of managing their own affairs at the age of seventeen, should wait a few years before they enjoy the whole control of their property, than that there should be no definite rule with regard to minority and majority. But although that is indisputable, there must be some means of discovering whether the existing rule, say as to minority and majority, is a good or a bad one. If it was agreed on all hands that every man was able to make a good use of his property at the age of seventeen; if it was admitted that the great mass of mankind came to their prime at that age, and that they were no more likely to be under the influence of others, or be affected with boyish rashness at that age than at thirty, then, unquestionably, the rule, as it at present exists, would be a bad one. The rule is founded, not upon a scientific estimate of the development of mind, but upon a common-sense experience; and it is because that common-sense experience is in conformity with palpable facts, that it is adopted by law and approved of by mankind. This indicates, then, that the rules of law are to be judged of, as to their excellence, by a reference to facts, and that these facts must not be occult and discoverable only by the microscopes of science, but must be visible to the unassisted eyes of ordinary men. By this criterion, then, we must estimate the worth of the existing test of insanity. At the present time the law with regard to this subject may be supposed to rest upon the answers given by the judges to the questions proposed to them by the House of Lords after the trial of M'Naughten. According to these answers the knowledge of right and wrong is made the test of insanity, and without entering more fully into the doctrines involved in their answers as to the presence of delusions, and as to the exis-

tence of partial insanity, I may enter upon the consideration of the question whether that test is satisfactory or not.

The argument most frequently urged against it is that it cannot be a test of insanity, because a great many insane persons know right from wrong. Thus, those persons who labour under *melancholia* are often free from all delusion, and very often have the sense of right and wrong in a morbidly acute condition. Superintendents and directors of asylums for the insane manage to maintain discipline and order in their institutions by means of a system of rewards and punishments, and that fact proves that those persons who are upon all hands admitted to be insane, have a knowledge of what is permitted and what is forbidden—a knowledge of right and wrong. This argument is thought by many persons to be a satisfactory proof of the absurdity of the present legal test. What can be more absurd than to set about distinguishing between two classes of men by a knowledge which is common to both?

One preliminary question requires to be answered before we arrive at any satisfactory conclusion as to this matter, and that is, is there such a disease as monomania? Is there such a thing as a mental disease, which makes a man mad at one time, although he is sane at another; which makes him mad in relation to certain circumstances, while he is sane in other relations? Can a man be sane with reference to one subject, and insane with reference to another? The answer to these questions has been over and over again given in the affirmative by medical men, and even those who know nothing about medicine are in a position to answer it. Men have delusions about particular things or persons, or events, but upon every other subject they are rational and sane. The existence of such words as *klopedomania*, *pyromania*, *homocidal mania*, in the nomenclature of insanity, shows that the separateness of diseases, in relation to these manifestations in act, has long been recognised. It being decided, then, that a man may be sane with reference to one subject, and insane with regard to another, or, as Baron Alderson put it, “may be *non compos mentis quoad hoc*, and yet not *non compos mentis* altogether;” and it being certain that a man is never wholly, and, with regard to any subject, utterly and always insane, is it not evident that the argument that the insane know right from wrong proves nothing? Should we not expect to find a man knowing right from wrong in relation to every subject upon which he was sane, and yet unable to appreciate the distinction in relation to his conduct which resulted from his insane belief? Can that be said to be any reason why right and wrong should not be the test of insanity? Does not the existence of the moral sense in all lunatics; does not the fact that order and discipline

in hospitals for the insane are preserved by means of rewards and punishments, prove that lunatics are, in relation to many of their acts, sane? If a monomaniac speaks truth, are we to deny him virtue? If he lies, is it not vice? Can a man who is partially insane not at the same time be vicious? Then why plead the possession of right and wrong by all lunatics on subjects apart from their delusion as an argument against its use as a test on subjects connected with their delusion? It tells the other way if we can prove that an insane man lacks the power of distinguishing good from evil in relation to his erroneous and diseased impression.

In that case it will be proved to be a most accurate means of distinguishing the sane acts of a man from his insane acts, which is much more important than distinguishing the insane man from the sane.

Suppose an individual to labour under a delusion that God speaks to him, and commands him to give light to the world, and that the voice even indicates in what way it is to be done—say, by burning down the house. Although that man may know right from wrong; may know that it is wrong to lie, or steal, or swear; yet in relation to that one act he cannot distinguish right from wrong at the time he does the deed; the supposed voice of God has made the distinction between these impossible, and, therefore, he should not be punished for the arson.

In interpreting the law as to this point, medical men have been influenced too much by their feelings as to the unsatisfactory nature of the rule to endeavour accurately to understand what it means. The best argument which has been produced against it is, to the following effect, and it is urged by some physicians who are clear of glance and intelligent of appreciation. The speculative is very different from the active, they say. Many men can *reason* well, but *do* ill. Men live two lives; one in their heads, and the other in the world; and a great gulf often yawns between these which it is impossible to bridge over. There is a wide difference between a speculative knowledge of right and wrong and the power which enables men to put speculative beliefs into action. This gulf may be left unbridged voluntarily or involuntarily. Hypocrisy, of course, delights in the most sublime speculations, for never intending to go beyond speculation it costs nothing to have it magnificent. But the madman may be incapable of going beyond speculation. He may know right from wrong, and yet have none of the capacity to refrain from doing the crime, although he may be fully convinced of the criminality of the act. There is a great deal in this suggestion which is worthy of consideration. Man is, as it were, two. He *thinks* and he *acts*. It is with the latter that law has to do, and it

may seem wrong to choose a test of acts from thought which is partially dissociated from conduct. True, his thoughts do influence his acts, and his acts re-act upon his thoughts; still many men know the good and choose the evil; and if that choice is dictated either by bodily fear, or by what has been called the *duress* of disease, he ought certainly to be held irresponsible for the crime committed. To fill up the notion of a crime, you require not only the knowledge of good and evil, but the power to choose the one and refrain from the other. Responsibility implies free will. If there is no real volition, there is no real criminality. Looked at in that aspect the present test of insanity seems defective. It is not in conformity with the facts which are capable of observation by the mass of mankind, for it is certain that unless the legal test, at the same time that it supplies a means of discovering the health or disease of the cognitive faculties, supplies a means of discovering whether the individual whose insanity is in question, has the power to refrain from the wrong of which he is conscious, it would be open to numerous objections, and there would be the most obvious and pressing necessity for a revision and alteration of the law in this respect. An engineer might as well judge of the horse-power of a locomotive from examining the cylinder and the wheels, without looking at the boiler, as a jurist gauge the capacity simply by an acquaintance with the reasoning faculties. The engine will not run without steam; potential thought will not become actual thought without volition.

Now, although it does seem that the present test is unsatisfactory, I am inclined to believe that the seeming unsatisfactoriness is due rather to a misapprehension of the true meaning of the test, than to any inherent defect in the test itself. Those who censure it do not seem to have taken the trouble to ascertain what the test really is. It is sometimes an advantage in an argument to mistake your adversary's meaning, and refute your own misconstruction; and I believe that is what most medical men, and not a few lawyers, have done with reference to the test of insanity. The words of the judges' answer are these: "That before a plea of insanity should be allowed, undoubted evidence ought to be adduced that the accused was of diseased mind, and that *at the time* he committed the act he was not conscious of right and wrong." I think that any one who reads these words will be convinced that it is not the knowledge of right and wrong which one may speculatively entertain in calm moments which is meant to be the test of insanity, as so many persons seem to imagine, but that it is the active idea of right and wrong which a man has when thought is passing over into action that is relied upon as the distinguishing mark of sanity. These words do

not mean that a man's responsibility is to be judged of by his thorough understanding of the decalogue, or of his calm doubts as to the existence of a conscience. They mean that we are to judge by means of the principle of action; and I am so far from thinking that it is the intention of the law to make a speculative belief the test of insanity, that I regard these words as indicating an intention to make the capacity of doing or refraining, the power of choice between good and evil, the real test, and that it shows that such is its intention by the words "at the time he committed the act." The question to be left to the jury is not, Does he know right from wrong now? Does he possess a conscience? but did he *at the time* he committed the act know he was doing wrong? At such a time, speculative beliefs go for nothing. A man's closet-code is not that which he takes into the market-place, into the strife. We do not judge of a man's actions by what he thinks at home, but by what he does abroad. Are right and wrong present to his mind at the time he acts, or are they absent? If they are absent, his actions cannot be influenced by them: he has no choice; and that absence is due to disease. If that deprivation of moral scales is due to mental aberration, he is to be regarded as irresponsible. This knowledge of right and wrong, then, is the capacity which a man has at the particular moment of the deed of being influenced by motives, the power he has of refraining from the act in question. I believe that this construction is not only the obvious one, but that it will be found to be the meaning which has been almost invariably attached to these words by all the judges who have had to leave this question to the jury, and although cases may be pointed to in which injustice has been done by the verdict of the jury, I am convinced that these casualties are due only to the unseemly conflict which has existed between the medical testimony, and not to any difficulty in the rule of law. But it may not be inexpedient to explain my meaning more fully, and that may be done by means of an illustration. Suppose a man to be under the influence of bodily fear, and that a neighbour, with every appearance of malevolent intention, threatens to take his life, and holds a loaded pistol to his head, that man is, according to the law, justified in killing the neighbour who would have taken his life. It is self-defence. Now, at the moment, did the sane man whose life was threatened know right from wrong? The very proverb, "Necessity knows no law," indicates that extreme circumstances do away with all moral distinctions. All the man thought of was how to save his own life, and he did it. An instant afterwards the knowledge of right and wrong returns, and he stands there sane, and responsible for any act he may commit. Now, the case is almost precisely the same in the case of an insane man. Although

he may be perfectly cognizant of right and wrong, still the delusion that God commands him to set fire to the house, confounds and sets at naught all moral distinctions at the time. So a delusion that a man is going to take one's life may lead to a direr crime, from which, as in the case of *duress* above alluded to, the want of the knowledge of right and wrong at the time of the commission of the crime would be held to exempt the individual from the consequences of his act.

Now, this may seem to some to bring the law back simply to a proof of the existence of insanity as a ground for exemption from punishment, for it may be argued that thus explained no criminal has a knowledge of right and wrong at the time the act was committed; but that is not the case. Every ordinary criminal is at the moment he commits the crime fully aware that he is doing wrong; but he calculates the chances; he thinks of the probability of his escaping detection; of the satisfaction of his desire for revenge or the like, and he is influenced by ordinary motives to the commission of the crime, and must be, in case of discovery, dealt with in the ordinary way. The test of insanity thus explained seems to me to draw as accurate a line between sanity and insanity as is practicable, and, viewed in this aspect, it seems to me to be open to none of the objections which are urged against it. At the same time, I am of opinion that any test which would make itself thoroughly comprehensible to the public should be more explicit than the test alluded to at present is. I think that with very few exceptions, the members of the medical profession have mistaken the meaning of the plain words in which the test is expressed; and the legal profession, if it has understood them, which I am inclined to doubt, has not taken the trouble to explicate their meaning. I am, therefore, convinced that the legal test, while it may remain the same in substance, should be different in form. It should be re-expressed, and that with the view of bringing out the fact that the *power of choice* is the real test of sanity, and that to make any choice efficient there must be a knowledge of right and wrong—of the permitted or the forbidden.

I have, then, in this paper considered—First, the necessity of a test of insanity; and secondly, the satisfactory nature of the present test. The first question was answered in the affirmative, on the ground of expediency; and as there has been no other test proposed by those who oppose the present rule of law which would have enabled me to compare the present law with the proposed amendment, I had to examine the merits of the present test in relation to the objects it is meant to attain. As it does to my judgment seem capable of obtaining these ends; and as in times past it has for the most part worked as well as the conflicting evidence which is

produced in courts of law, in such cases, would allow it, I cannot see any other possible answer to the second of the questions I proposed in an earlier part of this paper, than an answer in the affirmative. The way in which the Home Secretary reverses sentences, the irretrievability of punishment by death, however interesting in themselves, have nothing to do with the question under discussion, although they have been so often imported into it that people begin to think there must be some reason for so invariable a sequence. And reason there is; the reason which induces people to win a point at any hazard, and the somewhat stupid zeal for a reform where none is absolutely necessary.

## V.—THE "ALABAMA" ARBITRATION.

THE international arbitration now pending at Geneva—perhaps, in some points of view, the greatest event in modern times—as possibly the harbinger of recourse to arbitration in all cases of international disputes—raises many questions of the highest interest and importance as to the principles which ought to govern the resort to such arbitrations, and the conduct of them. Upon a right understanding and appreciation of those principles must mainly depend the success of such arbitrations, and it is lamentable to observe, in the discussions of the arbitration now pending, that these principles have too often been ignored, or entirely disregarded, if not actually derided and disclaimed.

Two opposite heads of error have been observable in these discussions: the idea that there is no standard of right or wrong as between nations, and the notion that it is to be sought in the narrow doctrines of municipal law. It is hard to say which of these errors is the greatest or the worst. The first is fatal to all international arbitration and to any attempt to solve disputes between nations otherwise than by war, and this dreadful doctrine has actually been propounded, in a spirit perfectly cynical, in an able journal.\* The other error, we have reason to believe, has influenced the advisers of the Government, who appear to rely upon English law, forgetting that it is not binding on our opponents, nor upon the arbitrators, three of whom, as it happens, are foreigners, not acquainted with it, nor recognising its authority. There is, however, a third view, far more in accordance with reason, good sense, and justice, and that is that the Americans, the arbitrators, and ourselves are all equally amenable to public opinion, and

\* *Pall Mall Gazette*.

therefore morally bound by that law which would be recognised by public opinion as binding upon all of us; that is, the general law of Europe—the law which is generally recognised as just and reasonable among all civilized nations. This view was put forward in a letter in the *Times*, on the 15th instant, under the signature of "A Jurist," and it is that to which we feel disposed to give our adhesion. It assumes that there is some law which in all civilized nations would be recognised as so imbued with the principles of natural and moral justice as to be morally obligatory upon nations as well as upon individuals, and as applicable to the affairs of nations as to those of individuals. And in this age it cannot be difficult to discover such a law. In the time of Cicero it was recognised that there was a natural justice equally applicable to men as individuals and in communities, to men in all ages and in all countries, available and applicable in all time; and perhaps the finest passage in uninspired writings is that in which the eloquent Roman describes and enforces this natural justice. All writers assume this natural justice as the basis of international law, and to ignore it is simply to ignore all arbitration but the old, brutal, barbarous one of war. The very reference to arbitration in the instance before us assumes the existence and obligation of this natural justice. All legal systems seek, as Adam Smith said, to make this the basis of their laws, and though they may not all have succeeded in the same degree, and none perhaps perfectly; yet certain principles of justice, as Redesdale, Story, and other great jurists have pointed out, will be found to prevail in all systems of civilized nations, to a greater or less degree, as they have not been perverted or distorted by positive law at variance with them; to a greater degree in our courts of equity than in our courts of law; and to a greater degree in foreign systems, which blend the legal and the equitable, than in our own. Taking the best systems of law—that is, those most generally prevalent and approved of—there will be no difficulty in extracting the great general principles applicable, by way of analogy, equally to international disputes or arbitrations, and those of individuals. The test by which to ascertain these principles will be simple and infallible, and that is, *their general adoption*. As Cicero said, whatever is recognised as just by all nations, may be safely assumed to be so. The Roman law carried out and applied the principles of natural justice to the highest possible degree, and hence its capability for universal use; and its adoption as the basis of every good system of jurisprudence, including our own equity, and whatever is really good in our common law; but, above all, in foreign systems. In modern times, the magnificent development which the French law has received through the labours of successive generations of jurists



like Pothier, has made it the highest standard of juristic excellence; and what the French law recognises as just, may be safely assumed is likely to be taken to be so by any intelligent arbitrators who are foreigners, and to be recognised as just first by foreign nations generally, and equally so by ourselves and the Americans.

Take, for instance, the primal question of all, that of liability. Nations, as Austin has shown, deal with the *sovereign power* in each community; not with the individuals composing it; and hence the very phrase international. But the principles of liability are, it is said, the same with nations as with individuals. Be it so; then what is the *universal* principle as between individuals? It is clear and plain that we cannot have a claim against another founded upon neglect to prevent an act which the one was just as much bound and as well able to prevent as the other. Applying that to the present case, Mr. Adams, as appears from the Appendix to the English case, had an American vessel waiting outside the port of Liverpool when the "Alabama" was about to escape, and warned him to stop her, as he might easily have done, but he neglected to do so. Assuming any amount of neglect on our part, how could it be *greater* than this; or how could the escape be said to be *more* a consequence of our negligence than of that of the Americans? That being clearly the general principle of jurisprudence recognised by all nations, it is *impossible* that the claim can be sustained.

Again, as to the claim for damages, and especially as to *indirect* damages, the French law, which on this as upon most other subjects represents the general sense of nations, lays it down clearly that for the disregard of obligations, even in the case of fraud, only direct and immediate damages are recoverable, not such as are indirect and remote.

"Le débiteur n'est tenu que des dommages et intérêts qu'ont été prévoir ou qui on a pu prévoir lors du contrat, lorsque ce n'est point exécutée" (Code Civile, liv. iii. c. 4, art. 1150).

"Dans le cas même où l'inexécution de la convention résulte du dol de débiteur les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est suite *immédiate et directe* de l'inexécution de la convention" (Ibid., art. 1151).

The "*direct and immediate*" consequences of the non-performance of the obligation; those alone are recoverable by French law. Test this rule by the universality of its adoption. Has it been adopted generally among civilized nations? Beyond a doubt it has, for example, in America and England. "The reasonable rule appears," says Lord Wensleydale, "to be that laid down in France, and which is declared in their code,

and is translated by Sedgwick," that is in the American work, "Sedgwick on the Measure of Damage;" who thus states the effect of the French law as adopted in the American. "The debtor is only liable for the damages foreseen, or which might have been foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor as *directly and immediately* results from the non-performance of the contract" (Sedgwick, p. 80). This translation, it will be seen, is inaccurate, as it substitutes the term "contract" for the French term "obligation," which is of far wider signification, and gives the doctrine a larger application. However, the general principle is adopted in the American law, and it is equally adopted in our own; and in 1854 the American doctrine on the subject was incorporated in a well-known case into our own law. So, as a learned writer has truly said: "Both the English and American courts have generally denied the loss of profits as any part of the damages to be recovered, and that whether in cases of contract or of tort;"\* and he cites Mr. Justice Story to that effect, in a case of capture. Here we have a general principle, recognised by the jurists of all nations, as founded upon good sense and justice, and which is applicable by the clearest analogy to the present case, it having been applied by American judges to losses in cases of capture.

This would certainly go to show that we might safely have submitted the whole question of damage to the arbitrators; and, indeed, *prima facie*, and apart from express words, excluding damage, or any head of damage, from the submission to arbitration, it would be included in a submission of the principal claim itself. Damages are clearly an accessory, and the submission of the principal would imply a submission of the accessory. There, again, the laws of all nations are in accordance. It is so laid down in the writers on civil law, and on that point, as on most others, they are followed by the French jurists. Thus French jurists cite Van Espen, as showing that on a submission of a claim anything arising or growing out of it is also submitted. "Si enim aliquid emergat dependens in principali negotio, recte de eo arbiter cognoscit" (Van Espen, c. 91). So, in our own law, the submission of a claim or cause of action would, *prima facie*, submit all questions as to damages. But it is well known that questions as to the admissibility of certain heads of damage often raise difficult and important questions of law, which the parties will

\* Broom's "Legal Maxims," 95.

not submit to arbitration. Whether in the present case the question of indirect damages was so excluded, is a question into which we will not enter, as it involves the construction of the Treaty, and has in a great degree been decided.

But there is another question of far deeper and wider importance, arising out of the other, and that is the power of either party to revoke the submission to arbitration. By this we mean their moral power, with reference to public opinion, founded on the general law of Europe. Upon this point, as between individuals, there has never been any difference in any system of law; and it has been universally recognised that to revoke a submission to arbitration, without just cause, was a breach of the contract. There was, indeed, this difference between our law and that of foreign countries; that while, in the latter, neither of the parties could revoke a submission to arbitration without the consent of the other, yet, in our law, either party was allowed to revoke at pleasure, at any time before an award was made. Thus in the French law it was laid down that neither party could revoke without the consent of the other: "*Pendant le delai de l'arbitrage, les arbitres ne pourront être révoqués que du consentement unanime des parties*" (Code de Procedure, lib. iii. c. i, art. 1008). This, as the French jurists explained, was because the submission to arbitration is a contract, and a contract cannot be got rid of without the consent of both parties to it, and hence they describe the submission in our contract irrevocable. In our law, also, the submission was regarded as a contract, and, therefore, as Sir W. Evans pointed out half a century ago, it was a violation of all principle to allow one party to revoke. This was recognised at last by our Legislature; and in the earliest of the Acts of the present era for the amendment of the law, the law in that respect was altered, and it was provided that a submission to arbitration should be rendered irrevocable, except with the leave of a judge (3 & 4 Wm. IV. c. 42), which is only given for a just cause. Then in this respect our law was assimilated to that of Europe; another illustration of the influence of public opinion, and of ideas of natural justice, and of the tendency of modern law to come into accordance with them. Under this law, however, it has always been deemed, in accordance with other principles of good sense and justice, that a party who, for any cause, desires to revoke a submission must do so at once upon discovery of the cause; and if he proceeds with the arbitration he will be deemed to have waived the objection. Applying those principles of sense and justice which have already been invoked, it is manifest that the attempt to introduce, on a doubtful construction of the submission, claims clearly untenable by the law of every civilized

nation would be a just cause of revocation. But then this, like every other objection, would require to be urged with promptness, and might be considered to be waived by an indecisive course, and especially by an attendance, and discussion of the claims before the arbitrators. And here arise other and very important considerations as to the power of the arbitrators and their course of procedure.

Here, again, the same general principles of good sense and justice are applicable to arbitration between nations and individuals. The judicial power of the arbitrators is obviously joint, and is to be exercised jointly; though, on the other hand, it is equally obvious that they must necessarily decide a case of difference by a majority.

The French jurists explain it thus: The arbitrators are to have the advantage of their mutual aid and co-operation in the way of discussion and deliberation; and in this sense they must all concur in the arbitration; that is, co-operate and contribute to the ultimate result: and hence, of course, three could not meet without notice to the others, and arrive at a decision. But, on the other hand, when this joint discussion and deliberation has taken place among them all, then—as in all courts and public bodies—the majority must determine. Hence it was that the number, five, was adopted as uneven, in order to avoid the inconvenience of an equal division: and hence, also, three foreigners were enabled to overrule the arbitrators of the two litigants. Upon a joint discussion and deliberation the majority can arrive at a decision and make an award.

And it is to be observed again that, after such a discussion, neither of the Powers—not having previously revoked—could, by the mere withdrawal of its arbitrator, put an end to the arbitration, and preclude the majority from making an award. This rests on the most obvious principles of good sense and justice; for, otherwise, it would be in the power of either party, perceiving the award likely to go against him, to put an end to the arbitration, and defeat that justice which was its object. It is idle to assert that either Power could do this: of course, in one sense it could; but, in another and a higher sense, it could not, as it would violate public law, and outrage public opinion. As between individuals, the French law clearly expresses the dictates of justice and good sense:—

"Les arbitres ne pourront se déporter si leurs opérations sont commencées; ils ne pourront être recusés si ce n'est pour cause survenue depuis le compromis" (Code de Proceed., liv. iii., art. 1).

So is the Spanish penal law as it prevails in Louisiana:—

"The arbiters cannot resign after they have taken the oaths and the proceedings have begun" (Code of Louisiana, art. 450).

The mere withdrawal of an arbitrator after the proceedings have begun—except for good cause subsequently arising—would be a positive breach of the treaty; but more, it would be a wilful default, which, after discussion of the subject between all the arbitrators, would justify the others in proceeding to an award. It is so laid down by the French jurists, and by those of the Canton of Geneva, in which the arbitrators are sitting. It is so laid down in the *Exposition des Motifs* of the Law of Procedure in that Canton, by Professor Bellot, an eminent Swiss jurist:—

"Le compromis étant l'œuvre de toutes les parties, si le défaillant se tait, c'est avec intention, il doit s'importer les conséquences de son silence. Nous lui refusons le recours de l'opposition" (*Exposé des Motifs de la Loi sur la Procédure du Canton de Genève. Par T. F. Bellot, Professeur de Droit, art. 29.*)

The same principle is applied by the French jurists to the wilful absence either of the advocate or arbitrator of a party; and if the arbitrator absent himself after discussion, then the other arbitrators may proceed to an award. So it is laid down by the French courts, and so in our own courts of equity; for it has been held that the mere absence of one of several arbitrators when an award is made is no objection to the award, if it was really discussed in the presence of all of them (*Goodman v. Sayers*, 2 Jac. and W.). So in the American systems of law: though the arbitrators ought to be present when an award is really arrived at, unanimity is not necessary (Code of Louisiana, art. 444), and the majority may proceed to make an award (Brightley's "*Digest of Law of United States*"). Here, again, we see that the universality of a principle is the best possible proof of its soundness, its good sense, and its justice, and, therefore, of its moral obligation on nations as upon persons, and the sanction it is sure to receive from public opinion.

It is idle to say, as some writers persist in doing, that as there is no power to coerce sovereign states, therefore there is no power to control them, and they may act as they please. States, like sovereigns, are amenable to public opinion, and can no more venture to disregard it than can their subjects.

Indeed, in truth, states are more amenable to public opinion than individuals are, for their affairs are public in their nature and invite and appeal to public opinion; and governments in free states are responsible to the public opinion of their subjects. Neither the English nor the American Government, in the face of their own subjects, to say nothing of the public opinion of the world, can venture to violate the general sense of justice, as embodied in public law, or to outrage public

opinion. The very submission of these claims to arbitration is, in itself, the best possible proof of the power of public opinion and the influence of public law. It is because there is such a thing as a public sense of justice embodied in public law, that these two great States bowed to it by submitting to this arbitration. And the same mighty influence to which states and senates must yield, will bind both the Powers, unless the submission is fairly and promptly revoked for just cause, to carry out the arbitration in good faith. This requires that, in the absence of such a revocation, they will proceed fairly and in a straightforward manner; and that they shall obey that award which the majority of the arbitrators, after fair discussion, shall pronounce.

## VI.—MATTHEW DAVENPORT HILL.

WE do not propose in this place to give an exhaustive biography of Mr. Hill. But such a work would be undoubtedly of the highest interest. For fifty years he associated with men whose names are amongst the brightest on the rolls of the nineteenth century, and the story of his life would be valuable, not only as the biography of a life spent in good work, but also as a record of the men he knew who have played an important part in the history of our time. We cannot, however, now do more than briefly record the leading events of his life; whilst in doing so we would venture to express a hope that Mr. Hill's literary executors will in due time give the world a more detailed and matured work.

Mr. Hill was born on the 6th of August, 1792, in Suffolk Street, Birmingham. His father, Thomas Wright Hill, was a man of considerable intellectual power, high principle, and great simplicity of character. When Matthew, who was the eldest child, was three years old, the family removed to Kidderminster, and thence to Wolverhampton. But as the father found that his income, which was very small, would not suffice to educate his children in the manner he would like, he determined to invest all he had in a school, in order that he might secure for them a good education. He therefore, in 1802, purchased a school in Birmingham, which fortunately proved a success. The sons—first as pupils, and then as masters—worked with the father, and in a few years the school was so prosperous that a larger building was required, and the new establishment made a considerable name as the Hazelwood School. The Hazelwood

system of education became celebrated, as a protest against the narrowness of the school system of that day, and was in a great measure the cause of the subsequent improvement in public school education. For several years two establishments were carried on; one at Birmingham, and the other at Tottenham. Finally the whole was united at Bruce Castle, Tottenham, where Mr. Arthur Hill, one of the sons, carried on the school for many years, and was succeeded in his turn by his son, who conducts the school at the present day. The assistance of his sons enabled Mr. Thomas Hill to devote a good deal of time to scientific pursuits, for which he had always a great taste, and he was an active member of the Astronomical Society in its early days. Even within a month or two of his death, when he was 89 years old, he was occupied in framing a system of nomenclature for the stars, and when he was 88 he went down with his telescope to the coast of Sussex, to observe an eclipse of the sun. He was also distinguished, at a time when Liberal opinions were rare and unpopular, for an unswerving adherence to the principles of civil and religious liberty. When Dr. Priestley's house was attacked by a furious mob on account of that gentleman's religious and political views, Mr. T. Hill strove to defend it, and the same spirit led his betrothed wife to refuse to utter the party cry of "Church and King" when the carriage in which she was riding was surrounded by a crowd of rioters.

The children of such parents could hardly fail to do the world good service, and the careers of the sons of Mr. Thomas Hill have proved his talents and love of liberty to be an hereditary possession of the family. The author of penny postage has won a name in history which needs no comment. The second son, Mr. Edwin Hill, has done good work as the head of the stamp department at Somerset House. Mr. Arthur Hill, who took the whole charge of the school when the other sons entered upon their various careers, has proved himself an able and successful educator. Mr. Frederic Hill, the youngest son, now Assistant-Secretary to the Post Office, was the first, when Inspector of Prisons in Scotland, to advocate and enforce those humane principles on which modern prison discipline is founded; and his work on crime is a standard authority for legislation. The eldest son, the subject of this memoir, assisted in the school, and gave lessons as a private tutor in neighbouring families until 1816, when he went to London to enter himself at Lincoln's Inn, and to prepare himself for the Bar. He was not one of those law students who seem to think that the periodical consumption of a certain amount of roast mutton and port wine in the legal atmosphere of an Inn of Court is sufficient in itself to fit a man for the strife of Westminster Hall. He studied hard and well, and thus acquired a

wide knowledge of the theory of the law, which stood him in good stead in after life, when the daily demands of a large practice made study of anything but the matter in hand almost impossible. He was called in 1819, and in the same year married Miss Bucknall, of Kidderminster, who made him an excellent wife for forty-eight years—dying five years before her husband. At this period of his life Mr. Hill had no resources but such as his pen furnished, and his early days necessarily were passed in the practise of the strictest economy. Like Lord Campbell, and other men afterwards eminent at the Bar, he worked for some time as a newspaper reporter, whilst his brothers added what they could to his store. He lived for some time in Boswell Court, now pulled down as part of the site for the New Law Courts, and whilst there he first thought of that district as an eligible site for a Palace of Justice, and he advocated the Carey Street site twenty years before it was actually chosen. Mr. Hill's first case at the Bar, which was argued during the term of his call, was an argument in the King's Bench, in *King v. Borron*, a memorable case arising out of what is still known as the Manchester massacre, when a troop of Yeomanry charged a harmless and unarmed crowd at Peterloo, near Manchester. Mr. Hill has given an amusing account of his first appearance before the judges, in an article entitled "My Maiden Brief," first published in *Knight's Quarterly Magazine*. The paper has been often reprinted, and has deservedly found a place in Knight's "Half-Hours with the Best Authors." Young barristers will there find the consolatory fact that a man whose composure in after days could not be shaken, was as nervous as the most timid beginner on the occasion of his first brief. The time when Mr. Hill first showed great forensic talent, was in the defence of Major Cartwright, at the Summer Assizes, at Warwick, 1820. He had only just joined the Midland Circuit, and owed the honour of selection as counsel for the defence to his private acquaintance with the major, whose friendship he enjoyed until the death of the latter, in 1824. The defendant was a retired navy officer and major of militia, brother to the inventor of the power loom for weaving, and a man of extreme political opinions. He had advocated the expediency for England of the independence of America, at a time when the nation felt sorely the failure to crush the revolted colonies, and he had urged the adoption of annual parliament and universal suffrage when such measures were considered absolutely revolutionary. The case in which Mr. Hill was called upon to defend him at Warwick was an ex-officio prosecution for having with others convened a public meeting at Birmingham, and there caused to be elected "a legislative attorney"—to use the phrase adopted by the major and his friends—to be returned to Parliament, as member for



the town, which was not then a parliamentary borough. The profession of Liberal views was not at that time a stepping-stone to success: the Bench and the Bar were Tory almost to a man; and Mr. Hill was warned that if he accepted the brief, he would ruin his prospects at the Bar; but he regarded the acceptance of the brief as a public duty, and never through life departed from what he felt to be his duty for fear of possible injury to his prospects. He failed to carry the verdict; but the manner in which he conducted the defence won general admiration, and was the foundation of a life-long friendship with Lords Brougham, Truro, and Denman, who were still at the Bar, and had taken much interest in the case.

The prophets of evil, who had said that the conduct of the Cartwright case would be Mr. Hill's ruin, were fortunately proved wrong by the event. From that time forth Mr. Hill's business slowly but steadily increased. He was without connection; he had no attorney in the family; he was a poor man. He had not a wide circle of friends, where A tells B that C is an able man, and so C gets gradually pushed into fame. He succeeded purely on his merits; he worked hard, and made the most of his legitimate opportunities; and his success is another proof that connection is not so all powerful and indispensable as it is the fashion to maintain at the present day.

In 1820, when Mr. Hill had hardly been a year at the Bar, he received a junior brief to attend a Parliamentary committee, in support of a Bill to empower the Commissioners of Police of Manchester to light that town with gas. Mr. Hill's leader, Serjeant Adams, was a man of eminence at the Bar, with a large circuit practice; and the second brief was held by Mr. Wilde, afterwards Lord Truro, who had already a considerable business. Contrary to expectation, the Bill did not come before the committee until the summer circuit began. The leader and first junior, unwilling to give up their circuit, returned their briefs. Thus Mr. Hill, an unknown junior of a single year's standing, was left alone, and time hardly admitted of the instruction of other counsel. It must be added that the difficulty of the case was much increased by the fact that a new principle of political economy was involved in the issue. This was the first application from a municipal body for leave to apply public funds to the carrying on of a manufacturing business for the benefit of the public. The Bill was opposed on the ground that it would give the commissioners a monopoly, whilst public interest required competition, in order to ensure a supply of gas at the lowest prices, and the best quality. The solicitor to the commissioners came to Mr. Hill, and asked to be allowed to see his notes for his address to the committee. Mr. Hill thought the circumstances of the case justified this unusual request, and he complied with it. The solicitor was so

highly satisfied that he confidently left Mr. Hill to fight the case single-handed. Mr. Hill was entirely successful, and carried the Bill through Parliament, against a powerful opposition. In consequence of this success, he acted as standing counsel for the commissioners until this office was abolished on the incorporation of the town. As regards the economical question, Mr. Hill argued, that although private companies might compete with each other for a time, they were sure, at last, to see their true interest in a combination against the public, which would result in a far more injurious monopoly than any that could be maintained by the town. In the one case there would be the interest of several capitals, and the expense of several undertakings to pay, without any check upon quality or price, whereas in the other the town's own delegates would administer the concern, and all profits would return to the community in the shape of improvement of the town and decrease of the rates. The success of the Manchester Gasworks has fully justified Mr. Hill's contention, and we hope to see the principle some day applied to all undertakings of a like nature, and even extended to the railway system of the country.

Whilst his work at the Bar was increasing, he found time—as, indeed, he did at his busiest moments—for much other useful work. In 1822, in conjunction with his brother, the present Sir Rowland Hill, he wrote a book on the principles of education, entitled “Public Education,” with illustrations drawn from his experience at his father's school. This work first set forth, in a clear light, many rules of training and instruction, which have since that time gradually worked themselves into general acceptance. It was elaborately reviewed by the *Edinburgh Review*, and other periodicals. The work so pleased Jeremy Bentham that he sought out the author, and from that time honoured him with his friendship. When Bentham shunned society, and denied himself to almost all who sought him, Mr. Hill was one of the few who were still admitted, and had many pleasant reminiscences of the *tête-à-tête* dinners, which the great legist held to be the only rational mode of enjoying company. Mr. Hill was associated with Bentham and Brougham in the establishment of the Society for the Diffusion of Useful Knowledge. He took an active part in its proceedings, and suggested many of its most successful publications. It was owing chiefly to his exertions that the art of illustration, which had fallen into neglect, was introduced again to public use, and much extended and improved by the publications of this association. He was a frequent writer in the *Penny Magazine*, the first penny illustrated paper, which was one of the greatest successes of the society. At one time its weekly circulation rose to 170,000, and for a long time it was over 100,000. It had the advantage of three or four woodcuts in each number, and its extraordinary

cheapness, for those days, excited much hostility in the trade. It was the first publication in which the printing-machine was made to operate at once upon woodcut and metallic types. This combination was thought impracticable; but Mr. Hill arrived at success by bringing together skilled workmen, who under his superintendence gradually overcame each difficulty. As Martin, Danvers, Heavyside, Mr. Hill was one of the band of young authors who, under assumed names, gave celebrity to *Knight's Quarterly Magazine*, during its brief and brilliant career. Amongst his colleagues were Macaulay (known as Tristram Merton), Hartley Coleridge, Mackworth Praed, John Moultire, and Professor Malden.

Meanwhile, Mr. Hill progressed steadily in his profession; and, in 1829, his position at the Bar was such as to lead to his appointment on a royal commission to consider the subject of fees receivable in the superior law courts. On this subject he held Bentham's opinion, that the increase of litigation which might follow on the cheapening of justice, is not so great an evil as the debarring suitors from their rights by the exaction of a fee at each step of the process. Mr. Hill used to illustrate this opinion by a quotation from Professor Porson's mock-examination questions for students, which ran: "What happens if you win your cause?" "You are nearly ruined." "What happens if you lose your cause?" "You are quite ruined." When the commission had concluded its labours, each commissioner was paid 1000*l.* for his labour. But Mr. Hill thought this remuneration was too large for the work performed, and returned 500*l.* to the Treasury. This act of conscience seems to have been taken by the Government as implying censure; for Mr. Hill was never again placed on a paid commission.

Mr. Hill was a strong Liberal in politics, and took an active share in the labours of the Liberal party to obtain Parliamentary reform. This fact, combined with a successful defence of a young physician of Hull, under circumstances which attracted popular sympathy with the accused, led to an invitation from the people of that town to represent them in the first reformed Parliament. Mr. Hill accepted the invitation, but under what were, in those days, somewhat singular terms. He stipulated that there should be no "colour-money," no treating, no personal canvass. The terms were accepted; and although the town had been hitherto noted for its corrupt electioneering practices, Mr. Hill was returned at the head of the poll. But he nearly paid dear for his success. A large party of voters and non-voters took it ill that a stranger to the town should come and deprive them of their usual season of bribery and unlimited drink. Whilst Mr. Hill was on his way in procession to the hustings, they seized him, and began to drag him towards a dock close by, filled with many feet of soft mud, where he must

inevitably have been suffocated. His opponent, Mr. Carruthers, flung his arms round Mr. Hill, and declared that if the mob threw Mr. Hill into the dock, they should throw him in also. This caused a diversion, which was materially assisted by a hair-dresser, who rushed out from his shop, leaving a customer's hair half curled, and belaboured the fingers of the rioters with his hot curling-irons. Mr. Hill's friends thus had time to rally, and they rescued their candidate; but not before he was so injured that he had to keep his bed for some time.

One of the earliest measures Mr. Hill took up in Parliament was municipal reform; and he presented the first petition in its support. In consequence of the power of municipal corporations being at that time vested in self-electing bodies, local interests were sacrificed to party purposes, corporate property was illegally alienated, and many other similar abuses had arisen. Mr. Hill failed to carry any measure of reform at the time. The abolition of colonial slavery and the reform of Poor Laws was enough for one Parliament to accomplish. But the several Municipal Reform Acts passed in the following Parliament to regulate corporate boroughs no doubt owed their success in part to his efforts. His labours in this direction were unfortunate as regards himself. The constituency of Hull was largely composed of "freemen," who felt their existence threatened by the proposed reforms; and at the next election they succeeded in depriving Mr. Hill of his seat by means of their adverse vote. During the short period—not more than two years—that Mr. Hill was a member of the House of Commons, he gave particular attention to the improvement of the criminal law. Both by evidence before a select committee and by his speeches in the House he strongly supported the Bill for allowing persons charged with felony to employ counsel in their defence. He took an active part in obtaining the Bill for the establishment of the now flourishing colony of South Australia. He also spoke in favour of slave emancipation, the repeal of the stamp duty on newspapers, and of the tax upon almanacks.

The case of the Baron de Bode, a name well known to readers of old law reports, is intimately connected with Mr. Hill's career. It appeared that property in Alsace belonging to the baron, both by inheritance and by cession from his father, had been confiscated during the French Revolution. Indemnification was therefore claimed from a fund amounting to seven millions sterling, which had been paid by France to the English Government, on the accession of the Bourbons, for the liquidation of such claims. This application was refused, chiefly on the ground that the father was the owner of the estate, and not the son, at the time of the confiscation; and that the father, not being a British subject, could not, if he were alive, claim compensation. The son, on the other hand, argued that the

property became his by cession before the confiscation, and that, therefore, his claim was good. Mr. Hill, in 1833, moved for a committee of the House of Commons to examine into the claim, but without success. He brought forward his motion again the following year, and a committee was appointed, of which Mr. Hill acted as chairman. But before the committee could report, the Parliament was dissolved. In 1838, Mr. Hill pleaded the baron's cause in the Court of Queen's Bench. Notwithstanding an adverse judgment, he subsequently argued the case in other courts with success, but he failed to convince the Court of Appeal. In 1851, Mr. Hill's promotion obliged him to relinquish the cause which he had advocated for nearly twenty years. In 1852, again in 1853, and, finally, in 1854, the case was laid before the consideration of Parliament, and the baron was fortunate enough to obtain a unanimous report in his favour from a select committee of the House of Lords; but, notwithstanding all these efforts, his claims remain unsettled to the present day.

Mr. Hill lost his seat for Hull in 1835, and never re-entered Parliament, although more than once invited by constituencies to come forward as their candidate. In 1834, he received his silk gown from Lord Brougham as Chancellor, with a patent of precedence. Of his speech in a famous election petition, in 1835, the author of "The Bench and the Bar" says:—

"I am not sure whether taken altogether it was not one of the most masterly forensic exhibitions which had been made in Westminster Hall or its neighbourhood for some years previously. There was in that speech a striking union of intellectual and professional attainments of a first-rate order, with a zeal and boldness in the cause of his clients which it would be impossible to surpass."

In 1838, Mr. Hill won general respect and admiration by his gratuitous defence of twelve men who had been condemned to transportation by a Canadian Court for political offences in that country. It was believed that the conviction could not be sustained in law, and they were brought to London on a writ of *habeas corpus*. Sufficient doubt was thrown upon the justice of the conviction to cause the release of six out of the twelve prisoners.

In 1839, when Birmingham received its charter of incorporation, his native town paid Mr. Hill the compliment of petitioning Government for his appointment as the first recorder. He accepted the office, and delivered in July, 1839, the first of that series of charges to the grand jury, by which he obtained a wide publicity for those principles of prison treatment and criminal reform which are associated with his name, and which have since been adopted as the basis of all

enlightened penal systems. These addresses have usually found a place in the leading journals at the time of their delivery, and have often been the subject of prolonged and earnest discussion by the press. The first charge was delivered under exceptional circumstances. For some little time the town had been in a disturbed state, in consequence of large daily meetings being held in the streets at the instance of certain Chartist leaders, and the day previous to the sitting of the Court a collision took place between the populace and the police, in which the police were worsted. Soldiers in consequence were guarding the town, and a squad of dragoons surrounded the Court House. No further disorder occurred, but it was a natural subject of regret to the recorder, that "the first introduction of trial by jury into the town of Birmingham should be made so unhappily memorable." In the course of his opening address, Mr. Hill alluded to many of those principles of criminal jurisprudence which in later charges he has more fully developed. That certainty rather than severity of punishment is the true deterrent from crime; that criminal justice should be administered as far as possible where the crime has been committed; that the injured party should be put to no expense in his performance of a public duty; that the State should pay the cost of prisoners' witnesses; that an offender should be withdrawn upon his first sentence from the scene of his crime, in order to save him from returning to pursue crime as a calling; that it is cheaper for the country to keep a depredator in prison until his cure is complete, than to release him in order that he may maintain himself by further depredations. All these points were touched upon, with a final reference "to education in the large and true meaning of the word as the means of striking at the root of the evil."

A charge delivered by Mr. Hill in 1850 attracted especial attention. The public at that time were terrified by a succession of daring burglaries attended with violence to the person, which gave rise to a general panic. The recorder thought it a fitting time for the promulgation of a plan which he had long had under consideration. He pointed out that the existence of a class of men who followed crime as a calling was well known, and that these men herded together, and their haunts were known to the police. They keep the public in a state of constant alarm; their existence is a heavy charge on the community, not only on account of the depredations they commit, but also by reason of the necessity of protection against them, whilst their immunity is a temptation to others to join their ranks. Mr. Hill proposed to meet this evil by a modification of the principles of our criminal law. Hitherto the law only dealt with crime actually committed; Mr. Hill proposed to deal also with crime in contemplation.

"What I would propose," he said, "is that when by the evidence of two or more credible witnesses, a jury has been satisfied that there is good ground for believing, and that the witnesses do actually believe, that the accused party is addicted to robbery or theft so as to deserve the appellation of robber or thief, he shall be called upon in defence to prove himself in possession of means of subsistence lawfully obtained either from his property, his labour, the assistance of his friends, or from some other honest source. On the failure of such proof, let him be adjudged a reputed thief, and put under high recognizances to be of good conduct for some limited period, or in default of responsible bail, let him suffer imprisonment for the same term."

Mr. Hill, with wise caution, proposed that the operation of the law should be at first confined to persons who have already been convicted of a felony, or of such a misdemeanour as necessarily implies dishonesty in the guilty party. Adverse testimony against the accused might also be met by a counter presumption that his wants did not place him under temptation to commit the crimes of which he was suspected.

In the following year Mr. Hill delivered a second charge, in which he explained his plan in greater detail. It was natural that the suggestion should be widely discussed, and whilst it was received with much favour by some of the leading organs of opinion, its mere novelty was enough to evoke adverse criticism from many quarters. Exact proof would never be found; too much power would be given to the police; French espionage cannot be admitted in England; honest poor men would be exposed to persecution: these were some of the adverse opinions of the day. But whilst there is a class subsisting entirely by the perpetration of crime, and we have credible and intelligent police officers who are able, at a moment's notice, to give the addresses of the persons following this avocation within their particular district, it seems monstrous that we should allow these offenders to pillage with impunity; and we hope ere long to see Mr. Hill's plan adopted as part of the law of the land.

The ticket-of-leave system was the subject of three charges. Mr. Hill always regarded the principle as sound, although he strongly disapproved of the mode in which it was carried out. The theory embodied two most salutary principles. First, that the criminal should have the opportunity of working his way, by good conduct, to conditional liberty; and second, that he should, for a limited period, be liable to be deprived of this liberty, if his course of life should be such as to give reasonable ground for belief that he had relapsed into criminal habits. But the system was not administered in this theory of conditional pardons. Licences were granted—not as a reward for good conduct, or with a

view to test the convict's fitness for liberty, but simply because a certain portion of his sentence had expired. Of this abuse of the principle, Mr. Hill expressed his strong disapproval; and we believe that the system is now administered on a better basis. Mr. Hill's name is perhaps more identified, in the public mind, with the improved mode of dealing with juvenile offenders than with any other branch of criminal law reform. He adopted a course with regard to young prisoners brought before him as recorder, which had for a long time been pursued by the magistrates of Warwickshire, and of the success of which sixteen years' attendance at the sessions of that county had enabled him to judge. He returned to their employers, when willing to receive them, all young offenders who were beginners in crime, and whom such lenient treatment was likely to reform. Upwards of 400 youths were thus consigned to the care of willing guardians, and subsequent good conduct proved the soundness of the principle. In December, 1851, Mr. Hill presided at a conference at Birmingham, suggested by Miss Mary Carpenter, on the subject of preventive and reformatory schools; and two years later he took an active part at a similar meeting, held in the same town. To these conferences is attributed, in great measure, the rapid development throughout the country of the now universal opinion that young criminals should be sent to school rather than to prison. Reformatories have sprung up in almost every county, and Mr. Adderley's Juvenile Offenders Act of 1854 has converted hundreds of young criminals into useful members of society. It may be added that Mr. Hill, in concert with Miss Carpenter and his own daughters, made great use of the voluntary assistance of all capable persons who were willing to lend their aid to the reformatories and industrial schools with which he was immediately connected. This admirable principle of the utilization of all who are prepared to work in support of their convictions is now adopted generally in all such institutions. Mr. Hill's charges have subsequently been collected with much supplementary matter in a work, entitled "The Repression of Crime," a well-known book of reference on the subject.

In 1843 Mr. Hill, in conjunction with Lord Brougham, Mr. James Steward, Mr. Pitt Taylor, and other leading law reformers, took part in founding the "Society for the Amendment of the Law." To this society are due many improvements in our jurisprudence, and as it still exists in vigorous action (amalgamated with the Social Science Association), further benefits may be anticipated from its operation.

Mr. Hill led his circuit for some years, but eventually left it in order to devote himself exclusively to his business in town, which increased so much both in the Parliamentary Committee Rooms and the Common Law Courts, that his health became



seriously affected. We have not space to go into any detail as regards Mr. Hill's professional work, and the mere mention of the names of the celebrated cases in which he was engaged, such as *Regina v. O'Connell*, *Stockdale v. Hansard*, *Dr. Hampden's case*, &c., would only weary the reader. His greatest triumph, though not by any means his best known case, was *Geach v. Jugall*, a case arising out of a claim on a life policy, repudiated by the insurance company on the ground of the concealment of a material fact, to wit, blood spitting. Mr. Hill, with the present Mr. Justice Mellor as his junior, won the verdict at Warwick against the company. The verdict was set aside as against evidence, and Mr. Hill went down on special retainer to fight the case over again. He won a second time, and a second time the verdict was set aside. Again he went down on special retainer, and again he carried the day, and the verdict this time was left undisturbed. Mr. Hill set the more store on this victory, as it was generally attributed to his cross-examination of the medical witnesses. In 1851 he accepted a commissionership in the Bristol Court of Bankruptcy. Mr. Hill at once showed a vigour in administering the law to be expected from one who had already given such signal proofs of ability. He held the office for nineteen years, and the manner in which he discharged the duties of his court won him universal respect. His judgments were rarely appealed against, and still more rarely reversed, whilst his manner to suitors and practitioners was invariably courteous, without ever descending to loss of dignity. In 1866 failing health obliged him to resign the Birmingham recordership, and the Bankruptcy Act of 1870 relieved him of the necessity of a similar step at Bristol, by the abolition of his office. Under the provisions of the Act he retired on full salary. Since that time the infirmity consequent on his advanced age prevented his taking a prominent part in measures for public improvement. But his interest in them continued the same up to the last, and he frequently corresponded with, and advised those who were engaged in their active promotion. He warmly interested himself in the International Congress for the Repression of Crime, which is to take place on the 3rd of July. He held the proposed comparison of the prison treatment of different countries, and of the effects of various systems of penal legislation, of the highest value, and had his life been spared, he would have journeyed to London in order to attend the sittings of the Congress.

He followed eagerly up to the last the progress of current history, both at home and abroad. Frequent visits to France—his first was in 1814, just before the hundred days—made him feel deeply the recent misfortunes of that country, and the uncertainty of her future. He said, about two months ago, in writing to a friend, "Poor France, indeed! She

might say with Voltaire: 'I am going to the *grand pent-être*.'" The progress of the negotiations relative to the "indirect claims" were far from giving him satisfaction. In a conversation just before his death, he said:—

"I fear that our commissioners fell into the error of taking too much for granted in arranging the details of the Washington Treaty. I have observed through life that verbal understandings, as they are called, almost invariably result in verbal misunderstandings. What our representatives should have done was this: As soon as they agreed, or agreed to differ, on any point, with the representatives of the United States, they should have said, 'Now let us have that down in black and white.' We should then have heard nothing of these preposterous indirect claims."

The practical common sense which marks this opinion never deserted Mr. Hill; and united with a persevering energy that almost amounted to enthusiasm, enabled him to achieve much solid good in fields where sentimental philanthropes too often work only harm. In addition to his labours in the repression of crime by the reformation of criminals, he took an active interest in everything that tended to elevate the working classes. But he never saw the working-man through rose-coloured spectacles, or, as he once put it, "The working-man is no angel; at any rate, I have never been able to discover his wings." Thus guided by the dictates of moderation and sound judgment, he was able to work much practical good. The educational institutions for the lower classes at Birmingham all received from him a helping hand. The Mechanics' Institute, the Polytechnic Institution, the Midland Institute, the Free Grammar School, all found in him an earnest friend and an able adviser. He was elected president of the Midland Institute for the year 1867, and passages in his inaugural address shows that he never shrank from an unpleasant truth where he thought the utterance of it might work good. Addressing an audience composed partly of manufacturers, partly of workmen, he attacked on the one hand, "that despicable species of competition in trade which incites the manufacturer, with the view of underselling his rival, to deteriorate the quality of his goods," whilst, on the other hand, he did not spare Trades Unions which "frame regulations to prevent strength and skill from effecting more for the employer than he obtains from a lower grade of capacity. 'This principle of trade,' he said, "combined with restraints on taking apprentices, whereby the supply of labour is lessened, and youths are cruelly precluded from becoming artisans, enhances prices, and debases quality; emulation is checked, legitimate ambition has no outlet, and an approach is made to the stagnation of intellect, which belongs to slavery."

In the same address Mr. Hill alluded to the principle of

co-operation, to which he attached very great importance. In his opinion it contained the true remedy for the abuses of unionism and the evils of strikes, and would eventually raise the workman to the level of the employer. His attention was first attracted to the subject by a visit to the co-operative establishment of the Equitable Pioneers of Rochdale, in 1860. It may be added, that through life he insisted on seeing and judging for himself whenever it was practicable. He had a lawyer's mistrust of hearsay evidence, and no inspector could have gone more thoroughly into the working of reformatories, both here and in France. After visiting Rochdale he laboured to extend the application of the principle of co-operation, either by the association of the workmen in the profits by the foundation of retail co-operative societies in old establishments, or by the combinations of workmen for the production of any article of trade. But practical common sense always tempered his enthusiasm, and his letters of advice to the *Co-operator Journal*, and his counsel to various societies who sought his aid, never failed to point out the dangers of the absence of capital, and the necessity of good management, constant checking of accounts, and harmony among the members, "whose aid," he said, "must be secured by an interest in the undertaking, which should rise and fall with the prosperity of the concern, over and above a fixed remuneration for his labour or his capital."

Mr. Hill was a man of much literary taste and an omnivorous reader. Even at his busiest moments he was always well posted in current literature, whilst an excellent memory enabled him to retain to old age the books he had not read since youth. His power of work was much aided by an hereditary love of order and method, and he accomplished much in the many idle five minutes of life which come in our daily avocations, and which most people never think of utilizing. He had a great fund of good stories, and found that pleasure in telling them, which men experience in what they do well; but he never monopolized a conversation, and a pleasant courtesy made him always a delightful companion. He had much love of poetry, and possessed a large store of quotations, of which he made a sparing, but always telling, use in his public addresses. His fondness for the Latin poets never left him, and he knew his Virgil and Horace in a way that many university men would envy, who have not left college half-a-dozen years. Pope and Milton were his favourite English poets, and to hear him read the "Rape of the Lock," or the first Canto of "Paradise Lost," was a great intellectual treat. He was not without keen appreciation of our later writers. He found much pleasure in most of the chiefs of modern poetic literature, though he confessed himself more puzzled than

delighted by the works of Robert Browning. Nor was he in other matters too much a *laudator temporis acti*. The growth of intellectual freedom was always a subject of pleasure to him, and the increase of material prosperity a source of continual satisfaction. This is not to be wondered at in a man who went circuit in a post-chaise, lived in streets dimly lighted with oil, and paid a shilling for every letter he wrote; who had heard high railway speed proved impossible, and who was told by the first electrician in France that the electric telegraph must fail, because the current would die away before it had gone a mile along the wire; who remembered the imprisonment of Sir Francis Burdett, for censuring the conduct of the Yeomanry at the massacre of Peterloo, and who sat in a Parliament that contained zealous advocates of the system of slave labour.

Our task is now concluded. We will not attempt to depict Mr. Hill's character in a series of set phrases. His life speaks for itself, and the work he leaves behind is more eloquent than any panegyric. He himself despised perorations, and used to say that the British public was like the British jury, and would always give the verdict to the best facts, and not to the finest words. Our facts, we take it, are of the best, and we will follow the advice of him who has left us, and not encumber them with an idle fringe of empty words. A great and good man has gone from us; what could we say more?

## LEGAL GOSSIP.

WITHIN the last few days we have had another example of the fact that the test of insanity which mad doctors apply is quite other than that which not only our profession but the public generally apply. The Rev. Selby Watson killed his wife a few months ago. He was tried, found guilty, and sentenced to death. Subsequently, this sentence was commuted into penal servitude for life. It turns out that while in Horsemonger Lane Gaol, he wrote a sort of poetical rhapsody on the death of his wife. Why a man does an act is of course always difficult to say. The most obvious explanation of the present act is, that he wrote this rigmarole—for such it is—to pass the time. He had already published a quantity of stuff which he, and probably a few of his friends, regard as poetry. Those who know anything of the religious world where Robert Montgomery was, and Martin F. Tupper is, regarded as the first man of the age, will remember that its standard of poetry is not the worldly standard; and probably Mr. Watson himself is thoroughly convinced of the existence of deep well-springs of poetry in his own soul. This new apostrophe to himself is a sort of bad imitation of Ossian, or rather, is almost exactly like the stilted rubbish which is to be found in the Methodist magazines of the end of last century. A few days ago, this document was published, whereupon Dr. Forbes Winslow, a gentleman of the highest authority, we believe, among the mad doctors, wrote to the newspapers to declare his conviction that this document proves Watson to be mad. To make the matter worse, Dr. Winslow affirms, “the great bulk of physicians in this country engaged in the practice of lunacy” would sign a memorial to the Home Secretary in favour of the murderer, on the ground that he is insane. Now, in this case the test of insanity seems to be the murder *plus* the essay. As we have not yet come to the conclusion that the committal of murder is any evidence of madness, we may pass on to the essay. “It is worthy,” says Dr. Winslow, “of the pen of Victor Hugo.” This is of course a matter of opinion. But though the French poet has no doubt put his name to very poor stuff, he has, in our opinion, never condescended to such paltry commonplace as this.

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The recent decision of the Judicial Committee of the Privy Council in the Bennett case can scarcely have occasioned much surprise to those who were acquainted with the grounds

on which that tribunal proceeds in dealing with ecclesiastical cases relating to doctrine. The principles which were applied in the Gorham case, and in the "Essays and Reviews" case, have been applied also in the Bennett case. However small our sympathy may be with the Vicar of Frome, we cannot regret that he has had the same law administered to him as the defendants in the other cases we have mentioned. Whatever we may think of the doctrine of the *spiritual presence* in the consecrated elements, it is not excluded by the Articles or formularies of the Church of England, and is therefore not contrary to law. The same must be said of the doctrine of *sacrifice* as applied to the communion according to the lenient interpretation which the Court put on the language of the respondent. There was greater difficulty with respect to the matter of *adoration* of the consecrated elements, but as a doubt might be raised as to the meaning of the respondent, the Court thought it better to give him the benefit of such doubt.

We must frankly acknowledge that a careful perusal of the judgment of Sir Robert Phillimore in the court below, had led us to question whether his decision on the last two points could be upheld. The doctrine of *spiritual presence*, however unintelligible, had always been supported by certain divines of the Church of England, although it could not be regarded as the doctrine of that Church, as the learned judge of the Court of Arches assumed to state. But on the other two points the case seemed to us to be stronger against the respondent. We were inclined to question whether the view of *sacrifice* as laid down by the respondent differed materially from the "sacrifices of masses," which are condemned in the thirty-first Article as "blasphemous fables and dangerous deceits." On the last point we must acknowledge that the doubt which some of the members of the Judicial Committee were astute enough to raise, had not occurred to our minds with any considerable force. After the decision of the Judicial Committee, however, it would be an entire waste of time and labour to enter into any argument on such questions. The general law with respect to doctrine and ritual in the Church of England has now been fully settled, and it may be stated briefly as follows: With respect to doctrine, it is illegal to contradict what is explicitly or implicitly declared in the Articles or Prayer Book; but where these are doubtful, it is not illegal to maintain any doctrine which has been held without offence by eminent divines of the Church; and in matters as to which there is no statement in the Articles or Prayer Book, it is not illegal to maintain any doctrine whatever. With respect to ritual, however, the directions of the Prayer Book must be strictly observed, and it is illegal to introduce any variation in, or addition to, the rites and ceremonies as

therein declared and set forth. To state the matter still more succinctly—As to doctrine, whatever is not contradicted by the Articles and Prayer Book is legal; as to ritual, whatever is not enjoined by the Prayer Book is illegal.

We have no desire at present to look at the judgment in the Bennett case with reference to any other than its legal bearings; but these it is obvious form the least part of the interest which attaches to it. The effect it is likely to produce on the character and position of the Church of England will be estimated differently by different minds. On this matter it is perhaps beyond our province to speculate, and at all events it would be premature at this moment to express any opinion. It is unlikely that the judgment of the Judicial Committee will restore peace and harmony to the Church of England; but whether it will tend to divide it still more, or to leave it very much as it is, remains to be seen.

The judgment is one which we believe is in harmony with the spirit of our English law, one which was just and therefore wise. If we are to have a National Church, its boundaries ought to be wide; ought to include the broadest of broad churchmen on the one hand; and the narrowest of high or low churchmen on the other. Our profession has always gloried in its Erastianism. But none the less is it obvious that the judgment may inflict a serious blow to the English Church. There is in the community an ever-increasing number of educated men who are becoming alienated from the National Church, and from all churches; who believe with Professor Huxley that a National Church is one of the noblest of conceptions, and might be of great use in the higher education of the people, but who are being forced to the conviction that the movements in the Church at the present moment are reactionary. The *Pall Mall Gazette* has on several occasions pointed out the position of educated men in regard to these movements. It has shown that though there may be an absence of active opposition to the doctrines and the practices which the Ritualists are making such a fuss about, there is yet for them only a contemptuous toleration. The clergy, in their discussions about the Athanasian Creed, the taking of tests, and the interpretation of language, are fast convincing the English people that their mode of using and understanding language is governed by a different rule from that which governs men in the ordinary business of life. Their zeal in showing the difference between transubstantiation, consubstantiation, and the real presence, and in other mediævalisms, is altogether lost upon the educated laity. If the judgment should cause a further development of the Ritualistic movement, the conviction will deepen among educated men that the case of the Church is hopeless, that she has ceased to be

able to adapt herself to the wants of the nation, and must therefore cease to occupy the lofty position she has hitherto held. Educated men, with no love for dissent, are already asking themselves why an organization, which promises in religious matters to be merely reactionary, should enjoy exclusive privileges; and unless the Church can show that she has not ceased to grow, but has still room left in her for development upwards instead of downwards, seeking her ideal in the future instead of in the past, they will be inclined to join in Mr. Lowe's condemnation of the Irish Church, "Cut it down: why cumbereth it the ground?"

The doctors had their revenge, on the 5th, upon a certain number of the legal profession. The latter had been invited by the Council of the British Medical Association to the hall of the Society of Arts, to hear a paper "On the Legal Tests of Insanity," by Dr. Russell Reynolds. This eminent member of his profession having complained of what many of his brethren—probably himself also—had felt when under the torture of cross-examination, proceeded to serve out all the lawyers who had been cajoled into attendance. The present writer was one of them. He was first made to feel that he had *melancholia* in an aggravated form; that the various symptoms which he had observed in himself indicated in the plainest and most unmistakable manner that he had every indication of incipient madness; that at any moment this madness might break forth, and lead him either to commit suicide or to murder his best friend. As one by one the indications were laid before the meeting, he felt that the obscure diseases of his brain would soon be brought to light. First there was mentioned a tendency to idleness; a strong disinclination at times to do any kind of work whatever. "That you certainly have got," was his mental memorandum. "A feeling that one is not up to work as we were two or three years ago," is another symptom. Here again the writer felt that his case had been hit off. Next, the sufferer was described as being queer-tempered at times, irritable, cross even with his children. The symptoms were accumulating with horrible rapidity. Unfortunately, the paper has not been printed, or we venture to affirm that our readers would agree with us that there are few of them who do not feel themselves to be labouring under nearly every symptom described, and who are consequently on the immediate verge of madness. We felt this so keenly that our only wonder was how we had come to be allowed so long out of an asylum. Presently, however, the writer lost sight of his fears of madness. They were merged in the certainty that he was a victim of heart disease. In order to illustrate how madness might lie dormant for years, and then suddenly show itself in some wild, murderous act, the doctor quoted the



analogous example of *angina pectoris*. Here, too, the symptoms went home with such fearful directness that the writer felt his life was not worth an hour's purchase. The depression produced was only partially lightened after the lapse of some hours by the consideration that probably everybody in the room could show the same symptoms.

The Tercentenary Commemoration of the Middle Temple Hall is worth more than a passing notice in the newspapers. It is a really great event in the history of the Society to which it belongs. Apart from the associations connected with the Hall, others than Templars will be ready to admit that there are few finer specimens of the kind of Elizabethan architecture which it represents. The historical associations, however, are of a singularly rare character. To say nothing of the tradition about the wood from the Spanish Armada, which modern scepticism has cast its evil eye upon, there is the apparently better founded tradition, that "Midsummer Night's Dream" was read here by Shakespeare, in presence of Queen Elizabeth. There are the wainscoted panels on the walls containing the arms and names of the readers, from Richard Swaine, reader, in 1597, down to the present year. There is the old oak screen, evidently not much younger, though not coeval with the building. There are the suits of armour probably of great antiquity; and the colours of the Inns of Court Volunteers, of 1803. The windows contain nearly a hundred and fifty of the armorial bearings of persons of rank, who have been members of the Middle Temple, the latest being that of the Prince of Wales, who was made senior bencher in 1861. Above the dais at the western end is placed a full-length equestrian portrait of King Charles I., by Vandyck, one of four replica copies of the same picture, of which the other three are at Windsor Castle, Warwick Castle, and Chatsworth respectively. There are also fine portraits of Charles II., James, Duke of York, William III., Queen Anne, and George II., besides marble busts of the present Prince of Wales, of the brothers Lords Eldon and Stowell, and of Plowden. The associations, too, are not peculiar to any period since its erection. The members have entertained many kings and queens from Elizabeth, and a generation later, Henrietta, the wife of Charles I., and, still later, Peter the Great, and William III., down to the Prince of Wales. The names of those eminent lawyers who have belonged to the Society, and who were therefore familiar with the Hall, are scattered thickly about the pages of English history during the last three hundred years. Besides these names, the roll of the Society contains those of several poets and dramatists who are known to fame, amongst others, Sir John Davis, Knight,

John Forde, Nicholas Rowe, William Congreve, Thomas Shadwell, Richard Brinsley Sheridan, and Thomas Moore.

To these, and other historical associations, the treasurer, Sir Thomas Chambers, to whom every member of the Inn is under deep obligations for the way in which the commemoration was celebrated, contrived to add features of a peculiarly interesting character. It was an excellent idea to disentomb the interesting passage about Sir Francis Drake's visit to the Hall, and to crown the reading of the passage by bringing forward a real live Sir Francis Drake, to respond to the toast of "The Descendants of the Ancient Members of the Middle Temple." It was equally interesting to have, in Earl Onslow, a representative of Mr. Speaker Onslow.

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The celebration itself took place on the 12th of June, the last and Grand Day of Trinity Term. Dugdale, in his "Origines," says of the Hall:—"But the fairest structure belonging to this house is the hall, it being very large and stately; the first preparation whereunto was in the year 1562 (5 Eliz.), though not finished till the year 1572 (14 Eliz.)." It was built under the direct superintendence of Edmund Plowden, the eminent lawyer, who was re-elected treasurer for the purpose, and to whom the direction was given even after another treasurer had in due course been elected. His arms are in the window over the gallery at the east end of the Hall. As is usual on the Grand Day of this Term, all the judges who have been or are members of this house are invited. On the present occasion, the guests were the Earl of Derby, the Earl of Onslow, Lord Colchester, Lord Houghton, Lord Colonsay, Lord Chief Justice Bovill, the Lord Mayor, Sir Montague Smith, Baron Bramwell, Mr. Justice Mellor, Baron Pigott, Mr. Justice Quain, Sir Francis Drake, Colonel Sir E. Sabine, Mr. Gordon (Dean of the Faculty), Colonel Hogg, the Treasurer of the Inner Temple (Mr. Forsyth, Q.C.), the President and Vice-President of the Law Institution, and Mr. Charles Shaw (the under treasurer).

During the dinner the band of the Inns of Court Rifle Volunteers played a selection of airs appropriate. The grace after dinner, "For these and all Thy mercies," was sung by Mr. Lewis Thomas and Mr. Montem Smith, and by the choristers of the Temple Church, to tune of *Laudi Spirituali*, itself coeval with the building, and therefore *apropos*.

The Treasurer, Sir Thomas Chambers, the Common Serjeant, in proposing the first toast of the evening, "The Queen," alluded to the opening of the Hall 300 years ago by Queen Elizabeth, whose worthy representative's health he then had the honour to propose. This was received by the loyal audience assembled with the greatest enthusiasm.

The second toast, "The Prince and Princess of Wales and the other members of the Royal Family," was greeted with loud and prolonged cheering. The Prince of Wales is the senior master of the bench.

"The Army, Navy, and Reserve Forces" was responded to by Colonel Sir E. Sabine.

"The Houses of Parliament" were represented by the Earl of Derby and Mr. Gordon—the former of whom on rising was received with such cheers and waving of handkerchiefs by the members that he could not utter a word for some considerable length of time, and during his most able speech he was repeatedly interrupted by cheers and prolonged bursts of applause.

"The Descendants of the Ancient Members of the Middle Temple," coupled with the name of Sir Francis Drake, who was present, was next proposed by the Treasurer, who read the following extract from the records of the Society of a reception given, in 1586, to Sir Francis Drake, the great navigator, in the following words:—"On the fourth day of August, in the year of our Lord 1586, and in the 28th year of the reign of our sovereign lady Queen Elizabeth, Sir Francis Drake, a member of the Middle Temple, after a voyage begun in the past year and brought to a prosperous end, by the grace of Almighty God, came to the Hall of the Middle Temple at the time of dinner, and interchanged the greetings and courtesies usual amongst members of the Middle Temple, with John Saville, Esq., the then reader, Matthew Dale, Thomas Bowyer, Henry Agmondesham, and Thomas Hanham, Esq., masters of the bench, and others then present. All the members of the Middle Temple then assembled in the Hall, with one accord, and with great enthusiasm congratulated Sir Francis on his safe return."

Lord Chief Justice Bovill responded for "The Judges."

The toast of the evening, "Prosperity to the Honourable Society of the Middle Temple," was proposed by the Earl of Onslow, this duty being deputed to him as the lineal descendant of Speaker Onslow, one of the most distinguished members of the Inn.

There were also given "The Master and the Reader of the Temple Church," to which the Rev. Dr. Vaughan replied; "Our National Literature," coupled with the name of Lord Houghton; "The Lord Mayor and the Commerce of London," "The Other Inns of Court," "The Other Branch of the Profession," and "The Ladies."

The members of the Inn, students and barristers, as well as benchers, were present during the whole of the commemoration. An extra allowance of commons had been placed at their disposal, and dessert had been provided. The Hall was

filled, the usual benchers' table having a table placed at right-angles to it, and extending some distance into the body of the Hall. A band of music was placed in the gallery, where also were many visitors. The proceedings terminated about a quarter before eleven.

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The Attorney-General attended the anniversary dinner of the United Law Clerks, on the 8th ult., and made an eloquent address, which it is to be hoped had the effect of lightening the pockets of some of those more influential members of the profession who were present. A tolerable muster of Queen's Counsel and members of both branches of the profession supported the chair, and took part in the proposing and responding to the various toasts, chiefly characteristic of the composition of the meeting, which were given.

## BOOK NOTICES.

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[\* \* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not prelude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

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The Imperial and Colonial Constitutions of the Britannic Empire, including Indian Institutions. By Sir Edward Creasy, M.A.  
London: Longmans, Green & Co. 1872.

THIS is a work from Sir Edward Creasy, whose "Rise and Progress of the English Constitution," is probably well known to most of our readers. The main object of the work is one which has not yet been attempted, but which can hardly fail to prove of interest to cultivated Englishmen. It is an attempt to place side by side the various constitutions under which our countrymen and fellow-subjects dwell. Such a work may be treated in one of two ways: the actually existing constitutions may be analysed and compared together as certain definite entities; or again, they may be placed together with a view of showing how they have grown up to be what they are. The latter, which is the historical method, is that which Sir Edward Creasy has wisely chosen. Macaulay remarks that there is not a free assembly in the world which does not owe its liberties directly or indirectly to the Long Parliament. In a broad sense, the observation is true; but the student of our colonial institutions as well as the student of our early English history, knows that there has been no period of our history when the spirit of free institutions was not alive. The spirit of Bell, of Yelverton, and of the two Wentworths, in the time of Elizabeth, was, as Hallam remarks, by no means the new apparition in English history which Hume and the writers of his school would have us believe. And nowhere

has the spirit of English liberty, the devotion to freedom, whether of thought, of speech, of worship, or of action, been more conspicuous than in our colonies. It is perhaps fortunate that the reign of Elizabeth, which marks the commencement of our colonial empire and of our maritime greatness, is that which coincides with the revival of the ancient independence of Parliament. Drake, whom the Middle Temple claims as a member,\* Hawkins, Frobisher, Howard of Effingham, Raleigh, and the rest of the Elizabethan heroes, were the contemporaries of the men whose names have already been mentioned as the upholders of popular rights; men to whom England owes gratitude equal to that due to the heroes who resisted the Armada. It is fortunate, because the spirit of liberty was needed as the supplement to the spirit of adventure, in order that colonies should be successfully planted. England was last in the race for colonial possessions. Spain and Portugal had acquired large territories before England had obtained a foot of soil beyond the four seas. The French Government got a hold upon North America, and saw the importance of colonization long before our own had given their attention to the question. The Dutch republic had selected swamps in every quarter of the globe on which to build towns which should extend the commerce of their native country, and provide new homes for Dutchmen, before a single ship-load of colonists had left our shores. A few years only after the time when Charles I. had laid an embargo on all emigration from England, the Dutch, in presence of as serious a danger as ever menaced a nation, had seriously prepared to submerge their own country and to emigrate in mass to their possessions in the island of Java, or possibly to the newly discovered lands of more temperate climate, which the bravery of the pious and adventurous Tasman, and the energy of Governor Van Diemen had added to European knowledge. But although England was last in the race, and had many disadvantages to contend against, she has proved, after the lapse of two centuries, the only candidate which possessed the secret of colonization. The Spanish colonies have long since broken away from the mother country, have in no case been able to secure stable governments, and will before long, in all probability, disappear to give way to colonists speaking the English language. The Dutch colonies might have been more successful but for the accident of political circumstances, for as the Dutch come nearest to England in their love of liberty and power of self-government, so too they have excelled the other countries we have named in the success they have met with in colonization. France knowing less of free government than any western country of Europe, has failed in every attempt she has hitherto made in establishing a colony. And we maintain that the reason why England has been so successful where others have failed, is to be sought in the traditions of self-government into which men have been born in this country, and the spirit of liberty which they have carried with them abroad.

The spirit of the *nullus liber homo* clause of the Great Charter, has formed part of the being of many generations of Englishmen.

\* See p. 536.

The appeals to the liberties of their forefathers, which Queen Elizabeth had in vain endeavoured to check, and the assertion of the right of inquiry into every matter of state, "nay, into the right of the crown itself, which it were," to use the words of Yelverton, "high treason to deny," show that the men of the sixteenth century were worthy to inherit the rights which their fathers had handed down. Nor should it be forgotten that the hostility of the English people was never so distinctly called forth as in 1621, on the occasion when James, with the obstinacy and stupidity which characterized the whole of his conduct, denied the assertion of the House of Commons, that the "liberties of Parliament are the undoubted birthright of the subjects of England." The whole of the struggle which immediately follows, and is not at an end until the people have got rid for ever of the doctrine of arbitrary government, and the divine right of kings, shows how deeply rooted in the English mind was the determination to make government the servant of the nation. Now, it was precisely during the period when our fathers were waging war against tyranny, and opposing every encroachment which the Stuart kings made upon the liberties of Englishmen, that our colonial empire was founded. Every one knows that the settlement of the New England States owed its origin to the determination on the part of Charles I. to introduce uniformity of worship in England by repressing the Puritan party. Religious persecution, operating by a species of natural selection, brings forward the best men belonging to the persecuted sect. The men who are ready to leave country, home, and friends, for the sake of an idea, are pretty sure to be above the average in intelligence and energy. The descendants of the exiled Huguenots who came to England, have in a large number of cases risen to influence and prosperity. We may be sure that the Pilgrim Fathers and the Puritans who left England to get free from the domination of Laud, and the Roman Catholics, who fled from the persecution of their Protestant fellow-countrymen, and who endeavoured to found in Maryland a state in which they might practise their own religion with security, were the men who would have been likely to make their influence felt, had they remained at home. To show this, it is only necessary to remember that Hampden and Cromwell had made preparations for leaving England, when the order in council of Charles forbade further emigration. Such men as the early emigrants to America needed no government assistance; they wished only to be left alone. In its remote bays they were prepared to establish communities which should be capable of self-government.

Indeed, from what we know of this history of the early American States, it may well be doubted whether there were ever better examples of good government than they furnish. They had to contend with an ever-watchful enemy. Whole communities were destroyed, and their inhabitants put to the torture. The daily occupations of the field had to be conducted in momentary readiness to fight. The rifle and the sword took their places by the side of the plough. Sentries had to be posted in every direction, to keep watch while the inhabitants listened to those wonderful sermons of seven or eight hours' length, the attention to which alone proves the marvellous

patience and dogged determination of the people. And yet while thus in a state of continual warfare, fighting now with Frenchmen, now with Spaniards, and now with Dutchmen, the treacherous Indian being always at hand, the people were educating themselves by the study and the discussion of the various religious, social, and political questions with which the loftiest minds of the time were concerning themselves. That they themselves had not reached our own standard of toleration is true ; but it is also true that no nation, or considerable section of a nation in Europe had come to that conclusion ; that even Milton and Cromwell had no tolerance for the Roman Catholic ; and that a large portion of the nation held opinions on these questions with great intensity ; an intensity which makes one doubt whether, if it existed now, we should be so tolerant as we are. And it must be remembered that when all is said against the intolerance of the Pilgrim Fathers, they were much less intolerant than other communities in the Old World, and that the New World gave us the first example of a civilized community which realized the principles of universal toleration. To Roger Williams and his brethren, who founded the colony of Rhode Island, is the glory due of having founded a state in whose constitution it was laid down that the punishment of a person on account of his religious opinions was an encroachment on conscience, and an act of persecution. It was to such men that England owes the foundation of her colonial empire ; men whom no persecution short of extermination could get rid of, whom no hardships could daunt, no perils frighten. In the foundation of the American colonies the religious element was peculiarly prominent ; but allowing for this important addition, which, however, has never been altogether wanting as a characteristic in all our early colonial societies, the same qualities which made these colonists successful in America have made other Englishmen successful in India, Australia, and elsewhere. In all, there have been self-reliance, the power of self-government, the power of initiation, enterprise, perseverance, and tenacity of purpose. Our colonies are at this moment full of energy and activity. Many of them have grown now so far that the mother country has intrusted to them the entire management of their own affairs. Those which thus possess responsible government cause wonderful alarm and agitation among a certain class of Englishmen by the remarkable throes through which they seem to be continually passing. A state of political crisis and of change of government seems to be the normal condition of things ; but they who know our colonies, know that these are but the result of the superabundant energies of young communities, and that they should be quiet and staid, and respectable, would be by no means necessarily healthy indications.

Sir Edward Creasy has set himself the task of giving an account of the various constitutions of the English colonies. He does full justice to the energy and the life of which we have spoken, and he suggests questions which are now occupying the minds of some of the foremost among us. By a certain class of our political economists, it is assumed that England can have no relations with her colonists other than those of trade and commerce. We believe with them, that these relations must always occupy the first place. But there

are others which this class of economists overlook. Religion is not a matter which has been subject to the arbitration of interest, nor is sentiment. The Ionian islanders were certainly better governed by England, than they are likely to be by Greece, but yet they preferred to throw in their lot with their own race. We have disestablished, and rightly disestablished, the Irish Church; not because it was a practical grievance to the Roman Catholics, but because it was a standing reminder to them of old days of oppression. So, too, in considering the relationship which exists between England and her colonies, we shall make a mistake if we overlook the sentiment that blood is thicker than water holds good between nationalities as between individuals; and the conviction that England and her colonies must remain on terms of cordiality is too powerful a sentiment to be disregarded. Besides which, we believe it may be shown that it is of the utmost importance to the interest of England and of the world, that the bonds of union between them should be drawn tighter. We ourselves have by no means abandoned the dream, that the time may come when all the English-speaking nations of the world may be again united. The tendency among nations is everywhere towards union. A united Italy and a united Germany have followed as the natural result of the wish for such a consummation. We believe that a corresponding wish is now rapidly being developed in every portion of the globe where Englishmen are found, that England, her colonies, and America may be drawn together. "Practical" fools may condemn it as an idle dream, just as they have done the dreams of Italians and Germans; but in each of these cases, though the projects seemed more hopeless than our own, they have, nevertheless, been realized.

Many indications point to a federation of states. Mr. Seeley's notion of a united states of Europe is, after all, only the notion which a large part of the continental Red party maintain, and which may possibly be the only practicable way out of our huge national complications, with gigantic standing armies, and nations on the verge of bankruptcy. Meantime, our Canadian colonies have federated themselves. Australia is considering whether she shall not follow the example thus set her. It is worth noting, too, that all the various nations are almost insensibly aiming at the same ideal. Each wishes to preserve local state government while entering into a federation. We have heard before now of a union of the Latin races. Norway, Sweden, and Denmark are contemplating a similar union; but there is still no intention of abandoning what we may call "home rule." While, therefore, there exists this tendency towards union, we are surely justified in hoping that in these days of popular government, if the wish should exist for a union of the English-speaking races, that may be brought to pass. In the last century, when a tinge of the good feeling which now exists between England and America, in spite of the blundering of their politicians, would have prevented the formation of the United States as an altogether separate nationality, Grenville proposed that the colonies should be allowed to send representatives to Parliament. Burke, in his great speech in 1775, evidently wished for it, but felt its difficulties. "*Opposuit natura*—I cannot remove the eternal barriers of the



creation," said he. But, as Sir Edward Creasy points out, the barriers of creation have been removed. New Zealand, the most remote corner of the empire, is now nearer to us than was New York—is, in fact, as near to London as was Caithness when the Act of Union took place; while, if we merely regard the means of communication, she is very much nearer.

Looking to these facts, we maintain that it is by no means impossible that the next generation may see the federation of the whole empire in a truly Imperial Parliament; may even see an alliance of the firmest character between such an Imperial Parliament and the great English nation represented at Washington. We believe that this is the alliance and the federation which the great bulk of the English nation would most gladly see effected, and which would be most conducive to the interest of England and the general peaceful well being of the world. In order, however, that it may be accomplished, it is desirable that we should know what is going on in our own colonies; what is the development which their constitutions are taking, and whether the steps that they are taking are tending to hasten such a union or to make it more difficult. It is for this reason, mainly, that we are glad that Sir Edward Creasy has published the present work. It gives a sketch of the history of our colonies, so far as it is requisite to understand how far they became possessed of their present constitutions. That this is done in a popular style is we hold a recommendation, for the popularity is not gained by sacrificing accuracy, and still less by frivolity.

**The History and Law of Church Seats, or Pews.** By Alfred Heales, F.S.A., Proctor, of Doctors' Commons. London: Butterworths. 1872.

GREAT pains have evidently been taken in the compilation of this work, which exhibits throughout an immense amount of research, and a careful arrangement of cases and extracts. It is divided into two volumes; the first containing the history of church seats or pews, and the second the law on the subject. The author in the preface draws attention to the scarcity of trustworthy books written on this question. The present work, however, is, we think, well calculated to supply the want that has been felt very generally by ecclesiastical lawyers and by the public. A copious index is an essential feature in works of this kind. The author has not only given such an index but also a complete list of decided cases, which illustrate and confirm his statements. This will render it a great favourite for ready reference. On the other hand, amusing and instructive illustrations are taken from parish ledgers and vestry minute books, which somewhat lighten the weariness that oftentimes hinders the general reader from pursuing a subject which is not usually regarded as peculiarly interesting.

Until a few centuries since, seats of any kind in the body of the church were wholly illegal. There is, perhaps, some morbid satisfaction in finding, as we proceed, that the thin end of the wedge of the pew system came in through the ecclesiastics themselves, who, owing to the length of their services, were forced to erect stalls in

the choir. Although our forefathers seem to have been slow in imitating this example of ease, it is certain that they soon began to bring stools with them, which they carried away after service. The Dean of Edinburgh must, we think, have repented the clergy's laxity when, on his rebuking his congregation for disorderly conduct, the stools were converted into implements of warfare, and hurled at his head.

There is one chapter on the separation of sexes which will prove of great interest to many churchmen. It reminds us not to recommend this work to our lady readers without one word of warning, as the manner in which they seem to have been treated throughout by the Christian Church, is neither flattering to their sex nor to the boasted gallantry of their forefathers. The following passage is quoted from a work by Robert de Brunne, and being so quaint it is difficult to resist repeating here :—

“ For wommens sake this tale y tolde,  
That they *oute of the chaunsel* holde,  
With here kercheves, the devylys sayle,  
Elles shall they go to helle bothe top and tayle ;  
For at hym they larne alle  
To tempte men yn synne to falle.  
To synne they calle men, alle that they may,  
Why shulde they ellës make hem so gay ?  
For no thyng elles are they so dyght,  
But for to blyndë mennes syght.  
Certes hyt semeth at all endes,  
That many of them are but fendes.”

Shortly after the Reformation there seems to have been a great rage for appropriating seats on every possible occasion. Wives and widows had special pews set apart for them. Midwives were also provided for. So important was it considered that this separation during service should be rigidly enforced, that we find an entry by the parson of St. Mary Colchurch, London, in the parish register, of what would scarcely seem a sufficiently important ecclesiastical offence for that course to be taken. It runs thus : that one Hayward, being a young maid, sat in the pew with her mother, to the great offence of many reverent women. He adds that he had privately admonished her, and she had for a time obeyed ; but he winds up his note as a tender-hearted man would a hopeless case : “ but now she sitts again with her mother.” The mournful tone of the whole entry shows the deep sense of that being then a sin which we now regard as quite correct.

Scarcely less curious is the notice of a pew in Beningham Church, Norfolk, for wedding couples, with a peculiarly suggestive figure of death carved in wood in one corner, surmounted by the favourite information of benefactors, that as I am, so shall you be. As an antidote to this sentimental pew should be mentioned one of a purely practical kind, in Northorpe Church, Lincolnshire, known as the Hall-Dog Pew, in which the squire's dogs were till very recently placed during divine service.

A chapter on architectural history, to please the archæologist ;

and another on comfort and extravagances, conclude the history, which we can honestly recommend as not only useful and instructive, but highly interesting.

**Notes of Cases**, extracted from the Manuscripts of Sir Samuel Romilly, with Notes. By Edward Romilly, M.A., of Gray's Inn, Barrister-at-Law. London: William Maxwell & Son. 1872.

THIS is the first part of a selection of cases from the legal notes and papers left by Sir Samuel Romilly. The editor, Mr. Edward Romilly, tells us that upwards of 800 such notes of cases exist. Most of them appeared to have been noted by Sir S. Romilly himself, and relate to cases decided between Michaelmas, 1779, and the end of 1794. Many of them appeared to have been given by their author to other editors; and these have lost much of their interest; but the editor believes, and we cordially agree with him, that many of them appear to be likely to be useful to the profession. To the cases themselves Mr. Romilly has added notes of his own, after the fashion adopted in Smith and in Tudor's Leading Cases, bringing the law on the point decided down to the present day. These notes are carefully done, and add very much to the value of the book: The case of *Davies v. Preece* (page 147, *et seq.*), decided in the Exchequer, is of interest, as showing how long before the Wills Act the tendency of our courts was towards regarding the spirit rather than the letter in the matter of wills. The statute just mentioned, no doubt, embodies the spirit of the Justinian law, that the intention of the testator was to be considered in preference to anything that he had said. It may well be questioned, whether our courts of equity have, in regard to the interpretation of wills, not been in some danger, during late years, of departing from this kind of equity, and getting within the bondage of the law. There have been judges, no doubt—Vice-Chancellor Stuart was one—who would get rid of many errors and misdescriptions, and over-ride many directions, in order to give effect to the intention of the testator, and who have been thoroughly impregnated with the belief that equity should look to the spirit and not to the letter. But, on the other hand, there are now judges who regard themselves in equity as completely bound in by the words of an instrument as the most literal of our common law judges. The case of *Davies v. Preece*, decided before Eyre, C.B., with Hotham and Perryn, B.B., shows the same disposition to look towards the spirit on the part of the court, which many of our earlier Chancery judges have shown. We commend the book to the consideration of every lawyer.

**The Law of Master and Servant**, in regard to Clerks, Artizans, Domestic Servants, and Labourers in Husbandry. By Edward Spike, Attorney-at-Law. Third Edition. By Charles Hamilton Bromby, Esq., B.A., of the Inner Temple, Barrister-at-Law. London: Shaw & Sons, Fetter Lane. 1872.

THIS is a carefully-prepared book of a class which is far from common; those that are written rather than compiled. Mr. Bromby has not only added two new chapters, and cited many additional cases, but has carefully re-written the whole of the work.

How far the chapter on Trades Unions, Combinations and Strikes, will be of use in two months' time will depend somewhat on the way Parliament chooses to deal with the measure now before it. We can only say that this chapter is good law at the present moment. The book has a carefully prepared index, references to something like five hundred cases, and an elaborately prepared analysis of the statute now in force affecting the contract of service. The section treating of "the liability of the master for the acts of his servants is particularly well done. Without hesitation we can confidently recommend Bromby's Spike as a convenient and accurate book on the subject of which it treats, and one which will be found useful alike to lawyers and to the great class of employers throughout the country.

**Burgh Laws of Dundee ; with the History, Statutes, and Proceedings of the Guild of Merchants and Fraternities of Craftsmen.** By Alexander J. Warden, F.S.A. Dundee : Scot. London : Longmans, Green & Co. 1872.

A VERY uncharitable and unfounded opinion will be entertained by Southerners should they foolishly imagine that Dundee in the North is notable only for jute, marmalade, and domestic servants. Few towns of its size have made more rapid progress in population, as well as enterprise in the arts and literature. They have an Albert Institute, a Watt Institution, and several other associations of the like kind. One of the most successful of the meetings of the British Association was held some years ago in Dundee. Now one of its enterprising merchants has produced a volume which would do credit to one who had devoted a long lifetime to the study of archæological science, and in deciphering ancient and musty manuscripts. We need scarcely have been told that the compilation of this volume "has occupied the author's spare hours during the last four or five years; the work has been arduous, but the occupation was congenial to his tastes, and to him a labour of love." Every page of the book corroborates the author's modest statement. It is a great mistake to suppose that researches in local archives and their publication can be of interest only to the inhabitants of the locality. The author has well stated the great importance of all such researches, now for the first time exciting public attention. The ancient Burgh Records of Scotland contain much that is interesting to all classes of modern society. "They unfold the motives which actuated our forefathers in their intercourse with each other, and with those beyond the liberties of their respective burghs. They exhibit the laws framed in rude ages for protecting the lives and property of, and preserving peace and good brotherhood among, the burghal communities. They throw light on the manners and customs of the inhabitants in early times, and enable us to mark the progress made from age to age in their social, municipal, and political life; and they show us the bondage under which they were held by lord and priest, and the obstacles they had to surmount in order to free themselves from feudal and ecclesiastical bondage." We feel inclined to

give some extracts in illustration of the rude yet strong and patriotic sentiments which pervaded the ancient men of Dundee, which it would be well that young Dundee strove to emulate. But the strange language in which the statutes and laws of the sixteenth century are embodied would be worse than Greek or Sanscrit to Saxon ears; and, indeed, we doubt if even the denizens of Sea-gate, Murray-gate, Over-gate, and Cow-gate, of Dundee itself, will now master the uncouth language of their sires. To meet this difficulty the author has most kindly and considerably appended a copious and able glossary. We believe that some words may be found there which have not a place in that repertory of the Doric of Scotland—Dr. Jameson's Scotch Dictionary.

The dignitaries of our ancient burghs south of the Tweed would do well to procure a copy of this interesting and amusing work, and be thereby incited to rescue the remains of Norman lore from oblivion, and add to the amount of light now shed on what has hitherto been held as the dark ages—not so much because of its darkness, as from that of subsequent generations, who concerned themselves only with the present, and cared little or nothing for the past, or to trace up their present liberties and privileges to its patriarchal sources in ages long gone past.

**An Exposition of the Laws of Marriage and Divorce, as administered in the Court for Divorce and Matrimonial Causes, with the Method of Procedure in each kind of Suit. Illustrated by Copious Notes of Cases. By Ernest Browning, of the Inner Temple, Barrister-at-Law. London: William Ridgway; and Stevens & Haynes. 1872.**

THIS is a book which we can unhesitatingly approve. Our first impression on looking at it was, that it was unnecessary to add to the two leading text-books, both of very considerable merit, on the subjects with which the Divorce Court has to deal. But on examination of Mr. Browning's work, we were compelled to come to the conclusion that its author had not unnecessarily burdened our shelves, but had produced a work whose legal merits will cause it to be a favourite with those whose professional duty takes them into the Divorce Court, and whose clearness of statement will make it the book resorted to by those of the public who contemplate making their appearance before Lord Penzance. The author begins by explaining the constitution and general powers of the Court. He then states the laws of marriage, the conflict of marriage laws, and the effect of the domicile of the parties in limiting the jurisdiction of the Court. Having done this, he describes the procedure, and states the law relating to suits for dissolution of marriage, and for judicial separation respectively. A chapter, very well done, on suits for decrees of nullity of marriage, and another on a suit for restitution of conjugal rights, follow. The rest contain the necessary information on alimony, marriage settlements, custody of children, petition for reversal of decree and procedure, under the Legitimacy Declaration Act. An appendix contains the rules and regulations, and the forms authorized by the Court, and a table of fees.

Mr. Browning has added some valuable notes and directions with respect to pleading. On the general subject of the statement of the law, as administered in the Divorce Court, there is not much to be said. Mr. Browning has stated the law with singular clearness and ability, and the illustrations he brings of his legal propositions make the book positively interesting. On the subject of the law relating to the validity of marriages, the curious case of *Ruding v. Smith* is quoted, in order to show that a marriage, solemnized according to the law of England, as it existed before Lord Hardwicke's Act, within the lines of a British army serving abroad, is valid. The further question which was raised in this case, which Mr. Browning has not thought well to mention (and perhaps wisely), still bears on the law as relating to the validity of a marriage celebrated abroad. It is, how far do the marriage laws of a ceded colony apply to the conquerors? A captain of the 12th regiment of Foot married a woman at the Cape of Good Hope. The Cape had been a Dutch colony, and, according to the rule laid down by Lord Mansfield and others of our leading authorities, the laws which prevailed before the cession continue in a ceded colony until the sovereign changes them. Now, by the Dutch law then prevailing at the Cape, no marriage with a female minor was valid, unless with the consent of her guardians. The English captain had not obtained such consent, and subsequently it was sought to set aside the marriage on this ground. Whereupon two questions arose; first, the one with which Mr. Browning deals, what was the effect of the marriage ceremony described already within the lines of a British army serving abroad, in other words, was such a ceremony valid? And second, how far do the laws in force, in a conquered or ceded colony, affect the conquerors or cessees? Lord Stowell, on this occasion, said, "I am perfectly aware that it is laid down generally that the laws of a conquered country remain until altered by a new authority; but I cannot see any principle which bound the conquerors of the country to the legal institutions of the conquered." He held, therefore, that while the marriages would not have been good between two of the Dutch inhabitants, it was good between an Englishman and a Dutch lady, notwithstanding the existence of the colonial law.

Mr. Browning calls attention, in his usually clear fashion, to the important conflict of law which arises when doubts are raised as to the validity of a second marriage contracted by persons whose first marriage has been dissolved by a foreign or colonial court. He rightly states that the recognition by the English courts of a foreign divorce will depend upon, (1) the domicile of the parties at the time of the divorce; and (2) upon the sentence having been pronounced upon a ground of divorce recognised by English law. The history of English law, in regard to this question, is not a little curious. Before 1858 marriage was almost indissoluble; and the law, which hardly allowed divorce in this country, was of course opposed to recognising the power of foreign courts to effect what they were unable to do. In 1860, the doctrine on which this was founded, namely, that the *lex loci contractus* determines the character of the marriage, was carried to its farthest extreme. A Frenchman and a Frenchwoman, domiciled in France, were married in England in

conformity with our law, but not with that of their country. A suit for nullity was subsequently obtained in the French courts. It was held in England by Cresswell, Channell, and Keating, that as the marriage was contracted in England it could not be dissolved by a French divorce. In 1868, the House of Lords refused to act on this extreme theory. Meantime the principle laid down in *Lolley's case* has never been over-ruled, and the question still remains an open one, whether, even if the parties were domiciled in a foreign country, and had, in fact, permanently taken up their residence there, our courts would recognise a divorce granted by the courts of such foreign country. There are other points which we had marked as worthy of special approval for the way in which they are treated, but the pressure upon our space compels us to refer the reader directly to the book itself, with the assurance that they will find an excellent treatise, in precise, yet simple and accurate language.

\* \* \* The Editor regrets that owing to a pressure of matter more than usually opportune to the moment, our usual Scotch and Irish notes, and several articles of importance must stand over till our next, among which may be mentioned :—

- I.—The Temple Church. Part II.
- II.—Plea for a new Print of Bracton. By H. S. Milman.
- III.—The Law of Injunctions. Review of Mr. Joyce's work.
- IV.—The Personal Character of Obligations in English Law.
- V.—The Growth of Jewish Law.

## EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

*Easter Term, 1872.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—Henry Pendrill Charles, Thomas Harwood, Harry Bevir, Robert Loweband Fulford.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books :—To Mr. Charles, the Prize of the Honourable Society of Clifford's Inn ; to Mr. Harwood, Mr. Bevir, Mr. Fulford, Mr. Gordon, and Mr. Peach, Prizes of the Incorporated Law Society.

The Examiners also certify that the following candidates, under the age of 26, passed examinations which entitle them to commendation :—Alfred Edward Robbett, Isidore James Carter, John Errington, Richard Cresswell Loader, Henry Ormiston Lyus, William Postlethwaite, Charles Tanner Kingdon Roberts, Sydney Charles

Scott. The Council have accordingly awarded them certificates of merit.

The number of candidates examined in this Term was 122; of these 102 passed, and 20 were postponed.

## INNS OF COURT EXAMINATIONS.

*Trinity Term, 1872.*

*Hindu and Mahomedan Law, and Laws in force in British India.*

THE Council of Legal Education have awarded to James Anderson, Esq., Emery James Churcher, Esq., students of Lincoln's Inn; Thomas Conlan, Esq., student of the Middle Temple; Fendall Currie, Esq., John Dillon, Esq., students of Lincoln's Inn; Henry James Duggan, Esq., student of the Middle Temple; Robert Fischer, Esq., student of Lincoln's Inn; Charles Edward Lanauze, Esq., Raj Narain Mittra, Esq., students of the Middle Temple; Francis Robert Morrison, Esq., student of the Inner Temple; James O'Kinealy, Esq., student of Lincoln's Inn; William Edwin Ormsby, Esq., Sitarem Narayan Pandit, Esq., students of the Middle Temple; William Henry Rattigan, Esq., student of Lincoln's Inn; Patrick Ryan, Esq., student of the Inner Temple; Edward Henry Whinfield, Esq., Robert Wilson, Esq., Augustus William Wollaston, Esq., and Mahomed Wuhiduddin, Esq., students of the Middle Temple, certificates that they have satisfactorily passed an examination in the subjects above mentioned.

### GENERAL EXAMINATION.

The Council of Legal Education have awarded to Robert Forster M'Swinney, Esq., student of the Inner Temple, a studentship of fifty guineas per annum, to continue for a period of three years.

Frederick George Carey, Esq., student of the Inner Temple, an exhibition of twenty-five guineas per annum, to continue for a period of three years.

Edward Denny Fairfield, Esq., student of the Inner Temple; James Keith Grosjean, Esq., student of the Middle Temple; William Henry Rattigan, Esq., student of Lincoln's Inn, certificates of honour of the first class.

James Anderson, Esq., John Winfield Bonsor, Esq., students of Lincoln's Inn; Harry Armstrong Brett, Esq., student of the Middle Temple; John Worrell Carrington, Esq., Emery James Churcher, Esq., students of Lincoln's Inn; Richard Henry Cole, Esq., student of the Inner Temple; Thomas Conlan, Esq., student of the Middle Temple; Charles Arthur Duncan, Esq., student of Lincoln's Inn; Henry James Duggan, Esq., student of the Middle Temple; John Dillon, Esq., student of Lincoln's Inn; Thomas Edward Fairfax, Esq., student of the Middle Temple; Robert Fischer, Esq., student of Lincoln's Inn; John Donohoe Fitzgerald, Esq., Arthur John Flaxman, Esq., students of the Middle Temple; Charles J. Fleming, Esq., student of Gray's Inn; Marischal Keith Frith, Esq., student of the Middle Temple; Henry Spencer Berkeley Hardtman, Esq., student of the Inner Temple; William Hardy, Esq., student of



the Middle Temple; Timothy Nathaniel Hilbery, Esq., Peter Quin Keegan, Esq., students of Lincoln's Inn; John Taylor Lingen, Esq., John MacDonell, Esq., Henry Francis Makins, Esq., students of the Middle Temple; Francis Robert Morrison, Esq., student of the Inner Temple; James O'Kinealy, Esq., student of Lincoln's Inn; William Edwin Ormsby, Esq., John William Owsley, Esq., students of the Middle Temple; William Peregrine Probert, Esq., Robert Purvis, Esq., students of the Inner Temple; James Hermann de Ricci, Esq., student of the Middle Temple; William Benet Rickman, Esq., Patrick Ryan, Esq., students of the Inner Temple; Henry Rawlins Ripon Schooles, Esq., student of the Middle Temple; Joseph James Smith, Esq., Francis Willis Taylor, Esq., students of the Inner Temple; Augustus William Wollaston, Esq., student of the Middle Temple; Hugo Joseph Young, Esq., student of the Inner Temple, certificates that they have satisfactorily passed a public examination.

## CALLS TO THE BAR.

### *Trinity Term, 1872.*

**LINCOLN'S INN.**—Algernon Herbert Paley, Esq., of Exeter College, Oxford; William Knight, Esq., B.A., Cambridge; John Amherst Walter, Esq., M.A., Cambridge; Frank Harrison Hill, Esq., B.A., University of London; Charles Francis Fellows, Esq., M.A., Oxford; Arthur John Goodford, Esq., M.A., Cambridge; Douglass Round, Esq., B.A., Cambridge; Arrakiël Peter Gaspar, Esq.; George Atkins, jun., Esq., B.A., Cambridge; Arthur Underhill, Esq., B.A., Dublin; Francis Villiers Forster, Esq.; Alfred Hinuber Haggard, Esq.; William Miller Lewis, Esq.; Robert Williams, Esq., M.A., Oxford, Fellow of Merton College; John Worrell Carrington, Esq., of Lincoln College, Oxford; James Anderson, Esq., M.A., Edinburgh, Member of the Covenanted Civil Service of India; Robert James Forrest, Esq., of Her Majesty's Consular Service in China.

**INNER TEMPLE.**—Robert Forster M'Swinney (holder of a studentship awarded in the present Trinity Term, of a certificate of honour awarded in Michaelmas Term last, and of an exhibition awarded July, 1871), M.A., LL.B., Queen's University, Ireland; John O'Donohue FitzGerald, Esq., LL.B., Cambridge; Samuel Barrington Tristram, Esq., B.A., Oxford; Henry John Moseley, Esq., B.A., Oxford; William John Greenwell, Esq., B.A., Oxford; James Thomas Richard Fussell, Esq., B.A., Cambridge; George Anderson, Esq., M.A., Oxford; John James Emerson, Esq., LL.B., Cambridge; Lyde Ernest George Benson, Esq., Oxford; Francis Willis Taylor, Esq., B.A.S.C.L., Oxford; John Martin Routh, Esq., Oxford; Louis Henry Cecil Jackson, Esq., B.A., Oxford; Edwin Francis Chamier, Esq., B.A., Oxford; Adolphus George Charles Liddell, Esq., B.A., Oxford; Robert Clement Bunbury, Esq., B.A., Cambridge; Joseph James Smith, Esq., B.A., London; Arthur

James Le Mottée, Esq., B.A., Cambridge; Charles Roden Filgate, Esq.; Brodrick Shipley Warner, Esq.; Charles Colson Bernard, Esq., B.A., Oxford; Alfred William Foster, Esq., Cambridge; Nathaniel Ernest Cooke, Esq., B.A., Cambridge; William Austin Metcalfe, Esq.; James Hutchinson, Esq.; Thomas Hill Sooby, Esq.; Alexander Charles Richards Maitland, Esq., M.A., Oxford; Abel John Ram, Esq., M.A., Oxford; Hugo Joseph Young, Esq., B.A., London; Walter Henry Dickman, Esq.; John Parish Kingsford, Esq., B.A., Cambridge; Tertanatt Cherian Poonen, Esq., B.A., Madras; George Bickersteth Hudson, Esq., Oxford; Albert Childers Thompson, Esq., B.A., Cambridge.

MIDDLE TEMPLE.—Edward James Ackroyd, Esq., certificate of honour, Trinity, 1872; William Garrow Waterfield, Esq.; Augustus William Wollaston, Esq.; James Taylor, Esq., St. John's College, Cambridge; Maurice O'Connor Morris, Esq., Worcester College, Oxford; Pope Alexander Cooper, Esq.; Henry Francis Makins, Esq.; Marischal Keith Frith, Esq.; George Frederick Clifford, Esq.; Hugh Dawson, Esq., University of London; Arthur John Flaxman, Esq.; Francis Douglas Boggis-Rolfe, Esq.; Walter Field Hooper, Esq., University of London; Charles Henry Hill, Esq., B.A., Trinity College, Dublin; Edward Mansfield, Esq.; John Charles Pritchard, Esq., King's College; Raj Narain Mittra, Esq.; John William Owsley, Esq.; Sydney Batchelor Michael, Esq., University of London; Henry John George Bissill, Esq., M.A., Pembroke College, Oxford; John Taylor Lingen, Esq., B.A., Pembroke College, Cambridge; Morton William Smith, Esq.; Thomas Fellowes Gill, Esq., Worcester College, Oxford; H. Risi Case Mullick, Esq.; Le Do Frederick Mathews, Esq.; Harry Armstrong Brett, Esq.; William Edwin Ormsby, Esq., B.A., Trinity College, Dublin; Anundoram Borooah, Esq.

GRAY'S INN.—Gustavus Adolphus Smith, Esq., certificate of honour, 1st class, Michaelmas Term, 1871; John Carr, Esq., jun., London University; Charles James Fleming, Esq.

## APPOINTMENTS.

Mr. Richard Child Heath, Solicitor, has been appointed Clerk of the Peace for the Borough of Warwick; Mr. George Spackman, Registrar of the Trowbridge County Court; Mr. W. Picton Evans, Clerk to the Magistrates for the Petty Sessional Division of Troedyrwyr, in the County of Cardigan; Mr. Robert Robson Blyth, Steward to the Ladies of the Manors of Holtley and Burythorpe-with-Stockton; Mr. John Moore Todd, Solicitor, Coroner for Winchester; Mr. Hugh Reilly Semper, Barrister-at-Law, Attorney-General for the Leeward Islands; The Right Hon. Sir Barnes Peacock, a Member of the Judicial Committee of the Privy Council;

Dr. Thomas H. Tristram, Chancellor of the Diocese of Hereford ; Mr. Charles Wethered Willett, Barrister-at-Law, Surrogate of the Diocese of Norwich ; Mr. Gwelym Williams, Stipendiary Magistrate for Llantrissant, Pontypridd, and Rhondda Valley District, in the County of Glamorgan.

## OBITUARY.

*May.*

- 15th. GREAVES, Edward Sey, Esq., Solicitor, aged 62.
- 22nd. BOLTON, R. R., Esq., Barrister-at-Law, aged 73.
- 23rd. FITZGERALD, Charles, Esq., Solicitor, aged 88.
- 28th. HOOLE, F. W., Esq., Solicitor, aged 28.
- 28th. MENSARD, Charles Leonard, Esq., Solicitor, aged 31.
- 28th. OLDREIVE, E. Brown, Esq., Solicitor, aged 47.
- 29th. GEDDES, Thomas, Esq., Solicitor, aged 53.

*June.*

- 2nd. HAYMES, Arthur, Esq., Solicitor, aged 62.
- 7th. HILL, Matthew Davenport, Esq., Q.C., formerly a Commissioner in Bankruptcy, aged 80.
- 8th. GOODMAN, Thomas, Esq., Barrister-at-Law, aged 32.
- 12th. GREEN, Henry, Esq., Barrister-at-Law, aged 66.
- 14th. McCULLOCH, S., Esq., Barrister-at-Law, aged 42.
- 15th. LAMBERT, Sir Henry Edward Francis, Bart., Barrister-at-Law, aged 49.
- 17th. JEE, Thomas, Esq., Solicitor, aged 28.

THE  
LAW MAGAZINE AND REVIEW.

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No. VII.—AUGUST 1, 1872.

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I.—THE PERSONAL CHARACTER OF OBLIGATIONS IN ENGLISH LAW.

I. ASSIGNMENT OF A CHOSE IN ACTION.

THE doctrine that a chose in action is not assignable at law is usually stated as being a kind of artificial restraint on the natural freedom of alienation, introduced on grounds of supposed public convenience by the “wisdom and policy of the founders of our law,”\* to avoid the danger of maintenance and oppressive litigation. This reason, first given by Coke in *Lampet’s case*, is repeated by almost every modern text-book without remark.

Now the doctrine would in itself be an immediate consequence, or rather a partial expression, of the general principle that the reciprocal right and duty involved in an obligation are strictly personal to the creditor and debtor. This principle is recognised as fundamental in the Roman law,† and continues to be so in the modern systems derived from it. But here it appears by no means as a positive restriction deliberately introduced, but as a relic of primitive legal ideas, which, whilst carefully preserved in form, was even in early times constantly evaded in substance by means

\* *Lampet’s case*, 10 Rep., 48a.

† Gaius ii. 38, 39. Perhaps the most neat and comprehensive way of stating the rule is Savigny’s (Syst. sec. 104, note f, vol. 3, p. 15): Obligations cannot be conveyed save by an universal succession: (Bei den Obligationen giebt es keine Singular Succession.) There was a limited exception in the case of obligations transferred on the sale of an inheritance as parcel of it: c. 4, 39, *de hered. vel. act. vendita*, 5, 7, 8: Mr. Poste in his edition of Gaius (p. 352) seems to take this too generally. It presents a rudimentary analogy to our own equitable assignments.

exactly analogous to those which are used for the same purpose amongst ourselves, so as to be practically inoperative in the very cases where its application would seem most necessary and obvious.

Now it can hardly be considered rash to conjecture even *a priori* that a diametrically opposite state of circumstances, such as is assumed by the dictum in Lampet's case to have existed in England, was not very likely to result in precisely similar phenomena. And Mr. Spence has indeed observed (*Equit. Jurisd. of the Court of Chancery*, ii. 850):—

“It may be doubted whether the reason which has been the foundation of the rule everywhere else was not also the reason for its introduction in this country, namely, that the credit being a personal right of the creditor, the debtor being obliged towards that person could not by a transfer of the credit which was not an act of his become obliged towards another.”

There is another general reflection which may be made in confirmation of this: the independent systematic development of our law of personal contracts is quite modern, and there is no trace in it, till a comparatively recent date, of any settled rules other than those adopted from Roman law.\* What little our earliest authorities say on the subject of obligations is taken entirely from Roman sources, with a few modifications not bearing on the present point.† It is true that they do not expressly state this rule, doubtless for no other reason than that it is not expressly stated in the passages of the *Institutes* which they follow.

So far, then, we have grounds for looking with considerable suspicion on the peculiar wisdom and policy attributed to the founders of our law. But there is historical evidence which (I venture to think) puts the matter beyond conjecture. An examination of the authorities previous to Lord Coke's time gives the following results, showing at the same time that his reason is unfounded, and that a certain amount of perverted fact is embodied in it:—

1. Both the general rule that a chose in action is not assignable, and the exception in favour of the Crown,‡ appear to have been always treated as clear and certain.

\* The doctrines as to consideration, for instance, cannot be said to have had any organic consistency before the last century at earliest.

† Bracton, 99; Britton, *De Dctte* (vol. i., p. 156, in Clarendon Press ed.).

‡ It may be conjectured that this exception, at first sight anomalous, took its rise in the Crown's universal succession on forfeitures, which, according to the general rule, would naturally comprise rights of action; and that the power to assign over the rights so acquired was inferred from this by a false analogy. There was another very curious apparent exception in the case of Jews, who, before their expulsion in 1290, were regarded as the king's serfs, “*taillyables au Roy come les seens serfs et a nul autre*” (*Estatutz de la*

2. But the device of practically effecting the object of such an assignment by the assignee suing in the assignor's name was in several instances disputed on the ground of maintenance, though with little success. Thus the objection of maintenance, instead of being a valid ground on which the rule against a direct assignment was founded, was but an argument fruitlessly employed against the indirect assignment by way of authorizing the use of the assignor's name which in modern times has been fully established.

The authorities on which this conclusion rests are now to be pointed out. It will be most convenient to take in chronological order, first the cases where an immediate assignment only is mentioned, afterwards those where the right of the assignee to sue in the name of the assignor is considered. Collateral points on which discrepancies with modern law appear will not be dwelt upon.

1. In Mich. 3 Hen. IV. 8, pl. 34, is a case where a grantee of an annuity from the king sued on it in his own name. No question seems to have been raised of his right to do so.

In Hil. 37 Hen. VI. 13, pl. 3, it appears that by the opinion of all the justices an assignment of debts was no consideration for a bond, forasmuch as no duty (*duty* here as elsewhere is used with the double aspect of *obligation* in the classical sense) was thereby vested in the assignee: and the Court of Chancery acted on that opinion by decreeing the bond to be delivered up: thus it is clear that the notion of such an assignment being good in equity though not at law had not then arisen. It may be noted in passing that the case is otherwise interesting, as it shows pretty fully the relations then existing between the Court of Chancery and the Courts of Common Law.\*

In Hil. 21 Ed. IV. 84, pl. 38, the question was raised whether an annuity for life granted without naming assigns could be granted over; and the dictum occurs that the right of action, whether on a bond or on a simple contract, cannot be granted over.

Mich. 39 Hen. VI. 26, pl. 36. If the king grant a duty due

*Jeuerie, temp. incert.*: the true date is shown by Prynne to be 3 Ed. I.), and as not capable of holding property under the common law, or subject to its jurisdiction. They were governed by special customs, administered by the Crown through special officers, as a matter of prerogative; and the Crown claimed accordingly to confiscate, release, or assign, or license them to assign, their debts at pleasure. See Prynne, "A Short Demurrer to the Jews," &c. London, 1656, *passim*, esp. the *Provisiones de Judaismo* of 53 Hen. III. there cited, part 2, fo. 63 b. (there is a lacuna in the printed paging); *ib.* pp. 53, 65, 134, *post*: Y.B. 33 Ed. I., xli., 355.

\* It was referred to not very long ago in the C.P. (*Balfour v. The Sea, Fire, Life Assurance Co.*, 3 C.B., N.S., 300) see per Willes J., p. 305.

to him from another, the grantee shall have an action in his own name: "*et issint ne puit nul autre faire.*"

So Mich. 2 Hen. VII. 8, pl. 25. "*Le Roy poit granter sa accion ou chose qui gist en accion; et issint ne poit nul autre person.*"

In Roll. Abr. Action sur Case, 1. 20, pl. 12, this case is stated to have been decided in B.R., 42 Eliz., between Mowse and Edney, *per curiam*: A is indebted to B by bill (*i.e.*, the now obsolete form of bond called a single bill), and B to C. B assigns A's bill to C. Forbearance on C's part for a certain time is no consideration for a promise by A to pay C at the end of that time:\* for notwithstanding the assignment of the bill, the property of the debt remains in the assignor.

In none of these cases is there a single word about maintenance or public policy. On the contrary, it appears to be assumed throughout that the impossibility of effectually assigning a chose in action is immemorial and inherent by some unquestionable necessity in the legal nature of things. Finally, in *Terms de la Ley*, tit. *Chose in Action*, the rule is briefly and positively stated to this effect: Things in action which are certain the king may grant, and the grantee have an action for them in his own name: but a common person can make no grant of the thing in action, nor a king himself of such as are uncertain. No reason is given.

2. The cases where the device of indirect assignment came in question present some obscurities in detail; but on the whole it appears with sufficient certainty that the experiment of opposing such a proceeding on the ground of maintenance was repeatedly tried without success, and by the time of Henry VII. was completely discredited.

In Hil. 9 Hen. VI. 64, pl. 17, Thomas Rothewel sues J. Pewer for maintaining W. H. in an action of detinue against him, Rothewel, for "*un box oze charters et muniments.*" Defence, that W. H. had granted to J. P. a rent-charge, to which the muniments in question related, and had also granted to J. P. the box and the deeds, then being in the possession of T. R. to the use of W. H., wherefore J. P. maintained W. H., as he well might. To this Paston, one of the court, made a curious objection by way of dilemma. It was not averred that W. H. was the owner of the deeds, but only that T. R. had them to his use; and so the property of them might have been in a stranger: "*et issint ceo fuit chose en accion et issint tout void*": the precise meaning of these words is not very clear, but the general drift is that, for

\* But as to this, *vide contra*, *ib.* 29, pl. 60. It must be remembered that the whole doctrine of consideration was still anything but well defined. As to the modern law, *Balfour v. The Sea, Fire, Life Assurance Co.*, *ubi sup.* 1 Wms. Saund. 220, note a.

anything that appeared, W. H. had no assignable interest whatever; and it looks as if the strong expression *tout void* was meant to take a higher ground, distinguishing between a transaction impeachable for maintenance and one wholly ineffectual from the beginning. But if W. H. was the true owner, Paston continued, then the whole property of the deeds, &c., passed to J. P., who ought to have brought *de-tinue* in his own name.\* Babington, C. J., and Martyn, J., the other judges present, were of a contrary opinion, holding that any real interest in the matter made it lawful to maintain the suit. The attempt to assign a chose in action is here compared by the counsel for the plaintiff to the grant of a reversion without attornment; showing that the personal character of the relation was considered the ground of the rule in both cases.

In Mich. 34 Hen. VI. 30, pl. 15, Robert Horn sued Stephen Foster for maintaining the administrators of one Francis in an action against him, R. H.: the circumstances being that R. H. was indebted to Francis by bond, and Francis being indebted to Stephen in an equal sum assigned the debt and delivered the bond to him, authorizing him, if necessary, to sue on it in his (Francis') name, to which R. H. agreed; and now Francis had died intestate, and Stephen was suing on the bond in the name of the administrators with their consent. And this being pleaded for the defendant, was held good. Prisot, in giving judgment, compared the case of the *cestui que use* of lands, whether originally or claiming by purchase through him to whose use the feoffment was originally made, taking part in any suit touching the lands. On this Fitzherbert remarks (*Maintenances*, 14) "*Nota icy que per ceo il semble que un duité puit estre assigne pour satisfaction.*" So it is said in Hil. 15 Hen. VII. 2, pl. 3, that, if one is indebted to me, and deliver to me an obligation in satisfaction of the debt, wherein another is bound to him, I shall sue in my debtor's name, and pay my counsel and all things incident to the suit; and so may do he to whom the obligation was made, for each of us may lawfully interfere in the matter.

Brooke, Abr. 140 b, observes, referring to the last mentioned case: "*Et sic vide que chose in accion poet estre assigne oustre pur loyal cause, come iust det, mez nemy pur maintenance.*" This form of expression is worth noting, as showing that assignment of a chose in action meant to the writer nothing else than empowering the assignee to sue in the assignor's

\* Another argument put by the plaintiff's counsel, though not very material, is too quaint to be passed over: Whatever interest J. P. may have had by the grant of the rent and the deeds relating to it, yet he had none in the box, and therefore in respect of the box, at all events, there was unlawful maintenance on his part.



name, and that he had no fear lest any one should suppose he meant to assert such a plainly impossible proposition as that the assignee could sue in his own name.

This evidence seems sufficient to establish with reasonable certainty the propositions stated above, and to convert what was a not improbable conjecture *à priori* into historical fact. The only historical difficulty is one which extends to the whole of our law of contract, namely, that of tracing any continuity of general principles in the interval between the purely Roman expositions of Bracton and Britton and their first appearance in a definitely English form.

This conclusion, if correct, fully justifies the remark of Mr. Justice Buller in *Master v. Miller* (4 T.R., 340), where he commented on the unreasonableness of the rule and its reason, as they are usually presented: "If a third person" (he said) "be permitted to acquire the interest in a thing, whether he is to bring the action in his own name or that of the grantor does not seem to me to affect the question of maintenance." We now see that no such thing was in fact supposed before Coke's time; and moreover it may well be doubted whether such a view was deliberately held by Coke himself, for the dictum in *Lampet's* case is little more than a rhetorical flourish, and it is clear from the context that he was thinking much more of future and contingent interests in real estate than of personal rights arising out of contract.

The reader may not unnaturally ask, what has been gained by this inquiry, supposing the results to be correct? What does it matter to us in the year 1872 whether Coke gave a right or a wrong reason for a rule which is, for most purposes, practically obsolete, and of which even the formal traces have disappeared from several important departments of law? There is a twofold answer. In the first place, there is a certain pleasure in satisfying pure curiosity, and one can never tell that some profit not apparent at the time may not afterwards come of it. But, besides this, there is a certain positive and solid satisfaction in being assured that something which has passed for odd and anomalous is really but a natural consequence of a far more general principle, a principle which, though this particular application of it has lost much of its importance, has by no means ceased to assert its influence.

The rule, in its narrow and technical form, "a chose in action is not assignable," has indeed shrunk, as Mr. Justice Buller said,\* to a mere shadow, in the preservation of which, after the substance is gone, it is difficult to see any use or convenience. But if we express the same idea in the more

\* *Master v. Miller*, 4 T.R., 340.

general form: A contract cannot be made with an uncertain person; or in the still wider, yet perhaps more accurate proposition: The legal effects of a contract are confined to the contracting parties, we find that we are in presence of a principle which has by no means lost its substantial weight and meaning. It is indeed subject to large exceptions in considerable departments of the law where it is excluded on special grounds; but notwithstanding the magnitude of those departments, such exclusion must still be distinctly regarded as exceptional; for the rule has a solid foundation in reason, and has in the main been firmly upheld. So far from any tendency being shown to relax it, the courts have been disposed of late years to carry it out more thoroughly and consistently than heretofore. Certain exceptions do indeed exist which seem to have escaped being clearly recognised as such until they had become too firmly established to be doubted; thus it is in the matter of rewards publicly offered, and of covenants running with the land in equity. It is proposed to discuss more particularly on a future occasion these modern encroachments, as they may be considered the relation of the general principle, as well as to the distinctly admitted exceptions.

FREDERICK POLLOCK.

## II.—A PLEA FOR A NEW PRINT OF BRACTON.

SIR WILLIAM STAUNDFORDE having set out, in his "Les Plees del Coron," printed in 1557, and "An Exposition of the Kinges Prerogative," printed in 1568, many, and some long, passages of Bracton's work, those treatises may, so far, be reckoned as the first print of it. They give no information as to the MS. of Bracton used by their author.

Bracton's work was first printed as a whole in 1569. The editor, T. N., is unknown. None of the MSS. used by him—the "diversi et vetustissimi codices" collated for the text, and the "duodecem libri antiqui" collated for the table of various readings—have been identified. The book was reprinted in 1640, without verbal alteration other than "denuo" for "nunc primum," on the title-page.

Early in the seventeenth century Selden began his literary life, which ended only with his natural life in 1654. He was throughout a diligent, and at the same time a judicious, student of Bracton; but he never trusted the print, either

for text or for arrangement. It appears from passages in his works (*De Synedr. Heb.*, lib. III. c. vii. s. viii.; *Janus Angl.*, lib. I. s. xxxv., lib. II. s. lxxviii.; *Titles of Honour*, c. V. ss. viii., xxiii., and additions, No. 245; *Hist. of Tythes*, c. XIII. s. i.; *Orig. of Eccl. Jur. of Test.*, c. VIII.; *Diss. ad Flet.*, c. II. ss. ii., iv.) that he possessed several, and had seen more, MSS. of Bracton; that he constantly had his own MSS. by him for collation with the print; that he preferred citing the MSS.; and that he viewed the method and distribution of the text as an open question. In one of his later works, he thus sums up his opinion of the print:—

“Eandem citaverat legem Bractonius, quod ex MSS. constat, ut cunque in ejusdem editione tam seculi superioris, quæ prima fuit, quam jam nupera (quarum utraque se fingit factum ingenti curâ atque è codicibus MSS.) perperam legatur. . . .

“In editionibus illis ufrisque menda sunt perplurima eaque crassissima, partim e librariorum inscitia, partim ex operarum incuria. . . .

“Hujusmodi in Bractonii editis sunt creberrima menda, etiam et non raro in exemplaribus ejus MSS., licet vetustis, aliquot.”

*Diss. ad Flet.*, c. III., s. i.

The materials for an improved rendering of Bracton known to Selden probably for the most part exist, and, with other MSS. since recovered, are more accessible than in his time.

The writer has reckoned thirty MSS. of Bracton in England:—

London, British Museum	{ Harl.	-	-	-	7
	{ Addit.	-	-	-	3
	{ Royal	-	-	-	1
Lambeth	-	-	-	-	2
Lincoln's Inn	{ Hale	-	-	-	1
	{ Anon.	-	-	-	1
Gray's Inn	-	-	-	-	1
Oxford, Bodleian Library	{ Bodleian	-	-	-	2
	{ Tanner	-	-	-	1
Merton College	-	-	-	-	1
Cambridge, University Library	-	-	-	-	4
Queen's College	-	-	-	-	1
York Minster	-	-	-	-	1
Worcester Cathedral	-	-	-	-	1
Ashburnham, Sussex (Earl of Ashburnham)	-	-	-	-	1
Stanford Court, Worcestershire (Sir F. Winnington)	-	-	-	-	1
Middlehill, Worcestershire (Mrs. Fenwick)	-	-	-	-	1
Total	-	-	-	-	30

The three Addit. MSS. in the British Museum came respectively from the libraries of Chertsey Abbey, of Glastonbury Abbey, and of Sir Thomas Crewe, King's Serjeant to

James I. The Hale MS. at Lincoln's Inn bears Selden's motto; the other MS. there belonged to Serjeant Cholmeley in 1563. The MS. at Gray's Inn came from Serjeant Godbold in 1635, and is arranged in four books. One MS. in the Bodleian Library, at Oxford, is stated by Selden to be arranged in 1067 chapters; and that at Merton College is in eight books. One MS. in the Cambridge University Library came from Luffield Priory; another belonged to Antony Stapleton, Reader of the Inner Temple, in the reign of Henry VIII., and afterwards to Francis Tate. The MS. at Ashburnham is described in O'Connor's Catalogue of MS. at Stowe (from whence it came) as of the 14th century, and differing considerably from the print. Other MSS. above referred to may bear marks of early and independent origin, and perhaps the list may be increased by private knowledge, by the further researches of the Historical MSS. Commission, and by reference to the catalogues of continental libraries.

There are at the present day apt instruments and skilful hands for working up these materials. Güterbock the author, and Coxe the translator, of "Bracton, and his Relation to the Roman Law," have so ably analysed and illustrated the existing print, that they have at once revived the desire for, and furnished aid towards, a new one. They have shown, more precisely than any before them, how far Bracton derives, not his matter only, but his very words, from the civil and canon laws, and the Sum of Azo. Good texts of the sources of Bracton's work, such as are now at hand, cannot but be useful in restoring the text of the work itself. Probably no texts whatsoever of them were used by the editor of 1569. The Statute of Merton, being now in print, may readily be compared with the notices of it. The *Abbreviatio Placitorum* for the reign of Henry III., being also now in print, may verify or explain cited cases. Bracton being the chief source of Britton, the revision of the earlier work may be aided by the later as revised by Mr. Nichols, whose execution of his task is a sufficient proof (if proof be required) that skill for the re-editing of a law treatise from its ancient MSS. is not now wanting.

A new print of Bracton is asked on behalf, not of legal antiquarianism, but of legal history, legal study, and legal reform.

The history of English law is in a great measure the history of England, and no view of either can be sufficient unless it take in the antagonism of the Latin and Teutonic elements of the English nation in the middle ages, and the various forms in which that antagonism developed itself, as conflicts between the See of Rome and the Crown of England, between the regular clergy and the laity, between the civil law and the feudal law.

It is unnecessary to trace these conflicts down to the latter part of Henry III.'s reign. It is sufficient to take Bracton's work as the legal result of them to that date, compiled by one who was perhaps an ecclesiastic, certainly a judge, and learned as well in the civil and canon laws as in the unwritten laws of the realm. The balance of opposite forces then established appears to have been little disturbed during the vigorous reigns of Edward I. and Edward III., but the wealth and power of the regular clergy grew disproportionately, and enabled them to take advantage in the following reigns of the weakness which occupied, and the dissensions which surrounded, the throne. The civil law element of English jurisprudence became aggressive, and so roused throughout the nation that feeling adverse to its very name which so long prevailed. Under the stronger Lancastrian and Yorkist kings—the influence of the See of Rome being more or less resisted and the connection of English with foreign clergy gradually broken—the apprehended danger became less; and, on the suppression of the regular clergy at the Reformation, it wholly passed away; but the fear which it had created long remained, and the remembrance of it still longer hindered the restoration of the two legal elements, not necessarily conflicting, to their ancient harmony.

Bracton, and the successive estimates of him, form a kind of historical barometer for this period. His contemporaries and immediate successors saw no undue partiality for the civil law in his work, which, accordingly, they fully trusted. The great legislator-king, Edward I., directed his chief justice, Gilbert de Thorne-ton, to compile an abridgment of Bracton; and other legal summaries of the same age appear to have taken Bracton as their basis. But in the reign of Edward III. the opinions of lawyers began to change, and in that of Richard II. distrust of the civil law was expressed in Parliament. On the other hand, the regular clergy favoured Bracton, and multiplied copies of his treatise in their scriptoria. A dictum of judges under Henry VI., "that Bracton never was held for an authority in our law," is recorded by Fitzherbert. When clerical law ceased to be formidable a reaction began. Bracton was rehabilitated by Staundforde and Coke, and his authority has since remained on the whole established.

He who has not learned the law of yesterday is not learning the law of to-day, and will not learn the law of to-morrow. That the study of the law, not only as part of a liberal education, but also with a view to professional use, should be historical, is now, happily, the prevalent opinion. Such a study of it is, to take no higher view, the most economical of time. If a student begins with the older authorities, properly chosen, he will afterwards find that he has already read the

best parts of the newer, and he will derive more intellectual nutriment from the clear and terse spirit of antiquity than from its modern dilutions.

Demand for an historical study of the law has been met by a corresponding supply of means to that end, to a certain extent. The Institutes of Justinian have been edited and re-edited. There are introductions to them, analyses, translations, summaries of them, and questions upon them. The Institutes of Gaius, the very source and model of those of Justinian, have lately come forth in three new English editions, each of peculiar excellence. Modern law treatises, so far as their subjects admit, start with civil law authorities. The old as well as the new universities, the Inns of Court *in esse*, as well as the legal university *in osse*, recognise this state of things.

The student reads Gaius. He then applies himself to Justinian, all the more agreeably and profitably for having read Gaius. He may next, in pursuit of the end which he has in view, turn to the "Sum of Azo," if he can get it; but this once famous book is scarcely to be found in the libraries of the Inns of Court, or on the shelves of law booksellers. However, there are many other able commentaries, not in Latin only, but also in English, French, and German, within his reach. He proceeds to inquire how the carefully-developed and long-tried laws of Latin civilization, recorded in writing, were built up with the ancient customs of Teutonic freedom, yet unwritten, into the great composite fabric of English law. He is, in short, ready for Bracton; but is Bracton ready for him? A somewhat repulsive folio or quarto, closely printed; a text, in form full of abbreviations, in substance emphatically condemned two centuries and a half ago by the most competent authority of his own or perhaps of any age; references to earlier books unrevised; index, marginal abstract, every kind of grammatical and historical light wholly wanting; these are the conditions under which he, if a classical scholar, must read Bracton. If he be not a classical scholar, he cannot read the book at all, for there is no translation. Hence Bracton is almost unknown to legal education, and is passed by in favour of later authors who, having themselves for the same reasons neglected him, have failed to observe and hand down the true relations of the civil law to that of their own country.

A liberal study of English law, including Bracton in its course, will be a stage on the road to the reform of English law.

The writer takes for his text the words of wisdom in which Mr. Justice Willes stated his dissent from the second Report of the Law Digest Commission. Those words sketched a

code, not preserving the conflicts of Common Law and Chancery, but laying down uniform rules of justice to govern every court, and also embodying improvements suggested by a comparison of our own laws with those of other countries, and so contributing to a great object—the gradual formation of international mercantile and maritime law. Let it be remembered that Bracton had before him not only the law of Imperial Rome, but also, in the “Sum of Azo,” the civil law as understood and applied in the famous republics of Italy during the 13th century, whence, as from a common source, the principles of mercantile and maritime jurisprudence have flowed over the whole civilized world. Bracton is the head of the English stream. It is from a comparison of the English first with the Scottish, and afterwards with every foreign, stream, that their re-union in one broad, clear river of international jurisprudence may be hoped for.

Bracton’s real property law is, of course, feudal; but not therefore all obsolete or useless in reference to reform. A study of his system will show that it is not responsible for the evils complained of, which are not really feudal, but post-feudal, many dating their origin even later than the abolition of feudal tenures at the Restoration; that it knows nothing of, but is in spirit rather opposed to, some legal ideas and practices, which are so fixed in the English mind as to pass for integral parts of the English constitution, or necessary supports of English society. The advocates of land-law reform will influence more and higher minds if they can show that some changes which they suggest are merely returns to the spirit, if not to the letter, of ancient simplicity, and that others are extensions of rules which have all along partially existed as customs, and have been found compatible with the interests of all classes, in ages when classes and their respective interests were far more distinct than is now the case.

Nor is it too much to hope that the simple and terse statements of law in Bracton, when more widely known to, and valued by, our legislators, may encourage a like simplicity and terseness in the language of our statutes, and reduce the list of those which, in their interpretation, often waste the time and sometimes defy the skill of the judges, and which, consequently, loyal subjects can scarcely learn, even by means of law-suits, to obey.

H. S. MILMAN.

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### III.—THE LAW OF INJUNCTIONS.

**H**AVING in our issue of June last briefly noticed the work of Mr. Joyce upon this subject,\* we return to it at present for the purpose of criticising it in a more elaborate and discriminating manner.

First of all, Mr. Joyce's two volumes are conceived upon an exhaustive scheme, and profess to notice every reported case in which an injunction, whether relating to real or to personal property, has formed a material part of the relief prayed. The work, therefore, demands a method of treatment other than that which is suitable to any of those abridgments of larger treatises which have recently been somewhat numerous.

It is curious to watch the growth of special heads of law. Mr. Eden published his work on the "Law and Practice of Injunctions" in 1821; Mr. Drewry followed with his work upon the same subject in 1841, and again with his supplement in 1849; and now Mr. Joyce has culminated the series for the present. The solid dimensions of Mr. Eden's work may be estimated at 50 cubic inches; and if so, Mr. Drewry's work would have to it the ratio of 70 cubic inches, the growth of 20 cubic inches making the products of twenty intervening years; and lastly, Mr. Joyce's work, adopting the same measure of comparison, is not over estimated when stated to be at least 200 cubic inches, or not much under three times the solid content of Mr. Drewry's work, and over four times that of Mr. Eden's. Pursuing the like argument, we should, therefore, say that the growth in cubical dimensions, which is exhibited by Mr. Joyce's work, should be taken as representing the growth of the law and practice of injunction during the twenty-five or thirty years that have last elapsed; nor would our own professional experience of the frequency of injunction cases during recent years belie this general conclusion. Surely, therefore, a work which aims at being so absolutely complete, as that of Mr. Joyce upon a subject which is of almost perpetual recurrence in the courts, cannot fail to be a welcome offering to the profession; and, doubtless, it will be well received and largely used, for it is as absolutely complete as it aims at being.

Mr. Joyce has, moreover, a great advantage over all previous writers on the subject, and that in many ways. For, not to mention that the first track in the forest is always more

\* "The Law and Practice of Injunctions in Equity." By William Joyce, Esq., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Haynes. 1872.



difficult to guess than the subsequent path is to open out, the Jurisdiction Act of 1852 was not in existence when either of his two predecessors wrote, and consequently the simplicity in the outline of their works was somewhat marred by the distinction between common and special injunctions which existed previously to that Act, but which the Act abolished by its 58th section. The greater uniformity of the general procedure in Chancery, which the last mentioned Act has also introduced, has afforded a further facility for simplicity in this respect; and Mr. Joyce has wisely studied simplicity, by eschewing historical disquisitions, and by touching by reference merely, when he touches at all, upon the past. This work is, therefore, eminently a work for the practitioner, being full of practical utility in every page, and even sentence, of it.

So great, indeed, is the simplicity of the subject, that the author had no scope for ingenuity of arrangement. He has compensated his want of opportunity in this direction by the most ample indulgence in another—that of assiduity of compilation. Upwards of 3500 cases and 160 statutes are cited, the cases including not only the English cases, but a large selection of American cases also, together with the Scotch cases of interdict which have been appealed to the House of Lords. The English cases which are the most familiar to ourselves are cited without a single exception, the case of *Sowerby v. Fryer* which we had thought to be omitted being also given on page 177, the distinction which Lord Justice James drew in that case, and which we failed (as we still fail) to find expressly stated in Mr. Joyce's work, not having reference strictly to the injunction part of his decision, but to the application of the capital proceeds of a timber fund, which the injunction was too late to stay accumulating. The distinction, therefore, as not being altogether relevant, was not one which Mr. Joyce was bound to state; we find that he assigns it casually and indirectly to *Knight v. Mosley*, on p. 161, where he says that "patrons cannot pray any account of the profits for their own benefit as patrons," implying, therefore, that they may do so for the benefit of the church itself, this being, in fact, the distinction which was taken, and, as we said, most needfully, by Lord Justice James, in *Sowerby v. Fryer*.

We have examined more particularly those sections in the third part of Mr. Joyce's work which relate to the evidence which it is necessary to produce on the motion for an injunction (s. 11), to the effect of an amendment of the bill or other alterations in the pleadings on an injunction previously obtained (s. 12), and to the acts which amount to a breach of the injunction (s. 18). Regarding Mr. Joyce's treatment of each of these, it may be well to say a little.

And first with regard to the evidence on motion for an

injunction. Mr. Joyce's statement is both complete and clear. The application must be supported by affidavits; and for this purpose the defendant's answer may be treated as an affidavit. The necessary affidavit or affidavits may be made by the plaintiff himself (as they usually are), or by any other person acquainted with the facts, *e. g.*, by an agent of the plaintiff, when the plaintiff is himself abroad (*Byron v. Johnston*, 2 Mer., 29) or by the solicitor of the plaintiff, when the plaintiff himself is prevented by any valid reason from doing so (*Spalding v. Keely*, 7 Sim., 377). Moreover the affidavits must be made *in a cause*, and therefore they may not be made until after the bill is filed (*Francome v. Francome*, 13 W.R., 355), an inattention to this particular requisite being fatal to the validity of the injunction, if any, which is obtained (*Williams v. Davies*, 2 Coop. C.C., 172-4). Provided, however, the bill has been put upon the file, the affidavits may be sworn immediately, and without waiting for the defendant to enter appearance in the suit, the plaintiff in this latter case producing, however, from the Office of Records and Writs a certificate of the due filing of the bill. Again, the affidavits to be used must, as a general rule, be such as have been filed subsequently to the date of the notice of motion; affidavits that have been filed previously to that date may, however, be made available on the motion, if notice of the plaintiff's intention to use them has been duly served on the defendant, or if the defendant choose to waive any objection on the ground of want of notice which he will be presumed as doing should he file an affidavit of his own in answer. Such being the *terminus a quo*, or limit of time, *from which* the affidavits must commence, the *terminus ad quem*, or limit of it *up to which* they may extend, is considerably more elastic; for, on motion for an injunction, counsel may make use of any affidavit filed before he rises to address the court, although not (unless in most exceptional circumstances) after he has commenced his opening (*Munro v. Wivenhoe Railway Co.*, 13 W.R., 880). In very pressing cases an affidavit may even be sworn in open court (*Mercers' Company v. G.N.R. Co.*, 13 W. R., 880). All these, among many other matters, Mr. Joyce points out with equal lucidity and brevity.

Secondly, with reference to the effect of an amendment of the bill, or other alteration in the pleadings, made subsequently to the injunction having been obtained. As a general rule, the subsequent amendment of the bill does not invalidate or prejudice the injunction, at least when the amendments are merely formal and the injunction has been obtained (as under the present system it always is) upon the merits; and it is not necessary that the amendment should be expressed to be *without prejudice* to the injunction.

(*Harvey v. Hall*, L.R., 11 Eq., 31). Nevertheless, when the plaintiff has not yet obtained, but has merely given notice of motion for, an injunction, and he afterwards wishes to amend this Bill, in such a case he must even still (and properly), if he wish to save his notice, expressly ask that the leave to amend shall not be suffered to prejudice the notice (*Monypenny v. —* 1 W.R., 99). But when the amendments are such as to materially affect the substance of the record, or to put the defendant to some inequitable disadvantage, then the injunction, if obtained, is gone, and, *à fortiori*, the notice of motion for an injunction is also gone, by the amendment, unless expressly stated to be without prejudice. But in the absence of these exceptional circumstances, the injunction is not vitiated even by the filing of a supplemental bill (*D'Arcy v. Sumner*, 2 Moll., 359). Furthermore, an injunction which is expressed to be "until answer or further order" is not *ipso facto* gone, when a sufficient answer is put in, but must be discharged by actual order (*Ooddeen v. Oakley*, 2 D.F. & J., 161), and the Court refuses in general to discharge it without first allowing the plaintiff a reasonable time to judge of the sufficiency of the answer. On the other hand, a demurrer to the whole bill, when allowed, puts an end to a subsisting injunction, and that whether the Court upon allowing the demurrer gives, or does not give, liberty to amend (*Harding v. Dingey*, 12 W.R., 817). But when the injunction is "until answer or further order," it is not *ipso facto* gone upon the allowance of a plea to the whole bill, but requires an express order to discharge it (*Lenand v. Hamer*, 4 M. & C., 134), and that, notwithstanding a plea, is in the nature of an answer.

Lastly, with reference to the acts which amount to a breach of injunction. The injunction operates from the moment the order is pronounced, and the defendant having notice of it, even in an informal or imperfect way, is liable to be committed for a breach of it, notwithstanding the order may not as yet have been formally drawn up (*Vansandau v. Rose*, 2 Jac. & W., 264). But the mere casual presence of a defendant's counsel in court at the time an interim injunction is continued, will not, in the absence and without notice to the solicitor of the party, justify his committal for contempt for a subsequent breach of the order (*Carrow v. Ferrior*, 37 L.J. Ch., 569). Again, an injunction, while it subsists, must be obeyed, however irregularly it may have been obtained, and the defendant wishing to disobey it must first obtain an order for its discharge, or otherwise he is liable to be punished for a contempt (*Harding v. Dingey*, 62 W.R., 685). Furthermore, a person may violate an injunction and so become liable to committal without taking a principal part in the

breach, if he be found to have abetted those who did (*St. John's College v. Carter*, 4 My. & Cr., 497), and the party so assisting in the breach may not, it seems, shelter himself under the lawful authority of his principal (*Woodward v. Earl of Lincoln*, 3 Lu., 626). But an injunction restraining a man, his servants, and agents, is not taken to affect the *tenant*, even though he has notice of it (*Hodson v. Coppard*, 9 W.R., 9), and it seems that the Court will not, upon the motion of the plaintiff at least, commit the defendant for a breach of the injunction, which the plaintiff had himself provoked the defendant to commit (*Barfield v. Nicholson*, 2 L.J. Ch., 90; 2 S. & S., 1). But in the absence of such exculpating circumstances, the Court will as a rule commit upon proof of even one particular act of violation, and will not discharge the guilty party until and unless he pay the other his costs of the committal; although upon the party making such payment it is a matter almost of course for the Court to grant a discharge in cases at least of inadvertent breach (*Leonard v. Attwell*, 17 Ves., 385), or subsequent expression of regret (*Parkington v. Booth*, 3 Mer., 149).

These are a few specimens of the manner in which Mr. Joyce has treated his subject. Our very condensed epitome of the sections above epitomised may serve to induce the profession to look into the book. The sections we have chosen are not exceptional, either in substance or in style; the work is, on the contrary, one of equal merits and usefulness throughout. The cost is 70s., but the volumes are cheap even at that figure. We think that in view of these substantial excellences, to find any infinitesimal fault with the comparison (which, by the way, Mr. Joyce has relegated to a note) between the *Interdictum* of the Roman and the injunctions of the English Law, as we were disposed at first to do, would be pedantic; and we refrain. In conclusion, therefore, we have to congratulate the profession and the author—the profession on this new acquisition to a digest of the law, and the author on his production of a work of permanent utility and—fame.

#### IV.—THE GROWTH OF JEWISH LAW.

**WHILST** the historical study of jurisprudence is still in its infancy, there exists a large class of older juridical speculations, characterized by its utter disregard of all history, and conducted upon a method of investigation, which might

conveniently be called *à priori*. The tendency of these speculations, in the attempted elimination of ideal systems of natural law, has been to retard the healthy progress of that science, which has become familiar in Germany at least under the name of the Philosophy of Law. The causes, meanwhile, which gave to these speculations "such overwhelming prominence a hundred years ago," have been held to lie in the rejection by the age of all historical evidence taking the form of *religious* records. The study of religion was in fact despised. To the sceptic, heathen mythology and the Mosaic scriptures were alike unreliable. "Greek religion," says Mr. Maine, "as then understood, was dissipated in imaginative myths. The Oriental religions, if noticed at all, appeared to be lost in vain cosmogenies. There was but one body of primitive records which was worth studying—the early history of the Jews. But resort to this was prevented by the prejudices of the time. One of the few characteristics, which the school of Rousseau had in common with the school of Voltaire, was an utter disdain of all religious antiquities, and more than all of those of the Hebrew race." Shut out thus from the consideration of the philosophic jurist, Hebrew antiquities, it may be said, remained almost exclusively the inheritance of theologians and divines. And whilst this exclusion has, on the one hand, been the cause of much error in the theories of the scientific lawyer, it has, on the other, left the theologian in the midst of perplexities, which perhaps it was the province of the jurist alone to solve. To those familiar with investigations into the origin and growth of law, there is no theological dispute so full of interest as that concerning the age and authorship of the Hebrew law books—a dispute caused in recent times, mainly we may say, by the learned investigations of Dr. Colenso. The diversities between the first and the second law, Leviticus, Numbers, and Deuteronomy, are variously explained. But in all the controversy, the presumption on the one hand is remarkable, not only that the whole Jewish law was from the hand of Moses, but that it was stereotyped in the form in which it now appears, in the approved canonical books. Dr. Colenso, on the other hand, has done much to prove that in Deuteronomy at least we have evidence of a change and development of that law; and that the book itself belongs to a period of Jewish history, decidedly later than the Mosaic legislation. But Dr. Colenso's theory is rejected. The Talmud, again, belonging to a comparatively recent period of Jewish history, but containing a digest of the unwritten or oral law of the Jews, is proscribed. So that while the Mishna and the Gemara (which evidence the growth of Jewish law) are held by the Rabbi in higher esteem than the Mosaic code itself, the Christian teacher regards them in the light of a wilful imposi-

tion and fraud. Christian and Jewish theology are here irreconcilable.

The code that forms the law of Moses—including in it the compilation of Deuteronomy—belongs to a period of Jewish history which finds a parallel in the primitive history of all progressive communities. The code inscribed on tables is held to be the immediate result of the invention of writing. However this may be, it forms a well-defined era in the history of law. Unwritten law, preceding the era of codes, was, as Mr. Maine holds, mere traditionary custom, assumed to be known precisely by a privileged order, or priestly aristocracy. Starting, however, with the written code of the Hebrews, the important question arises, whether Jewish law was arrested at this stage, or whether it received that development which may be traced in the history of other codes. If Jewish law had its growth, the causes among others lie precisely in those "social necessities and social opinions," which, in certain societies, being always in advance of law, necessitate its progress. Law answering thus to shifting wants and opinions, and marching *pari passu* with them, is an incident common in the history of all progressive communities. And here it may be remarked, in passing, that there is no written code in the history of the past—no code claiming even a divine origin which has practically met the requirements of a people for all time. Among Eastern communities, where the tendency towards fixed institutions is remarkable, the written code has undergone a process of change and decay. The circumstances which necessitate the growth and change of a language, operate not more powerfully than the exigencies which create new law among a people. If we turn to the code of Menu, claiming a divine origin, we find that the necessity for an interpretation of the text gave rise to various schools of inspired interpreters. Comment followed upon comment, all bearing equal authority, until the text is found enveloped in the folds of a voluminous exegesis. Indeed, the opinion of the learned seems to be, that the Institutes of Menu are applicable only to an age now long past. Among the Romans, the Prætor's edict and the Responsa Prudentum expanded their jurisprudence beyond the limits of the narrow code, called the Twelve Tables. The Hebrew code, meanwhile, is not exempt. Notwithstanding the jealous preservation of the text by the Masorite, and the fencing of the law by the scribe, the Hebrew judge and jurist have left us, in the pages of the Talmud, a body of case-law, and juridical doctrines, having the obligation of law, powerful enough to have influenced the life and destiny of the chosen people. The moral law, so carefully marked and enumerated in the written code of Moses, is summed up by

the later jurists of the schools of Hillel and Schammai, in one comprehensive word—*equity*. Indeed, the moral law as taught by the later Hebrew doctor, does not date from Moses, but is comprised in the seven precepts given to Noah (*Septem præcepta Noachidarum*), the first six having been intrusted to Adam. They are precepts, in fact, which came to be recognised by the learned few, not as belonging to his own exclusive system, but as comprising the law of nature common to all mankind, of which Cicero says: “Nec erit alia lex Romæ, alia Athenis, alia nunc, alia postea; sed et omnes gentes, et omni tempore, una lex et sempiterna et immutabilis continebit.”

How then was it that Jewish law had its growth, and what were the agencies by which it received its development? *Firstly*, we may say that the decisions and dicta of the judges, in process of time, added to the written code a large body of case-law, or binding precedents, answering to our common law; and *secondly*, the teachings of the Hebrew jurisconsult, or Responsa Prudentum, which were held binding, and formed much of the traditionary law which so powerfully influenced the people, and also contributed much towards this growth and development.

First, then, we may remark that the office of judge and the institution of law courts among the Hebrews, are incidents of their early history. Judges, it is well known, were appointed in every city for the determination of minor questions. Whatever be the date of the institution of the Sanhedrim, it is certain that a supreme court, consisting of seventy judges, existed as early even as the time of Moses. To this court were referred matters of difficulty and importance, which were left undecided by the inferior judges. Now, it must be remembered that every judgment or sentence pronounced in the several causes which came up for determination, gained the authority of, and was in fact, binding law, and this by Divine injunction. “Thou shalt come unto the priests, the Levites, and unto the judge that shall be in those days and inquire, and they shall show thee the sentence of judgment. . . . According to the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do: thou shalt not decline from the sentence which they shall show thee, to the right hand nor to the left.” Every judgment was inspired. What then were the functions of the judge? He was required, (1) to apply the law where it was clearly applicable; (2) to interpret it in cases of doubt; and (3) to provide for cases which were not contemplated by the written statute, or, in other words, for instances in which the written statute was silent. Under such circumstances, cases of considerable doubt and difficulty might have been expected

to arise for decision by the courts. Notwithstanding the law was generally well known (children being instructed in it), cases arose in which the judge had nothing to guide him, either in the written statute or the unwritten body of precedents. Of these there are familiar instances. The written code of the Hebrews, it is well known, did not admit females to the inheritance of property. The case, however, of the daughters of Zelophehad, reported in the Pentateuch, as for the first time, introducing inheritance by females into Hebrew law, with its attendant restriction, that the heiress should marry within her tribe, is a valid instance of a judicial decision, founding a rule of law. Here the statute was silent, and circumstances called for a decision, which, when once pronounced, introduced a rule which obtained a force as obligatory as that which attached to the written code of Moses. Again, the original institutions of the Jews, having provided nowhere for the privileges of testatorship, the later Rabbinical jurisprudence is found allowing the power of testation to attach, when all the kindred entitled under the Mosaic system to succeed have failed or are undiscoverable.\* But whence did the innovation receive its sanction and binding force?

Probably it will be found that the rule in the later jurisprudence had its origin in very early times, and was introduced as a judicial decision, when the subject first came up before a competent tribunal. There are, again, various provisions made in the Pentateuch regarding marriage, but the law is totally silent as to what constituted a legal marriage. Such cases, it may be said, were to be met by a judicial sentence. Indeed, provision was made in the law to meet the exigency of such cases. "If there arise a matter too hard for thee in judgment between blood and blood, between plea and plea, and between stroke and stroke, being matters of controversy within thy gates, then shalt thou arise, and get thee up into the place which the Lord thy God shall choose. Thou shalt come unto the priests, the Levites, and unto the judge that shall be in those days and inquire, and they shall show thee the sentence of judgment." It cannot be supposed that the additions thus made to the written law fell within the category of unauthorized precedents. Every judgment was binding, and every judge was in fact a minor legislator, speaking under direct inspiration. A mass of unwritten law thus originated, and, in the course of development, new rules of law took the place of what had become obsolete. But it is difficult to trace the changes which overtook Hebrew jurisprudence. In an age of much writing, we might have expected at times a digest of the *lex non scripta*. But with the excep-

\* See Maine's "Ancient Law," p. 197.



tion of the Talmud, which contains much of this law, surviving at the time of its compilation, there seems to have been no earlier attempt at anything like codification. It is not, however, improbable that the book of Deuteronomy embodies in itself some fragments of the unwritten law, current at the time of its compilation. Whether the book of the law found in the temple in the reign of Josiah be the book of Deuteronomy, or whether Jeremiah be the Deuteronomist instead of Moses, are questions sufficiently discussed by Dr. Colenso. It is certain, meanwhile, that Deuteronomy, or the second law, contains several additions to, and modifications of, the older Mosaic statutes, which can only be accounted for by the supposition that the book is a compilation of a date decidedly later than the Mosaic legislation. There is an opposite theory, however, of the critical school, countenanced by Dean Milman, which supposes that the entire Pentateuch is of an antiquity as high as the time of Moses, but that it has undergone many interpolations, some additions, and much modification, extending to the language in successive ages. In any view, it may, firstly, be said of the book of Deuteronomy (in which the additions and modifications mostly appear), that its precepts, in so far as they vary from the provisions of the rest of the Pentateuch, embrace what was originally mere unwritten law, originating in the decisions and dicta of the judges. Numerous instances of the entire change of law, on a comparison of Deuteronomy with the earlier law books, may be quoted; but it will be sufficient to quote the words of Bleek with reference to the subject of tithes, as they are found provided for in Numbers and in Deuteronomy. "No one," says Bleek, "upon an unprejudiced comparison of the two laws, can mistake the fact that they vary very much from one another, as regards both their contents and character. In the last, strictly speaking, no mention whatever is made of a special *legal* provision by way of tax for the benefit of the Levites, but only of a free will act of benevolence, which the Israelites are required to show to the landless Levites, just as to other needy persons. Hence they are placed in one and the same rank, with other destitute people, and their whole position is entirely changed. That *Moses himself*, with reference to the maintenance of the Levites, should have delivered two laws, so different from each other, as is their whole character (within the space of a few months), cannot well be believed, especially as the former law, just as much as the latter, refers to the time when the tribes of Israel would find themselves in possession of their promised land. We cannot but assume, that if the one law is Mosaic, the other belongs to a later time; and here there can be no doubt that the law in Numbers is the original, which also has the character of a Mosaic law. On the other hand, in

Deuteronomy we probably possess it in a form to which it was changed in a later time—probably at a time when the original law, with so many other Mosaic directions, had long ceased to be followed, and when the relations also had so settled themselves, that no more hope could be entertained, that they ever would again be followed.” It may, therefore, be presumed, that Hebrew law did not begin and end with Moses, nor could it. A people, whose condition and relations were ever changing, would find themselves outgrowing their ancient institutions. And though Moses is vested with the dignity of the legislator, he was evidently succeeded by the priest and the judge, who, as administrators and interpreters of the law, were the ordained agents in its growth and development. But it is not only to the judicial tribunals that Jewish law owes its growth. We must not here overlook the labours of the learned—the Νομοδιδασκαλοι, or doctors of the law.

Secondly, the study of law among the Hebrews ranked higher than every other pursuit. At the time of the birth of Christianity, when Greek culture had been already embraced by a large number of Jews, Greek philosophy was proscribed by the Rabbinical leaders of Palestine, and included in the same malediction, “he who rears swine, and he who teaches his son Greek science.” “The study of law,” says M. Renan, on the authority of Josephus, “was the only one accounted liberal and worthy of a thoughtful man.” Questioned as to the time when it would be proper to teach children Greek wisdom, a learned Rabbi had answered, “At a time when it is neither day nor night, since it is written of the law, ‘Thou shalt study it day and night.’” And it may be remarked, in passing, that in Greece, where philosophy was nursed, the cultivation of law was so far neglected, that we have nothing of Greek jurisprudence left us worthy of the name. Rome, on the other hand, the birth-place of legal science, spurned philosophy as the “toy of a childish race.” With the Hebrew it was a “womanly accomplishment.” *He* was the wise man who was skilled in the law. Among those devoted to the study of jurisprudence, the sopherim, or scribe, occupied a prominent position. But they were not mere lawyers. As remarked by a recent writer, the scribes of whom we are accustomed to have so unfavourable an opinion, appear to be not merely well-trained jurists, but scholars of eminence in the mathematics of their day, in natural history, in astronomy, in medicine, in philology, skilled in many accomplishments, masters of many languages. With all his depreciation of the worth of philosophy, it is probable that the scribe was initiated also in the metaphysical speculations of the Cabbala. Indeed, the wide prevalence of its leading

doctrines leaves this scarcely in any doubt. But the chief employment of the scribe was the teaching and expounding of the law. The necessity for interpretation arose early among the Jews. After the return from the Babylonish captivity, when the Hebrew became almost a dead letter, an extensive exegesis of the Scriptures became necessary. A class of men soon sprang up, whose office it was to interpret the law to the people.

It must be remembered that their teaching had a vast influence, and carried with it the force and obligation of law. In Roman jurisprudence something of the same kind occurs. The influence of the *Responsa Prudentum*, in developing that jurisprudence, was extensive. Among the Jews, however, the obligation of the oral law, as taught by the exegetists, rested upon the tradition that God first gave to Moses the text, and then an interpretation of it, which was to be transmitted by word of mouth. It passed from Moses to Aaron, and in an unbroken line reached Hillel, and Schammai, and Gamaliel, from whom it passed to Simeon, and finally to Judah Hakkadosh, the president of the Academy at Tiberias, by whom it was committed to writing, and forms now the Mishna of the Talmud. The scribes were the teachers of this traditionary law, and were considered to be the successors of Moses. As Moses was the first teacher of this law, so the scribes were deemed to be *in the seat of Moses*. And it is evident that Christ Himself sanctioned the authority of the teaching of the scribes, when He directed His disciples to do as these teachers bid them. "The scribes and the Pharisees sit in Moses' seat: all therefore whatsoever they bid you observe, that observe and do."\* The interpretation of the law, as might be expected, excited the mental activity of the lawyers to the utmost. Full of subtilty and logical acumen, they were pre-eminently the casuists of the day. Through their teaching a strange scholasticism had sprung up in the market-place and the synagogue, which whetted the intellectual appetite of the nation. Extreme subtilty and logical refinement characterized the disputations of the scribes, as they did the argumentations of the sophist. All the ambiguity of the law received at the hands of these teachers an interpretation which carried an obligatory force above the law itself. "To sin against the words of the scribes is far more grievous than to sin against the words of the law," says the Talmud. "The text of the Bible is like water, but the Mishna is like wine." "You must not depart from the declarations of the oral law," says the Rabbi Solomon Jarchi, "if they should assert that your right hand is your left, or your

\* Matt. xxiii. 2, 3.

left your right." Such was the veneration which was excited by the teaching of the scribes; and as an agency in the growth of Jewish law, *that* teaching was, perhaps, the most powerful, and even necessary.

Such are a few hints on a subject of much importance. The existence among the Hebrews of a large body of unwritten law is an historical fact which calls for more attention than has hitherto been bestowed upon it. The law of the Pentateuch, and of the Talmud, claim equally an important place in Jewish history. Indeed, Jewish history is but partially known, without an acquaintance with that body of unwritten law, which has exercised so powerful an influence among the chosen people. And the neglect of it is due only to the prejudice, which claims for the law of the Pentateuch that stereotyped and unchangeable character which can suppose no growth or development.

#### V.—THE PHILOSOPHY OF LAW. By J. H. BALFOUR BROWNE, Esq., Barrister-at-Law.

WE are for the most part content at the present time to make up our minds to the inevitable. We regard that as true wisdom. To do what is possible, and to refrain from attempting to do what is impossible, are regarded as equally wise. Thus to know all things capable of being known is not more commendable than to desist from vain seeking after empty knowledge, or obstinate questionings about things that knowledge cannot compass. These are the prudential rules of a very practical age; but prudence, although a worldly wisdom, is often a contemptible meanness. Prudence is to the palace of thought, which is builded by philosophy, what the cellars are to a house.

Still the fact remains, and it is thought to be a most excellent maxim, "know what you cannot know!" The most fashionable theory is that which ascribes very narrow limits to philosophical inquiry; and on the side of this peddling narrowness Socrates, who, according to Xenophon, would not speculate as to the cause of existence, is always quoted. The maxim in many aspects recommends itself. The proposition that it is well to know only what is capable of knowledge, does not require argument to support it. The maxim is deleterious in its application, not in its simple statement. The criterion capacity of knowledge is only too

often judged of by those who enunciate the maxim by their own subjective feeling of capacity. Hence the error. "I do not know," is an excellent admission in many cases, but the very fact of this admission of ignorance proves the impossibility of such a subjective negation being the ground of predication of others knowing.

This preliminary consideration was not unnecessary, for it is not unusual for people in these days to smile at what they consider the windy throes of metaphysicians, as they would at the pranks of a child who thought to catch a rainbow. But there is an echo in time that will throw their empty laughter back upon themselves. The trees which think themselves so much better than the hill they grow upon are not seen a mile off; but the mountain towers into the sky, a monument of creation, a mound and gravestone over some dead cataclysm. There is no more excellent method than to judge of things by one's own criterion. If we could all buy as well as sell by our own scales, we should all be rich. The trick could not exist a day where pounds of sugar were concerned. In matters of truth and fact it has existed for years, and that only because so few people know what these are.

The best way to meet an argument you cannot answer is to call the man who advances it a fool. A shrug will often prove more than a demonstration. That seems to be the position of many persons at the present time; but their shoulders will rot down out of their ears, and the truth will grow and burgeon. One of our best thinkers believes that the direction of its advance may be predicated with some certainty, and that the only advance at the present time possible is through an explication of the philosophy of Hegel.

Dr. Hutchison Stirling\* has undertaken to tell lawyers the basal principles of their science, and he must, when he undertook the task, have been prepared for some criticism at the hands of members of the legal profession; how well he was prepared a consideration of these lectures will show. When a man has grasped a truth it seems to him impossible but that other minds should grasp it too. It compels its own recognition. A man has no power to shut his eyes to it. And in all Dr. Hutchison Stirling's explanation of the Hegelian philosophy, he possibly trusts more to the force of the truth than to the mitigation of friction. His style is Hegelian. It is rugged and forcible; and through it one can discern the intolerance of strength. He *will* reveal Hegel, but he himself requires

\* Lectures on the Philosophy of Law. By James Hutchison Stirling, LL.D. Published in the *Journal of Jurisprudence and Scottish Law Magazine*, January, February, March, and April, 1872.

a revelation! God's truth is open, but men's eyes are not! And so it is, Dr. Stirling's admirable expositions are "*caviare* to the million." And his intolerance of the numskulledness of other people is rather a disadvantage, and renders much that he says almost as obscure as the author he so thoroughly understands, and means so amply to explain. If there is one part of Hegel which may be taken exception to, it is his great respect for men as men. He argues, with his iron-logic, that slavery is impossible, as a subsumption of free-will by free-will is wrong, and could not be right. So far he is correct. But he almost seems to go too far when he supposes all men to be endowed with free-will. Their needs and their greeds *have them*. They have not their needs and their greeds. This, then, is the distinction between thinghood and manhood; and if Dr. Stirling would recognise this element in men, he would be content to make his expositions more expository, and he would by such means command a much larger number of readers than he can hope for in his present form.

It is almost hyper-criticism to call attention to such a defect in such a writer. Criticism is suitable in the case of small gifts. When the donation is beneficent, gratitude should make us oblivious to the form of the gift. If we get gold, it is not necessary to insist upon its being the newest mintage. When we finger copper we look askance at the far-travelled coin, which has the grease of the counter, and the dust of the market-place upon its mulatto face. It is only our desire that Dr. Hutchison Stirling should be of wider benefit that induces us to dwell upon what, amidst so many merits, is scarcely a fault. Let us have a great estate, and we will take it with mortgages; let us have a great man, and we will take him with his faults, which are the mortgages of spirit.

One more preliminary word. Dr. Hutchison Stirling is not simply a hose. He has not simply conveyed the contents of Hegel from German into English. True, he has got into all Hegel's thoughts, and has made them his own; he has become possessed of Hegel's secret, and he has endeavoured to make that secret an open secret to all. But such a task is not to be accomplished by a mere translator. It required, in the first instance, an explorer, and an intrepid explorer, who was ready to give years of quiet labour to thankless work. But it required above all a philosopher. To enter into Hegel's thought one must almost be a Hegel. To wear the mantle of Elijah one must be an Elisha. The philosophy of Hegel is not to be entered into by dilettante research; his system is not to be understood by amateur survey. It is for great thought to receive great thought, and for like spirits to carry on noble work. There is a kinship in great minds. The same blood of truth runs through them. Their intent is so much the

same, that they have even the same superficial trick of features. Now, we believe Dr. Hutchison Stirling has understood Hegel's position, and is capable of advancing it. After all, much in Hegel is only in the seed-form of thought, hints; much is, to use Dr. Stirling's favourite phrase, simply implicit. That has to be made explicit, and as he himself thinks that the explication of these wells of truth is to be the work of philosophers for many years to come, we may confidently expect much more from that clear intelligence, that subtle force, that polemical ability, and that dialectical skill which has already given us "The Secret of Hegel," and these "Lectures on the Philosophy of Law."

These lectures do not come too soon. The fact that there is a philosophy associated with law—that there is some principle which makes so-called justice, just—a law which makes all our law legal, is apt to escape the memories of those who receive their law through long generations of precedent, and whose thoughts never go deeper in a search for principles than the ordinary habits and customs of the mass of mankind. That that philosophy is not a wisdom of makeshifts, that that principle is not a principle of expediency, and that that higher law is really a law and not a selfish maxim, requires to be stated and inculcated in England, where the shallow and external philosophy of a certain school of indigenous thinkers has been for many years paramount. What is the reason of law? What makes law possible? What makes property a fact? What makes penalty allowable? These are questions which we would find answers for. If we are answered that "Expediency" is the answer to each, we would still have to ask: What is the reason of expediency? It requires some sanction, and that can only be given by thought! It is evident, therefore, that a satisfactory answer to any of these questions can only be given after we have arrived at a satisfactory conclusion as to some preliminary matters.

All science is an explanation. When we associate certain phenomena with their causes, we explain. An event seems only half itself unless its reason is known; and so all science is a kind of natural history of causes and effects. But scientific explanation is always explanation within conditions; the facts to be explained are the conditions of the explanation. But these very conditions require some explanation, and in order to answer the final questions which haunt humanity, those whences? and whys? and whithers? we must have an explanation of explanation, or know explanation as explanation. "The physical pursuits," says Mr. Martineau, "followed into their farther haunts, rapidly run up into a series of notions common to them all, expressed by such words as law, cause, force, which at once transfer the juris-

diction from the provincial courts of the special sciences to the high chancery of Universal Philosophy." But we have seen that all explanation is conditioned; and if we would have an ultimate explanation, it is evident that that must be self-conditioned. Any final explanation which will explain the existence of conditions, and therefore existence as existence, must bring its own reason for its own self, its own necessity, and its proof that it is, and that it alone is. Let us put this again concisely. All explanation is a taking possession of by mind. The ultimate explanation is the taking possession of all explanation by mind, and therefore of *all* by mind. We have, therefore, nothing but self-consciousness. Everything is reduced into it, and to understand *all*, must simply mean to understand self-consciousness. It is to understand the self-conditionedness of self-consciousness that Hegel sets himself, and he finds that the constitutive process of self-consciousness is *the notion*. That process is the idealization of a particular through a universal into a singular; or otherwise, the realization of a universal through a particular into a singular. Now, I confess that at first this act of self-consciousness is a little difficult to understand, but it was scarcely to be expected that this creative effort would be readily intelligible. It is easy to see that two and two make four; but what a great empty void lies before one when one turns to the question why two and two should make four! But although the notion may be a little difficult to appreciate at first, it will be seen to be the radical of thought, and therefore the radical of all, in the long run. Now, it is by the march of this notion, by the continuation of these acts of self-consciousness, that the ego is developed into its own categories, which, in their concreteness, are externalization. We should wish to dwell longer upon Dr. Stirling's first lecture. It is devoted simply to an explanation of the notion, and of the historical position of Hegel in relation to Kant. It is in every respect most thorough. Hegel's whole inner contents are contained in these fifteen valuable pages. We may say that without a careful study of these the subsequent lectures would be unintelligible, and for the reason that Hegel is an evolutionist. He is not an evolutionist who believes that mind was evolved out of matter, which is absurd; but he is an evolutionist in a truer sense: he sees the notion evolved into logic, into nature, and into spirit (which is again only the universal, the particular, and the singular); and to understand any part of his system you must know the whole. Still, as every necessary explanation can be gathered from the lecture itself, we pass on to that portion of the evolution which has more particularly to do with the objective spirit, in its moments law, morality, and observance.



This subject may be introduced by an explanation of Hegel's transition from intellect to will; from what he calls the theoretical spirit to the practical spirit; from thought as thought, to thought as act.

It is to be remembered that as the categories, self-evolved by self-consciousness, have resulted, necessarily, in externalization, there exist not only infinite differences between the subject and object, but at the same time absolute identity. Consequently, the reduction of an object into the subject is perfectly possible, as in reality it thereby only reduces itself to itself. Now, the transition from the thinking idea to the acting idea is easy. When we theorize, we think about something external to ourselves. But theory, when complete, converts its object into itself. It has possessed itself of all that the objects really are. It has reduced them from their externality into itself; "it has determined their *its*." But that is will! Will is just kinetic thought, thought is just potential will.

But the great object of the Germans, Kant and Hegel, was to establish the truth of the freedom of the will. Their humanity felt insulted by the notion of necessity. They felt themselves, by the admission of compulsion, things and not men; things made in the image of a stone rather than men made in the image of God. They could not rest under the imputation of being shuttlecocks between the battledoors of events, and they were resolute to find some truer and better means of escape than some of our so-called advanced thinkers of the present day would find, who from the Fate of knowledge would be rescued by the Fetish of ignorance;\* and they set about the labour of proving will free.

In England, free-will is laughed at; and Dr. Johnson, who said, "We feel that we are free, and that is all about it," is laughed at too. Yet Dr. Johnson's argument was perhaps as excellent as any that has been urged against it, for any philosophy which would command respect must guard against being repugnant to common sense. Reid's demand was founded upon an excellent notion, but he had not the metaphysical acumen to perceive what was and what was not repugnant to common sense. It is not to be the cry of the rabble that is to decide what is true in philosophy; but if when a truth has been discovered and brought under

\* Mr. Huxley finds satisfaction in the thought that there are things we cannot know, such as cause, substance and externality; and upon the strength of such belief claims to be regarded as orthodox; and Mr. Herbert Spencer, looking upon "the materialistic interpretation utterly futile," finds some remarkable satisfaction in feeling that he cannot find any interpretation of the mystery of subject and object, and his inability to understand the power manifested in them.

the cognizance of ordinary men, they fail to appreciate it, or find it repugnant to all their conceptions, there is strong reason for suspecting the philosopher to be in the wrong. But the idea which has found favour in England is, that freedom means motivelessness! They would argue that because a man cannot act without a motive he is a slave, and the whole error has lain there. Hegel, on the other hand, asserts that to act by motive is to act freely; to act without motive is to act under necessity. Surely freedom is to obey oneself, rather than to yield obedience to something external to oneself? If that is so, motivated action is free, because the motives are my own, so that moral necessity is freedom.

I wish I could go at greater length into this question, which is admirably, and for the greatness of the subject succinctly, treated in these lectures; but I feel that although the idea of free-will in the basal notion of the whole of the externalization of spirit in law, I am to some extent only dealing with a preliminary, and I must content myself with these very imperfect utterances while I point out the ingenuity of Hegel in his distinction, in so far as the law of causality goes between the phenomena of nature and the phenomena of will. His metaphysical ability is gigantic, but his ingenuity and tough hard-headedness are no less remarkable. In nature, he points out that the cause repeats itself in the effect. The spark is repeated in the explosion; the motion of the hand is repeated in the motion of the stick; but in will the motive is not repeated in the act. It is the nature of the agent that is in the performance, and not the nature of the motive. Our language has a corroboration of the truth of this. With regard to physical nature we use the word *cause*; in reference to will we use the word *motive*. The first emphasises the absolute identity in the process, the second the indefinite difference. But it is to be remembered that it is only moral necessity that is freedom. A man may be a slave to his appetites, and then he is not free. True it may be argued that just as higher motives are one's own, so are one's desires and appetites, and that if obedience to the one is freedom, it would be utterly erroneous to call obedience to the other slavery. But to understand this subject thoroughly it is important to mark the two meanings of the word mine. Subjectivity is mine, but objectivity is doubly mine. In one sense, subjectivity might seem to belong to the inner me; but in another and truer sense, it is objectivity which belongs to my inmost me, is of my very essence, and that essence realized. Hence, one is truer to oneself when one is true to the universal mine, than to the particular mine. But it may be objected, with some plausibility, that these very particulars which one

obeys are externalized and realized. One's desires are the outcomes or the between-comes of nature and spirit, and nature is itself only the realized idea. But although there would be plausibility in such an argument, there would really be no logical weight. We are dealing with free-will, and free-will can only be free in that it wills its ownself. Will must be an end to itself. One feels that one's sensuous motives have that kind of externality to oneself to which we have alluded. But to be free one must obey one's own motives; will must will itself; just as the end of reason is reason, the object of will is will, and therefore it is free. Hence it is that the ordinary opinions of mankind, with reference to the freedom and slavery which a man may undergo in himself, have a deep foundation in actual fact. Each one feels that he is less a man when he is dragged at the heels of the senses; more a man when he frees himself from that democracy, and is under the restraint of monarch reason. Each one stands with graceful pride in the freedom of that restraint which is imposed by the universal reason; each one lies in chains who yields to those natural motives which are the sole lights, the sole guides, of animals and things. Such lights are like the stars, particular and sparse, while the light of reason is like the day, universal and wide. It is the object of each brave man, then, to conform his will to the universal will, for in that way only can he become free; can he become in the true sense a man; can the evolution of nature from thinghood to manhood be effected. Now free-will is the root of law. At the present time most of our so-called philosophers scout the idea of free-will. Men, they say, are ruled by their organism. Their organism is a thing just as a cabbage is, and is influenced entirely by its externals. There is nothing but one sequence of events, and men are only causes in the same sense that a cue that drives a billiard-ball is a cause; but the force was not in the cue, nor in the arm, nor in the man, nor in the food, nor in the sun and salts that made it grow. Before Abraham was, that force existed; it has undergone more curious exigencies in its day than Cæsar's clay. About its beginning we know nothing; it and matter are the twin Melchisedecs.

Does it ever occur to such people to consider what then is the meaning of law? Can it have any? If there is no free-will, why should we make Acts of Parliament? Why should there be penalties for theft, and civil action for breaches of contract? People appreciate now, that the reason that insane persons are regarded as irresponsible for their acts, and allowed to escape punishment, is because they are not free agents; but to our modern thinkers no sane man is free, and why should the latter under these circumstances be held liable to punishment if the former are to be

exempt? But men will not believe these advanced thinkers; and Dr. Johnson's argument is as good as theirs. We are free; otherwise law has no meaning.\* It is free-will that is the root of law; it is free-will that constitutes the contents of right or law.

But free-will is at first abstract. That is abstract which is isolated self-identity. If two things, parts, constitute a thing, one of these parts separated, isolated from the other, and looked at in itself is abstract. Now, as we have seen, the constitutive process of self-consciousness is a concrete. The notion is the very concreteness of the universal, the particular and the singular. And its process is the idealization of a particular, through a universal into a singular. Now free-will, as it first emerges, has the character of singleness, abstractness. That is, it is abstract. It is like one leg of a pair of scissors. In that singleness, however, and by that very oneness, it is constitutive of the person, is a person. But that person's personality must be realized, for it has in it implicitly the notion, because it is thinking will. But realization is always through something other than itself, and as free-will as the person, is an abstract inner, and its immediate other will be an abstract outer, it can only be realized through an external thing. And in this we have property. In this we must only see the same attitudes of thought. The will in the person is the undeveloped universal, which passes forward into its particular, with the resulting concreteness in the singular. This then gives us the notion of person and property which are in the words of Hegel, the abstract self-internal immediate, and the abstract self-external immediate.

It is beyond our purpose to follow Dr. Stirling into the exposition of the manifestation of the notional evolution into Abstract right, Morality, and *Sittlichkeit* (or, as he translates it, observance), in which we again find the universal, the particular, and the singular. For the will, which was universal in law, passes into a particular phase, and becomes inner as conscience, in morality, and finds its true concreteness in observance. We must, however, confine our attention to the philosophy of law, and while these others are intimately associated with it, and their exposition admirably illustrate the inner motions of the notion in the philosophy of abstract right, the consideration of them would require too much time and too much space to be profitable in this reference. All we hoped to do was, to give some indication of Hegel's philosophy of law, and a detailed account of these sister subjects

\* Since the above was written, I have seen the first portion of Mazzini's article on *The International*, in the July number of the *Contemporary Review*, in which he argues the impossibility of any rightful government if there is a denial of God, and an ascription of all that is to blind chance, or to the inexorable force of things.

would compel us to give only a step-child's share of attention to that which is primarily our object.

Legality, then, or abstract right, is divided, or rather divides itself, into property, contract, and penalty; and here again, as ever, we have the singular, the particular, and the universal. For in property we find the single will, in contract we find several or particular wills, and in penalty we find the will of the whole, the universal will.

First, then, of property. We have seen that will is realized through or by means of an abstract self-external, a thing without will, a thing; and if will is manifested through it, it in its turn has its meaning only in will. This is the concrete, and from this very nature certain things evidently follow. A man can, being in his personalty single, be possessed only of the singular. That only would be his immediate *other*. The universal could only be the other to the universal, therefore it cannot be the subject of private property. Property thus has its sanction, its meaning only in spirit, in the nature of the person. From the very statement of the nature of the concretion it follows that it is a man's duty to possess, or be a proprietor, as it is only in that way that his objective spirit can be thoroughly realized; a person who does not possess still remains in his abstractness implicitly, but not explicitly, concrete. But it does not follow that it is a man's duty to be rich. The notion does not dictate as to how much or how little a man shall own; all it dictates is its own evolution into the idea, into the objective spirit. The man who makes a life subservient to a banking account is not making his humanity an end in itself, but is making it a means to a wretchedly trivial end. Such an end, if it is made a ruler, will misrule. The man whose aim and object is a triviality, will become trivial. A life with external motives will become an external life, will become deformed, one-sided. It is only by noble ends that a man can do nobly. "Let him who would write heroic poems," says Milton, "make his life a heroic poem!" Like master, like man, is true of the (master) end, and the (men) means which are taken to attain it. The meaning of the necessity is not vulgarity, but a fuller life, a completer being; in that sense it is a man's duty to be an owner. But will even when it is set in the object requires to be enunciated, and that can only be by act. That act is seizure. "Seizure," says Hegel, "is the enunciation of the judgment that a thing is mine. My will has subsumed it, given it the predicate mine." The very immediacy of the body to the mind is a sufficient enunciation of property in that, and injury done to that in which I have set my will is injury done to my will. Seizure, then, is a bringing a more external property into relation to that less external property, my body. Of course, the

mode of occupation or seizure varies. I may go into a house, but I can hold a coin in my hand. Hegel, as Dr. Stirling points out, treats the whole subject of possession under three heads, and sees in that tripartite division again a necessary conformity to the moments of the notion; while he divides seizure itself into bodily seizure, formation, and designation. Here we find a rise in generalization, from individuality to universality. In this connection we could have wished that Dr. Stirling had been a little fuller than he has been in his lectures. He has evident satisfaction in discovering that Hegel was right after all with reference to occupancy, by means of designation being the most perfect means of occupancy, and quotes several passages to show the difficulties his master fought through before he arrived at the real truth of the matter; but he passes over somewhat briefly the questions of occupancy by bodily seizure, and by formation, upon the ground that it is so easily understood as to suggest itself to everybody. That thought has possibly misled him throughout. He was not in the main speaking to or writing for metaphysicians when he wrote and delivered these lectures, but he was writing for and speaking to lawyers. Their whole training had made them unfamiliar with the kind of thought that he introduced to their notice; and here in this question of occupancy, when he had an opportunity of making himself understood in his main thoughts in relation to familiar subjects, he is almost silent, upon the ground, as we have said above, that all these deductions will suggest themselves to his reader, and because concerning what is referred to as "connections," are decided by the understanding upon grounds and countergrounds, and not by the notion with its moments of reason. But what Dr. Stirling has forgotten to point out to those persons who are simply his readers in so far as these lectures are concerned, is the relation of that very understanding with its grounds and countergrounds to the notion with its moments of reason. The exposition without some such reference seems to us defective. And just when Dr. Stirling was in a position to give some such explanation, he turns from it because it is too easy. To teach, one must sometimes be content to stoop. Not only, then, is possession shown by bodily seizure, but by formation. Instead of taking a thing into relation to his less external property, he can place his less external property in it. He who bestows labour on a thing, also enunciates possession; and lastly, by naming, labelling, or the employment of signs, one can demonstrate appropriation, or prove that he has set his will in it.

But by seizure one demonstrates proprietorship roughly; that is, that one has set one's will in it; and even this is a kind of designation, for that is only another name for a sign, and

the whole of the forms of occupancy are only less general instances of this ultimate import, the demonstration of the fact that a thing is willed mine.

But possession is in itself treated of under three heads; and these are not arbitrary divisions, according to Hegel, but necessary moments of the same notion. The one of these is, as we have seen, *seizure*; the second of these *use*; and the third *alienation*. But these are not stereotyped in their separateness, but are known in their transitions. The evolution of *seizure* into *use* will illustrate this life-flux of the notion. All seizure is appropriation by will. Will makes the object its. But in so doing the will is to be regarded as positive, while the thing determined is negative. The will, then, being particularly determined by the thing, is particular will in a desire, and the thing or negative being particularly determined, is only for the will, and is consequently serving it, which is the whole meaning of use; for Hegel's definition of use—and it is one which will be accepted even by those who may differ from him in most matters—is, "Use is this realization of my desire through the alteration, destruction, consumption of the thing, the selfishness of whose nature is thus manifested, and which accordingly accomplishes thus its destiny." He has an intelligence that makes the rotten jaws of silent facts to open and gives them a voice. What could be more excellent than his explanation of prescription? It is as follows: Use is the real side of property, and it is often used as an argument by those who have wrongly taken possession. They say the thing was of no use to the man I took it from. Yet such argument is bad against the actual assignment of will. If will is in it, use can give no title to another whose will is not in it. But seizure may become an empty symbol. The will which made occupation or designation a force may have passed away, and the property is then really without an owner, and thus property may be acquired or lost in lapse of time by prescription. The very necessity of such enunciation as bodily seizure, formation, and designation, shows the necessity for continued manifestation. It is in this way that prescription has a meaning. In one particular it is difficult to see that Hegel is right, although he seems to be followed by Dr. Stirling. "Mere land," the latter remarks, "as burying-ground, or otherwise privileged to non-use, involves a simply arbitrary, unactual will, by infringement of which no veritably real interest is injured, and respect for which cannot be guaranteed." But surely respect for such mere land can be guaranteed just so long as the will of the living is set in it. Its privilege to non-use cannot affect the validity of that guarantee, and as real interests may be injured by an infringement of the rights to such property, as in the case

of any dwelling or garden. The clever phrase that use is the "real side of property" has, to our thinking, misled our author into the supposition that there was an unreality in property that was not used.

It is true that non-use does in some cases negative the fact of appropriation in time, but that is very readily compensated for by the other means of enunciating will. And all that is necessary is the headstone or railing, which will show that will is still in the land. True, it will lapse like copyright; but it is as stable, as guaranteeable as any other kind of property, for it is to be looked at not in relation to the dead desires of the dead, but to the positive will of the living.

But as will can lapse in time for want of enunciation, so can it be withdrawn by negation. If a thing is mine when I have willed it mine, it is evidently not mine when I have willed it *not* mine. But in the very act of willing it not mine we have alienation. But when two wills will at the same time proprietorship and alienation, we find ourselves in the presence of what lawyers have called consent, and therefore we have that which has been designated a contract. By this method we have arrived at the second moment of the notion of abstract right. In this connection it may not be out of place to remark that, although much of this evolution may seem unfamiliar, much of it is really sanctioned by men's ordinary experience, and such an explanation of consent as that given by Hegel is in perfect conformity with the definition which has been in use amongst lawyers.\* There is much drift truth in the world, and the philosopher only collects that, and makes a whole out of these isolated parts. This we believe to have been Hegel's merit. He was a seer in a true sense. He saw into the wells in which truth lies; he collected these scattered ears of sporadic truth, and has formed them into a lasting and complete system, nobler in its proportions and more harmonious in its details than any that the world has seen since the day of Aristotle.

It is in this unity of different wills then that property reaches or appears in its highest manifestation. In this we find the notion again prominent. In this eternalization of will we have a unity of different wills, or a unity in which difference is at the same time negated and affirmed. But as we have seen, the very essence of the notion is the identification of differences, and the differentiation of identity. In this act, then, Hegel sees a proprietor with his own will, and with the will of another ceasing to be, remaining and becoming a proprietor; and from these principles he deduces the

\* See Grotius, *De Jure Belli et Pacis*, Lib. 2, ch. 11, s. 4; Story's *Equity Jurisprudence*, sec. 222; and Wharton's *Law Lexicon*.



cancellation of the contract in case of a *læsio ultra dimidium vel enormis*.

The historical progress of law through many of its simplifications, the extinction of many of the sense symbolisms, and the actual change in the signs of possession, is a subject of interest to the lawyer, as it is in the growth of an institution that we must seek a key to wards of an exegesis of the present condition of that embodiment. The conversion of subjectivity into objectivity, which we discover in passing from property to possession, requires some formalities to effect itself; for possession is the expression of will, and expression is just particular externalization. The history, then, to which we have above alluded must be studied in relation to the question of expression, and its progress in time will be found to be regulated by the advance of the possibilities of expression, or the facility for the passage of the subjective into the objective.

But it will be clear to any one who has followed us so far that contract is not will manifested as will. The very statement that possession is the objective side of subjective will, shows that contract, after all, is only individual will, or self-will. The act of contract, in that it is particular, is a manifestation of wills in community, but not of will in universality. The element of universality is not in it, but in its sanction by the absolute will, its prescription by the universal will. It is impossible in this place to enter upon a consideration of the remedies under contract, which are indications of this sanction, in relation to the particular condition of the will in the breach. These, as every one knows, are two. There is the civil action, where the will of the individuals differs through mistake or misunderstanding; and criminal prosecution, where the will of the individuals differs through the fraud or misrepresentation of one of the parties. But this leads us to the consideration of the third head under our general division, and that is Penalty. As contract is under the sanction of the universal will, it follows that any one who intentionally negates the community of wills, in such a case negates by his act the absolute will, and affirms in its stead his own particular self-will. That is crime.

Now, the remedy under such circumstances is to reposit or reaffirm the universal will, and that must be by a negation of the particular will. That is penalty. The criminal's resort has been to force, for a negation of the absolute will is force; and the reaffirmation must be by a negation of his self-will. We know the effect of a double negative, and that will illustrate to some extent this process of thought. The criminal, then, must consequently be subsumed under his own law, force. He must, in other words, be compelled to undo his own compulsion, which

is evidently to restore to him his own right. But this can only be efficiently done by a disinterested representative of right. Mere individual counterassertion would, as Dr. Stirling points out, be interminable; and the restoration of the true inmost will of the criminal himself can, therefore, be effected only by means of a judge, who is universal, or a representative of the universal, because his feelings are apart from the inquiry, and he has to decide in conformity with objective standards of right. The relation of justice can only be made actual through the knowable existent, and, therefore, punishment relates either to the person or property of the criminal. The criticisms by Hegel upon the theories of the Stoics, which were realized in the laws of Draco, of the arguments of Beccaria with relation to capital punishment and the like, are in every way admirable; and the fact which he sets against these, that punishment is an idea on its own account, and has its foundation in the very nature of will, is evidently true from the very nature of the case. A more thorough appreciation of these inexorable facts of thought—for it is thought that is the only fate—would do much to bring back a better understanding of the true position of the criminal in relation to society, and to show the absurdity of many of the current platform notions of humanity, which really means a snivelling sentimentality, and not a manly regard to the true ends of being. In one sense, the judge is only there to sanction the criminal's conviction of himself. It is the universal that he has outraged, and that universal is his own, in a truer and deeper way than the appetites and desires he hoped to gratify by his crime. He has given his consent to the very law which punishes him. It is his inner self that tries, and convicts and condemns his outer self.

But looked at in this light all punishment may be regarded as education. Training is the counteracting of the passive force of nature by wise restraint and discipline. It is this that we mean when we speak of education in children. We have got beyond the idea that education is teaching a child to read; we have come to perceive that it is the elaboration of that cosmos, character, out of that chaos of nature; we understand, at last, that it is the subjection of nature in man, the subordination of his senses and his appetites, that is the object of education, and that that is possible only through the negation of the mechanical necessity of nature, the position of the universal and the consequent freedom of the will. Thus we find that all punishment is educational, and that the infliction of penalty is no wrong, as some would have us think, but a right which conduces to the freedom of the individual, to the welfare of the community, and to the absolute attainment of justice.

We wish we could enter into some of those delightful digressions which form so large a part of these lectures, and yet even while we must forego that pleasure, our minds misgive us that we have applied a misnomer to them. They are only half-digressions, for in one way they are departures from the main drift of meaning, and in another way they are not. Although some of the considerations, such as the deep glances into the present rapid cry for equality which, to twist a quotation, "is the cry of all, but the *game* of a few;" into the superiority of Hegel's conception of the philosophy of marriage to that of Kant, are to some extent divergences; they rather tend to make the whole progress more rapid and more agreeable. A journey seems shorter if one can fathom the vistas on either side of the way; and when these vistas, as in the present case, tend to give us a greater insight into that which we are attempting to comprehend, our side-gaze is not lost. We only regret that we are unable to do justice to any of these delightful episodes, as they show Dr. Hutchison Stirling in his very best form, and are in themselves at once deep and perspicuous. One other subject we should have desired to bring before our readers in this connection, and that is the Hegelian idea of the connection between free-spirit and Christianity. "This idea" (the abstract notion of freedom), he says, "came into the world through Christianity, in which it is that the individual, as *such*, has an *infinite* worth as being the aim and object of the love of God, and destined consequently to have his absolute relation to God as spirit, to have this spirit dwelling in him. Christianity it was, namely, that revealed man in *himself* to be destined to supreme freedom."

In no connection are Hegel's words so admirable as in their reference to Christianity; and in no connection is it so important that he should be at the present time explained, as he has been almost invariably misunderstood. Another subject which we should have desired to touch on, as being intimately connected with the very life of the age in which we live—so much so, that no one who has not recognised this as its life-blood, who has not felt this, its pulse, can understand the strange pathological conditions of the time—was the relation between *vorsellungen* and *begriffe*, or, as Dr. Stirling seems inclined to call them, thoughts and vicarious thoughts. To understand these is to understand history, is to understand that picture of the notion that we discover in the pseudo-evolutions of our times, and to have a broad light, as our author himself points out, cast upon the different creeds of the ignorant and the learned, the wise and the simple. But all these things we must content ourselves simply by alluding to. A thorough investigation of any one of them would require more time and

space than is now and here at our disposal. Only one subject demands recognition, and that is an answer to an objection which has been urged against Hegel, namely, the suggestion that there is nothing progressive in his system; that it is limited; that it is, because limited, narrow; and that the evolution once made, thought is in a *cul-de-sac*, and can go no farther. But this is due to a misconception. There is a something beyond; there is a possibility of progress; for Hegel holds that a man may get him new categories. In one of Voltaire's works there is a consideration of the different world, that the inhabitants of another planet—supposed to have a thousand senses—must enjoy, from the empty universe which we have with our five; and the followers of physical science are never tired of thinking of some new instrument which farther sight, or does away with the inaccuracies of that wide sense of touch, as another sense. And truly how the universe expanded in extent with the invention of the telescope, and in intent by the invention of the microscope!

But, after all, these growths are external in comparison with the real inner growth, which would result from the evolution of another category. Such a growth would be a deepening or widening of spirit, and from that, again, the world, as the objective idea, would expand and grow in richness and in fulness. It is not another sense we want, but another category. It is in this direction that advance is possible to humanity; and that is only possible if humanity is true to itself, true to its higher law and to that law which results in the realization of the true, and the necessary destruction of the false.

On the whole, then, we must express our gratitude to Dr. Hutchison Stirling for these admirable lectures. He who interprets a great man's thought is almost as much of a benefactor as the thinker; he who gives us the means of distinguishing the true doctrine from the false, as Dr. Stirling does in the fourth of these lectures, by means of his excellent and acute criticisms upon Röder, Hildenbrand, Lassalle, and Austin, deserves our gratitude almost as urgently as he whose intelligence first gave us the real facts of existence, of thought, and of law. Dr. Stirling has our gratitude, and we are convinced that any one who will take the trouble to get at the real meaning of these lectures will feel an indebtedness to this author. At the same time, they will feel somewhat surprised to find the comfortable and easy philosophy of our own Austin so hollow and empty as it undoubtedly is, and as it has, to some thinkers, seemed for a very long time to be. Dr. Stirling has done another good service to philosophy by his Lectures on the Philosophy of Law.

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## VI.—EARLY LIFE OF SIR W. H. MAULE.

WE certainly think that Miss Leathley exercised a very sound discretion, when acting on the advice of Sir Edward Ryan, she gave this volume\* to the world. All who remember the late Mr. Justice Maule on the Bench must have been struck, not only by his great ability as a judge, but by his strongly-pronounced character, and can scarcely fail, therefore, to have some curiosity as to the circumstances of his early life, and as to the influences brought to bear in developing a mental constitution so vigorous and so marked as that which he possessed. In many cases, the early character of an eminent man may be to some extent divined from what he afterwards becomes. The qualities which he shows in the maturity of his powers, we may well guess to be the same in kind as those which he exhibited from the first. Sometimes the solidity and sobriety displayed are such as we may be pretty sure must always have existed, and sometimes the juvenility which remains leaves no doubt as to what the earlier qualities must have been. But the character of Sir W. H. Maule was of a description which made it quite possible to suppose that, in his progress through life, some *vis major* had given it a bent different from that which it might naturally have taken. Many of his most striking and peculiar qualities were such as are not generally exhibited in early youth; and there was certainly nothing in his case to indicate very clearly that his natural and original disposition was the same as that with which the profession was so familiar a few years ago, and the displays of which furnished so many anecdotes and topics of conversation to the Bar. The present Memoir, however, shows that in his case, as in most others, Wordsworth was correct when he said, "The child is father of the man." It is startling to find in many of the early letters of Sir W. H. Maule the same mode of dealing with affectation and absurdity, the same ironical tendency, and the same caustic humour which he often so happily exhibited on the Bench. No less clear is it, also, that he possessed from the first that sense of independence which he always showed in after life, and that kindness of disposition which those who knew him best were most able to appreciate.

But independently of the professional interest which the

\* Memoir of the Early Life of the Right Honourable Sir W. H. Maule. Edited by Emma Leathley, his niece. London: Richard Bentley & Son. 1872.

volume thus possesses, we fully agree with Miss Leathley in thinking that the story of the early life of Sir W. H. Maule affords a valuable lesson to the young; a lesson which, in the dedication to Sir E. Ryan, she truly says, "it is to be regretted they often so much need, of the great influence children have over the happiness of their parents, and how, in promoting that, they most surely promote their own welfare." This is not a mere ordinary and matter-of-course observation, but conveys appropriately and exactly the moral of the Memoir now before us. No youth could have a more thorough regard for the views and wishes of his parents than the subject of it had, and in his case, "The path of duty was the road to glory." Much is no doubt to be attributed to the wise and prudent treatment which he received from his parents themselves; but all their efforts and sacrifices on his behalf were nobly met by him with the deepest filial affection, and the most resolute application to his studies. Equally happy and exemplary was he in his relations with the rest of his family, and such, on the uniform testimony of his most intimate friends, he continued through life. It is impossible not to see that Miss Leathley's volume is designed not so much as a record of the early life of a relative of great eminence, but as a tribute of affection.

Shortly after the death of Sir W. H. Maule, a memoir of him appeared in this journal.\* In it a sketch of his life is drawn, and an estimate attempted of his character, his mental powers, and his attainments. An account is given of his career at the University and at the Bar, and of his conduct on the Bench, and various instances of his peculiar humour when occupying the latter, are inserted. The description of his early life, however, is very brief; and we gladly avail ourselves of the information afforded by the present volume to supply what was, no doubt, a deficiency in our memoir. But independently of this, we need offer no excuse to our readers for giving them some account of a book which must necessarily interest that still considerable portion of the profession to whom the subject of it was once so familiar; and who assuredly are not likely to forget his powerful intellect, his forcible expressions, and his admirable independence. Even a younger generation will not, it may be safely assumed, view with indifference the sketch which we can thus present of the early years of a man whose fame in the legal world has not yet waxed dim. To non-professional readers the contents of the volume before us will scarcely have less interest than to those who claim the subject of it as an ornament of the body to which they belong.

W. H. Maule was the second son of Mr. Henry Maule,

\* *Law Magazine and Law Review*, vol. v. p. 1.

a medical practitioner at Edmonton. At the age of eleven he was taken charge of by his uncle, the Rev. John Maule, rector of Greenford, Middlesex, and an ex-fellow of King's College, Cambridge. In addition to the duties of his parish, Mr. Maule undertook the charge of a few pupils, and appears to have been a most careful and successful preceptor. Under him W. H. Maule was well grounded, both in classics and elementary mathematics, and no doubt, as Miss Leathley says, "was indebted to him for much of his after excellence in learning and capacity for self-instruction;" though she thinks that, "in some respects, the peculiarity of Mr. Maule's character probably exercised an influence not altogether advantageous on one naturally disposed to eccentricity." Letters from the uncle to the father, very sensible in substance, but somewhat peculiar in manner, remind us very forcibly of the pupil who was the principal subject of them. The following account of the character and habits of the latter when at Greenford, from an old schoolfellow, is extremely interesting—

"W. H. Maule's tastes and my own were similar at the time, and as we were not confined to bounds, our friendship and good feeling were much cemented by our rambles together through the fields in every direction, encountering and sharing together our boyish adventures and sports, only taking care to be at home in due time, and to be prepared with our appointed tasks. These joint rambles continued in a great measure our amusement during the four years we were together at Greenford. And I can confidently say that in point of advantage I derived much in many ways from his guidance and cleverness, and his fund of information, picked up I did not then know or think how, and have since often wondered at; for he was not a great reader, and was generally more inclined for amusement or fun or pleasure than for study. His memory was always most excellent, and his quickness very remarkable, and he must at that early period of his life have had great penetration and judgment in appreciating the meaning and spirit of what he treasured in his recollection; for I have heard him very often closely pressed by his uncle, who was an excellent scholar in Greek and Latin, for the very marrow of the most occult passages in the classic authors in use by us, and have always seen that his answers were satisfactory, and such in general as could not have been given by any of his seniors. . . . He was always kind and good-tempered, but seemed to be unwilling to be thought over ready to make advances to, or friendships with those connected, as almost all the other boys were, with high families."—Pp. 27, 28.

The death of his uncle, in 1804, brought the school days of W. H. Maule to a close. He was now in his seventeenth year, and much anxiety was felt by his father as to what was to be done with him, in the circumstances of the family, which

appear not to have been very flourishing at this period. He remained for some time at his father's house, studying by himself and with his younger brother Frederick. He was resolved to lighten the cares of his father, as far as he himself was concerned, by doing something for his own maintenance; and accordingly, at the beginning of the following year, he accepted the office of tutor in a Quaker family at Ipswich. An amusing account is given by him in a letter to his father and mother of his journey to Ipswich, and of the duties which he had to perform in his new position. Anything more irksome for a youth of his disposition than what was required of him can scarcely be imagined, but he submitted to it with patience, and made the best of everything. The scanty leisure he enjoyed was devoted to study, and especially to the preparation of an Index to Homer. In a letter written during this time, he points out to his father and Frederick a passage in Persius, relating to the power of conscience, which had struck him as very beautiful. It occurs in the Third Satire, and extends from line 32 to 43. The passage contains the well-known lines beginning—

Magne pater divum! sævos punire tyrannos  
Haud aliâ ratione velis, &c.

In the same letter he says—

“I shall always make a rule to comply with the good advice you give me in your last, respecting *coolness*. Nothing can be more necessary in every situation: it always gives its possessor an advantage. Though I am not over cool by nature, so thoroughly am I convinced of the necessity of being so, that I make it my continual study to acquire a habit of it; and I think I have not been quite unsuccessful.”

Throughout the whole of his correspondence at this time, it is impossible not to be struck by the sound sense and right feeling which the youth of seventeen displays. We meet with many specimens, also, of the mode of viewing things which afterwards so peculiarly distinguished him. Thus, writing to his father on the subject of his pupils, and the plan of education which their parents had adopted, he says—

“I recollect an observation of yours, that private education made *poor devils* of boys, and that a public one made them *sad dogs*. I am convinced that this observation is well founded; poorer devils than my pupils, even Mrs. Trimmer herself could not wish for. It is my private opinion that, one sad dog is worth forty poor devils.”

The following, though in a different style, is equally characteristic:—

“Emma [his sister] inquires whether I have a good washerwoman.



I think she is an honest old soul and skilful in her vocation ; but Mrs. H. says she is not a good mender ; and perhaps it may be as well not to employ her in that way, as she might be tempted, while exercising one of her functions, to make herself work in the other ; as a bricklayer when tiling a house makes a hole for the sake of his friend the plumber ; for poor folks must live as well as gentlefolks. This puts me in mind of a gentleman whom I saw the other day at the races. He had broken his arm, and seemed to be in great torture ; but the surrounding mob did not pity him, because he could afford it better than many a one."

Fortunately, his residence at Ipswich, in the capacity we have mentioned, came to an end before the close of the year 1805. It can scarcely be considered as time wasted, since it undoubtedly tended to strengthen those powers of self-reliance to which so much of his success in after life was owing. Shortly after he entered upon his situation, he wrote to his father—

" I shall not be seventeen till the 25th instant. If ever I am an old codger with a brown wig, fleecy hosiery stockings, and flaps to my waistcoat, I shall say to some of my grandchildren, ' Ah, boys, boys ! before I was your age I was out upon the world ; but things are altered now ; it was not so in my time. ' "

There can be but little doubt that even if it had been impossible for him to go to Cambridge, he would have made or found for himself a way to distinction. But things having improved at home during his absence, he returned to his father's house, in order that he might apply himself to study, for the purpose of entering the University. A more interesting picture of domestic concord can scarcely be imagined than the description by Miss Leathley of the family at Edmonton during this period. Not much is said about the studies of W. H. Maule, but they were doubtless not neglected. From a letter, however, written to his sister at this time, it is obvious that he was no mere book-worm. He had become a politician, reading the papers almost every day at the subscription-room, and knowing when a Hamburg mail had arrived as soon as any one in Edmonton.

In October, 1806, he commenced residence at Trinity College. His admirable preparation was at once shown by his attending the lectures on mathematical and philosophical subjects with the under-graduates of the year above his. Of his college career, however, we have only a few occasional glimpses. There can be no doubt that he worked hard. He obtained a scholarship in 1807. In the annual examination at Trinity College, at the end of his second year, his name appeared in the first class. Miss Leathley says—

"Not only were the official reports always satisfactory (for, with one exception, he never failed to take the very first place in every competition into which he entered), but the accounts that reached the family from their various connections at Cambridge, always alluded to him in terms that left no anxiety about his success."

He took his degree in 1810, when he was senior wrangler and first Smith's prizeman. The second wrangler and second Smith's prizeman was Brandreth, afterwards of the Northern Circuit, who had been a pupil, along with him, of the Rev. J. Maule, of Greenford. Brandreth was also the senior medallist for the year, the highest honour in classics at that time.

It is mentioned that semi-official rumour stated the marks obtained by the two first wranglers to have been 1600 and 900 respectively. Brandreth, however, it appears, was sanguine of being senior wrangler; and he afterwards mentioned to Mr. Murphy, one of their old Greenford schoolfellows, that "he had expected to beat Maule in mathematics; for though not doubting his transcendent abilities, he thought he must have neglected them and the opportunity of cultivating that especial branch, and as he was never out of bed till a late hour, he imagined he had thrown away his time." But Mr. Murphy had "found out the secret of his acquiring his book-learning, for his habit was to read in bed till a late hour, and, consequently, with his rambles and work by day, and his reading by night, he was usually a very late riser."

After taking his degree, W. H. Maule remained for some time at Cambridge. He took pupils, two of whom were Sir Edward Ryan and the late Sir Cresswell Cresswell. At the annual Michaelmas examination he was elected a fellow of Trinity. Writing to his brother Frederick from Cambridge, in the previous August, he says—

"I am now employed in reading for the fellowship examination, which takes place about the 23rd of September; an employment to which I am afraid I ought to have taken myself earlier. There are three vacancies; two candidates may be considered as certain of success, and though I have some chance of the third fellowship, I have five or six competitors for it."

The following extract from the same letter is also characteristic—

"About a fortnight ago, I went down the Cam to Ely; a mean town, with nothing worthy of notice but the Cathedral, which is very old and very high. It is famous for eels, unfortunately for them."

He had previously entered himself at Lincoln's Inn, and kept several terms before leaving Cambridge.

Shortly after taking up his abode permanently in London, for the purpose of pursuing his studies for the Bar, he met with a heavy blow in the death of his brother Frederick, who had entered on a career at Cambridge which promised great success. The letters in the volume addressed to the latter show how high was the estimate W. H. Maule had formed of his brother, and how deep was the interest he took in him.

In 1814 W. H. Maule was called to the Bar and joined the Oxford Circuit. Some interesting and amusing letters written by him to his sister during his first sessions and circuit are given. At the Usk Sessions he had two briefs, for which he received three guineas (his first fees); "there was nothing to do in one, and very little in the other." The only barristers mentioned by name were Campbell, with whom he travelled by the mail to Usk, and afterwards in a post-chaise between Monmouth and Gloucester, and Horace Twiss, whom he describes as "not an unentertaining man."

Before a year had elapsed after the loss of Frederick, he sustained another great affliction in the death of his mother. She had always exercised a powerful influence over him, governing, as Miss Leathley says, "with a hand at once so firm and gentle that her power was felt only by the attractions that drew him to her. He always," it is added, "retained a strong feeling of a mother's influence. In after life he appeared to think no motive for exertion could be greater than the knowledge of her wishes, and when they had been urged in vain, seemed at a loss to suggest any other, and regarded the case as hopeless."

With the death of his mother the volume closes. "There were henceforth," as Miss Leathley says, "no great joys and sorrows, no wonderful triumphs and successes, or what perhaps may be yet more interesting, no great struggles and anxieties."

His advancement in his profession was a gradual and lengthened process, and his elevation to the Bench was only in the natural course of things. The qualities which he displayed as a counsel and a judge were precisely those which had marked his early life. His character as a lawyer was adequately estimated in the article to which we have already referred; and we need now only add that he was in no respects inferior to any of the eminent judges who had attained the same University honours as himself. In none of those cases is it possible to discover that much advantage arose from a mathematical training, while with respect to Sir W. H. Maule it may be truly said that the essential elements of all those qualities of mind which he displayed so conspicuously at the Bar and on the Bench existed quite independently of his mathematical studies, and would have been equally striking if he had confined himself entirely to classical and philosophical

reading during his University career. We do not say that they would have been more so, because a man of such marked individuality must under any training have come out very much such as we knew him in Banco, at Nisi Prius, and in the Crown Court.

## VII.—NOTES ON THE TEMPLE CHURCH.

### PART II.

AS the establishment of the choral service in the Temple Church, now so well-known, was one of the earliest instances of an exceptional step being taken, which has since happily become the custom, a few additional words respecting its institution and development may not be without interest.

Previous to the restoration of the church, as we have seen, a quartet of vocalists used to sing the hymns from the organ gallery, closing the curtains between times. An improved feeling as to fitness forbade a continuance of this arrangement. On the completion of the restoration of the church a regular choir was provided, and properly divided into *decani* and *cantores*, on the two sides of the church immediately below and opposite the organ. The church was re-opened for Divine service on November 20, 1842, Mr. Turle, of Westminster Abbey, presiding at the organ; the present organist, Mr. Hopkins, giving his first competitive performance, May 7, 1843, and being appointed organist in the October following. The choral service, as originally introduced, consisted of English and Gregorian chants; the Ferial Responses for ordinary use, with Tallis's Responses on the Church Festivals; various settings of the Canticles, technically called services; and a selection of some of the best and most appropriate anthems. In the first instance, a few misplacements occurred, which were afterwards rectified. Thus, the anthem in the morning service was sung immediately before the sermon; but, in 1855, it was proposed and arranged in choir committee, "That henceforth the anthem in the morning service be sung at the period of the service mentioned in the rubric, and that a psalm or hymn, or a part, be sung between the service and the sermon." The opportunity thus offered of joining in a metrical hymn was so generally appreciated by the congregation, that a second hymn was directed to be sung between the prayers and the communion service in place of the sanctus, which correctly belonged to another period of the service. A hymn was also introduced into the afternoon service, after the prayers and before the sermon.

And here let us note that the effect of this change, and still more of the introduction of the new hymn-book and its general distribution throughout the church, has been very greatly to improve the congregational singing. We question very much if there is any place of worship in London—certainly there is none with which we are acquainted—where this is so good. Everybody has the music and words at hand. The organ and the choir lead well. The congregation is probably the most highly educated one which is to be found throughout England, and the result is often a volume of harmony that is rarely to be met with.

The organ had been placed so far back in the organ-chamber, that the organist sometimes experienced great difficulty in hearing the singers, and the singers the organ. This difficulty was, therefore, taken into consideration by the choir committee in 1866, and ultimately the instrument was moved forward about six feet, and the handsomely carved oak case, which had previously been almost out of sight, was placed immediately in front of the arches and columns. There was the less objection to this arrangement, as the marble shafts, now partially hidden, were of no greater age than the time of the restoration of the church thirty years ago, and, therefore, possessed neither historical nor archæological interest.

We have spoken of the Temple organ as it existed before the restoration of the church. This organ has a curious history of its own, which must not be passed over. Many members of the Middle Temple also have a pecuniary interest in the instrument, inasmuch as they have paid on their call 2*l.* for "organ and lucidaries." We do not know what a lucidary is, but no doubt the payment which had to be made on behalf thereof was the correct thing, like all the other payments. In "A Few Notes on the Temple Organ," the ancient history of this instrument is detailed, with curious and fresh matter collected by the writer. "Father Smith," as he is called in England, was the builder. His name was in truth Bernhardt Schmidt; and he came over to England from Germany with his nephews, Gerard and Bernhardt (or Christian), in the reign of King Charles II. The organ in Whitehall Chapel was his first undertaking in England. Pepys, in July, 1660, entered in his Diary the following notes:—

"8th (Lord's Day).—To Whitehall Chapel, where I got in with ease by going before the Lord Chancellor with Mr. Kipps. Here I heard very good musique, the first time that ever I remember to have heard the organs,\* and singing men in surplices, in my life."

\* Pepys is right in using the plural; for what is commonly called "an organ," generally consists of a combination of a great organ, a choir organ, a swell organ, and pedal organ.

Schmidt soon gained great fame and much employment. Westminster Abbey, St. Margaret's, and many other churches, were enriched with organs from his hand. One stop of Smith's has often sufficed to give a reputation to an instrument. The beauty and sweetness of his tone has been always unrivalled. But Father Smith had his mechanical defects; and the action, packing, and general arrangement was bad even for his own day, and now would not be tolerated. Even his pipes were, externally, ill-finished. When he was remonstrated with in respect of the latter incompleteness, he is reported to have replied, "I do not care if ze pipe looks like von teufel; I shall make him schpeak like von engel."\* Smith's great rivals were Harris, and his son Renatus Harris; and this led to the "battle of the organs" at the Temple, of which the following is the amusing account now presented to us:—

"About the end of the reign of King Charles II., the Societies of the Temple being determined to have erected in their church an organ as complete as possible, had been in treaty with Smith for that purpose, when Harris was introduced to their notice; and both of these eminent artists were backed by the recommendation of such an equal number of powerful friends and celebrated organists, that the Benchers were unable to determine among themselves which to employ. They, therefore (as appears by an order in the books of the Temple, dated February, 1682), proposed, that 'if each of these excellent artists would set up an organ in one of the halls belonging to either of the Societies, they would have erected in their church that which, in the greatest number of excellences, deserved the preference.' Smith and Harris agreeing to this proposal, a committee, composed of Masters of the Bench of both Societies, was appointed in May, 1683, to decide upon the instrument to be retained for the use of the Temple Church; and, in about a year or fourteen months after, each competitor, with the utmost exertion of his abilities, had an instrument ready for trial. When Harris had completed his instrument, he presented a petition to the Benchers of the Inner Temple, stating that his organ was ready for trial, and praying that he might be permitted to set it up in the church on the south side of the communion table. An order was accordingly made by the Benchers, granting the permission he sought. This petition of Harris is dated 26th May, 1684; and thereby the date of the completion of his instrument is established. It is almost certain that Smith's organ was ready previous to the above date, and that for some reason (possibly to avoid the necessity of re-voicing if he

\* "A Few Notes on the Temple Organ," p. 8.

should be the successful competitor) he had obtained leave to place it in the church, which suggested to Harris the propriety of adopting the same expedient.

"Dr. Tudway, who was living at that period, and was intimately acquainted with both the organ-makers, says that Dr. Blow and Mr. Purcell, then in their prime, performed on Father Smith's organ on appointed days, and displayed its excellence; and, until the other was heard, every one believed that this must be chosen.

"Harris employed M. Draghi, organist to Queen Catherine, a very eminent master, to touch his organ, which brought it into favour; and such was the excellence of the instruments, that to decide which deserved the preference puzzled the committee appointed for that purpose, who did not come to any determination, or make any report upon the subject; and in consequence the 'battle of the organs' was commenced, and the two rival organ-builders continued thus vieing with each other for near a twelvemonth. At length, Harris challenged Father Smith to make additional reed-stops within a given time; these were the Vox humana, Cremorne, the double Courtel, or double Bassoon, and some others. The stops, which were newly invented, or at least new to English ears, gave great delight to the crowds who attended the trials; and the imitations were so exact and pleasing on both sides, that it was difficult to determine who had best succeeded.

"The contention now became tedious and disagreeable, at least to the Benchers of the Middle Temple, who first made choice of Smith's organ, as appears by the following interesting extract from the books of that Society:—

"*June 2, 1685.*—The Masters of the Bench at this Parliament, taking into their consideration the tedious competicion betweene the two organ-makers, about their fitting an organ to the Temple Church, and having in severall termes, and at severall times, compared both the organs now standing in the said church, as they have played severall Sundays one after the other, and as they have lately played the same Sunday together alternately at the same service. Now, at the suite of severall masters of the barr, and students of this society, pressing to have a speedy determination of the said controversie; and in justice to the said workemen, as well as for the freeing themselves from any complaints concerning the same, doe unanimously in full parliamt resolve and declare the organ in the said church, made by Bernard Smith, to bee, in their judgments, both for sweetnes and fulness of sound (besides ye extraordinary stopps, quarter notes, and other rarities therein), beyond comparison preferrable before the other of the said organs made by — Harris, and that the same is more ornamentall and substantiall, and both for

depthe of sound and strengthe; fitter for the use of the said church; and, therefore, upon account of the excellency and perfection of the said organ made by Smith, and for that hee was the workeman first treated with, and employed by, the Tre<sup>ors</sup> of both societyes for the providing his organ; and for that the organ made by the said Harris is discernably too low and too weake for the said church, their Ma<sup>r</sup>pp<sup>s</sup> see not any cause of further delay, or need of any reference to musiciens or others to determine the difference; but doe, for their parts, unanimously make choise of the said organ made by Smith, for the use of these societyes; and Mr. Tre<sup>or</sup> is desired to acquainte the Tre<sup>or</sup> and Masters of the Bench of the Inner Temple with this declaration of their judgments, with all respect desiring their concurrence herein.'

"New difficulties now arose, which greatly interfered with the speedy determination of the controversy. The Benchers of the Inner Temple, upon consideration of the above declaration, sent to them by their brethren of the Middle Temple, did not concur in the course therein suggested; but on the 22nd June, 1685, made an order, in which, after expressing their dissatisfaction that such a resolution and determination should be made by the Benchers of the Middle Temple, in a matter which equally concerned both houses, without a conference being first had with them, they declared—

" 'That it is high time, and appears to be absolutely necessary, that impartial judges (and such as are the best judges of musick) be forthwith nominated by both houses, to determine the controversie betweene the two organ-makers, whose instrument is the best, which this society are ready to doe; and desire their Mastershippes of the Middle Temple to join with them therein, in order to the speedy putting an end to so troublesome a difference—and appointed a committee of five members of their body, with instructions that they—or any three of them doe, at a conference, deliver the answer above mentioned; and they are hereby impowered to enter into a treaty with the like number of the Masters of the Bench of the Middle Temple, in order to the speedy settling this affair.'

"The committee thus appointed appear to have entered upon their duties immediately, and to have fully considered the subject of the organs, not only with respect to the appointment of the 'impartial judges,' but also the respective prices and number of pipes in each instrument; for, two days afterwards, an answer was sent from the Middle Temple, from which the following extracts are taken:

" 'June 24<sup>th</sup>, 1685.—The Masters of the Bench of the Middle Temple now say:

" '1. That they cannot imagine how the masters of the Inner Temple can pretend any ill-usage or disrespect offered



towards them, either tending to a breach of correspondence, or common civility, by the Act of Parliament of the Middle Temple of the second of this instant June; for that the masters of the Middle Temple thereby, only on their own parts, with the concurrence of the barristers and students, declare their judgments and choice of Smith's organ (not imposing but requesting) the concurrence of the Inner Temple therein, with all respect.

“‘2. As to the matter of having the two organs referred to the judgment of impartial musicians, there yet appears not any difference between the two societies concerning the same; the masters of the bench of the Inner Temple having not as yet, in Parliament, declared their judgments and choice of the other organ, which if in their judgments they shall think fit to do, whereby a difference shall appear between the two societies, then their said masterpieces believe the society of the Middle Temple will find some other expedient for the determination of the said difference.

“‘3. As to the price of the organs, Smith, the organ-maker, absolutely refuseth to set any price upon his organ, but offers to submit the same to the judgment of the treasurers of both societies, or to such artists as they shall choose, which their masterpieces cannot but think reasonable.

“‘4. As to the numbering the organ-pipes and stops, their masterpieces think it below them to trouble themselves therein, because the proposal can have no other ground than a supposition of such fraud in the artist as is inconsistent with the credit of his profession.’

“The benchers of the Inner Temple, nevertheless, still adhered to their determination, ‘to have impartial judges chosen’ to decide the controversy; while the Middle Temple, satisfied that they had made choice of the better instrument, would not yield, so the contest was further prolonged; and accordingly we find the benchers of the Inner Temple, in February, 1686, again urging the necessity for the appointment of indifferent persons by each society to determine which is the best organ.

“‘At length,’ says Burney, ‘the decision was left to Lord Chief-Justice Jefferies, afterwards King James the Second’s pliant Chancellor, who was of that society (the Inner Temple), and he terminated the controversy in favour of Father Smith; so that Harris’s organ was taken away without loss of reputation, having so long pleased and puzzled better judges than Jefferies.’

“After its rejection by the societies of the Temple, Harris’s organ was divided; a portion of it formed the old organ in the cathedral of Christ Church, Dublin; and the remainder was erected in St. Andrew’s, Holborn,

“Reverting, however, to the accounts of the strange contention between Father Smith and Harris, for the order for the erection of the Temple organ; in Malcolm’s *Londinum Redivivum* we find the following:—‘The most singular occurrence of Smith’s professional life was the harmonic contest between his organ, now in the Temple Church, and the one erected by Renatus Harris, son of another German organ-builder, who left his country about the same time that Smith came. The learned Antients of the above seat of law wavered in their choice of the artist who should place an organ in their venerable church. The efforts of Smith and Harris were, therefore, brought into and heard by an open court, supported by counsel, who exerted their best abilities in their defence, but a respectable variety of jurors, and Judge Jefferies gave sentence, which was in Smith’s favour. In other words, the organ made by Harris was placed on one side of the church, and that of Smith on the other; the former played by Draghi, the latter by Dr. Blow and Mr. Purcell. Near a year elapsed before the contention ceased, and Jefferies made his fiat. It was this success that led to Smith’s employment at Paul’s.’

“And the Hon. Roger North, attorney-general to James I., who was in London at the time, adds his testimony to the virulence of the contest, and the acrimony exhibited by the friends on both sides, when, speaking of the evils which arise from competition in matters relating to music, he says, ‘And more (*i.e.*, ill effects) happened upon a competition for an organ at the Temple Church, for which the two competitors, the best artists in Europe, Smith and Harris, were *but just not ruined*.’—(*Memoirs of Music*, by the Hon Roger North, edited by Dr. Rimbault, 1846, p. 120.) ‘Indeed,’ says Dr. Burney, ‘old Roseingrave assured me that the partisans for each candidate, in the fury of their zeal, proceeded to the most mischievous and unwarrantable acts of hostilities; and that, in the night preceding the last trial of the reed stops, the friends of Harris cut the bellows of Smith’s organ in such a manner, that, when the time came for playing upon it, no wind could be conveyed into the wind chest.’—*Burney’s History of Music*, c. viii. p. 427.

In 1869, a very important and necessary step was taken towards bringing the choral and congregational service of the Temple Church into unity and accordance. Each member of the congregation who joined audibly in the service had, up to that time, sung such a version of the responses and hymn tunes, from the existing number, as his memory could supply. But so loose a state of things could scarcely be expected to be allowed to continue; and the two treasurers for the year just named—the Right Hon. J. E. Headlam, M.P., and

Sir Lawrence Peel—directed the organist to prepare a book containing the requisite music, which was accordingly done, and the church was supplied with the number of copies of "The Temple Church Choral Service Book," necessary for the use of the members and visitors. The opportunity was at the same time taken, of adding materially to the selection of hymns previously in use. The utmost possible improvement in the effect of the congregational portion of the service resulted from this judicious step.

We must not omit to mention that the choral service gained a great accession when the Rev. A. Ainger, a few years since, received the appointment as reader to the Temple Church. And here let us say, in passing, that it speaks well for the system of competitive examination that it should have given to the Temple an afternoon preacher such as Mr. Ainger, and an organist like Mr. E. J. Hopkins. They are both men of whom, in their different spheres, all Templars are proud, and they are men, respect for whom increases with knowledge. We have now the second edition of the Temple Choral Service Book before us. It contains the whole responses of the service in three separate forms: monotone, ferial, and festival, a selection of chants for the psalms, and metrical psalms and hymns. The tunes of the latter, which form the third division of the book, include some of the best English specimens, and also some of the finest German chorales. The selection of hymns is an admirable one. It is not perfect, for we miss a few modern hymns which have, on account of their beauty, become popular in the church; and, on the other hand, one or two instances occur of hymns which are in the minds of the public indissolubly united with certain tunes being adapted to new ones—always, as it seems to us, a mistake. The tune to "Abide with me," and that to "Holy, holy, holy, Lord God Almighty," illustrate what we mean. We learn, however, from the preface, that in some cases permission could not be obtained to use hymns which had been selected.

These cases, however, are rare; and the selection, taken altogether, and having regard both to the hymns and the music, is superior even to that of "Hymns, Ancient and Modern." It contains many adaptations from the great German composers, and several new tunes by Mr. E. J. Hopkins himself. We may particularly mention the noble "Angels' Song" to hymn 147, adapted from Mendelssohn by Mr. Hopkins, as being of great beauty; similar adaptations from the same composer, by Mr. Adolphus Levy, to the words of Bishop Heber, "Brightest and best of the sons of the morning;" and to the Christmas hymn, "Hark, the herald angels sing," by Mr. Cummings; an original tune, very simple but very beau-

tiful, by Mr. E. J. Hopkins, to hymn 179, "Just as I am," &c. Another by the same, No. 236, to the words "God who madest earth and heaven;" and a third, also by the Temple organist, which is likely to become popular, No. 269, "Glory be to Jesus." Perhaps the book contains no more beautiful hymn, words and tune together, than No. 286, "No; not despairingly," by Mr. W. R. Braine. Nor must we omit to mention that Mr. Hopkins has not fallen into the error, too common among recent editors of hymn books, of discarding wholesale the hymns which were favourites with the last generation. In some quarters it seems to be a qualification for admission that a hymn should be two or three centuries old, while that it should have been liked during what corresponds in church architecture to the churchwarden era is sufficient altogether to disqualify it. In a notice of this very hymn book, for example, we saw the profoundest contempt expressed for the tune "Helmsley," to the words, by Toplady, "Lo, he comes." The taste has changed, no doubt, in hymns as in architecture. But a hymn-book, especially an English church hymn-book, can afford to be catholic. Our churches are specimens of many phases of architecture, and every age has been quite positive that the style then in fashion was in accordance with the immutable laws of taste; but so long as the building is suited for its purpose, is useful and beautiful, we may be allowed to worship either in a classic building of Wren, or in one of the latest of Mr. Street's churches. So, too, with our hymns. The favourites of our fathers, Sicily, Adeste Fideles, Hanover, and others, which Mr. Hopkins has, as we think wisely, included in his selection, may be too florid for the taste which delights in Gregorian chants, but it would be a great mistake to omit them from a collection of hymns intended for use in an historical church like that of England; still less would it be desirable that they should be excluded from a building which has had so marvellous a history as our Temple Church, and which has heard within it the worship of almost every form of Christian faith.

The master of the Temple has always held a position of honour. The greatest name in the list is undoubtedly that of the "judicious Hooker." In the Life of Richard Hooker, prefixed to the edition of his works, in 1666, it is mentioned that, in 1585, a Mr. Aloy, master of the Temple, died—a man so well loved, says the biographer, that he went by the name of Father Aloy. His predecessor, and the only one since the Reformation, had been Mr. Ermstead. Hooker succeeded him, being selected thereto on account of his saint-like life. He was then thirty-four years old.\* He at once entered

\* Life of Hooker: Hooker's works, p. 9, edition, folio, 1666.

into controversy with the lecturer, a Mr. Walter Travers. The latter was a friend of Cartwright, and one of the great leaders of the Presbyterian school, which had given forth Martin Mar-prelate, and other books and pamphlets, which were disturbing the peace of Elizabeth and the Anglican party. It is said that Travers had hoped to be appointed master of the Temple, and to put his Presbyterian views of church government into practice. He was a man of blameless life, and, even according to his enemies, of great learning. His great offence was that he had taken orders at Antwerp. He kept up a correspondence with Beza at Geneva, and with others of his way of thinking in Scotland. Hooker and Travers seem to have preached in opposition to each other. They followed, says the biographer of Hooker, the apostolic example; for as Paul withstood Peter to the face, so did Hooker withstand Travers. "The forenoon sermon spake Canterbury; and the afternoons, Geneva." This was clearly dangerous, and the Archbishop of Canterbury prohibited Travers from preaching. Travers petitioned the queen in council. The latter refused to interfere. Whereupon the petition was published, and Hooker had to reply to it. The two great points in dispute show how entirely the "great vital truths" of one generation are apt to be looked on as mere curiosities by succeeding ones. We dig them from the great sepulchre of dead and buried controversies merely to suggest a moral. They were, first, that Hooker had declared "That the assurance of what we believe by the Word of God is not to us so certain as that which we perceive by sense;" and secondly, that he had ventured on the monstrous assertion, "That he doubted not but that God was merciful to save many of our forefathers living heretofore in Popish superstitions, forasmuch as they sinned ignorantly"—a horrible piece of latitudinarianism which in these days would pass unchallenged. Hooker was gentle enough as well as "judicious," but he could hit out very neatly. Take this, for example, "Your next argument consists of railing and of reasons; to your railing I say nothing; to your reasons, I say what follows." The controversy divided the lawyers into two parties: the younger going mostly with Travers. The life in the Temple was too busy for the gentle Hooker; and, in 1591, he petitioned to be removed, and had another living presented to him. His "Ecclesiastical Polity" was written whilst living in the Temple, and was the result of the controversy just mentioned. Hooker's marriage hardly seems to justify the adjective "judicious," which usually accompanies his name. Recovering from an illness, he came to the conclusion that it was well he should marry. Instead, however, of looking out for a wife, he commissioned his landlady to do this duty for him.

She made a selection, and her own daughter became the wife of Hooker. The marriage was about as unsatisfactory as might have been expected. Hooker's peculiarly gentle character, his simplicity, disinterestedness, and utter unworldliness, combined with his attainments and ability, his sweetness and light, made him a favourite; and within a few years of his death caused his name to be held in a veneration more resembling that of a saint than that of any other modern English divine. Hooker was succeeded by a Dr. Balgay.

Sherlock's name ranks next in the list of those who have held the mastership of the Temple. He was in many respects a model and a typical Anglican clergyman. Living in violent times, he refused on the one hand to become a violent man, and on the other, to abstain from taking part in the great controversies which were occupying men's minds. His first noteworthy appearance was, when, towards the end of the reign of Charles II., an order in council was issued forbidding the clergy to touch on controverted points of theology. What this meant was, of course, that though they might preach the doctrines of the Church of Rome to their hearts' content, they must not venture to attack these doctrines. Sherlock refused compliance, and became unpopular at Court in consequence. In 1688, when James II. issued his Declaration of Indulgence, and ordered it to be read in all churches, the leading clergy of London met together to consider whether or not they should comply with the royal command. Sherlock was among them, and was one of those who determined not to comply. A little later he was present at a still more important meeting, convened at the Palace of Lambeth. The famous seven bishops were there, together with Sherlock and others of the leading city clergy. The petition, as our readers know, was signed only by the bishops, but doubtless they represented the views of Sherlock and his companions. It is sufficient to mention that Stillingfleet, Tillotson, Tenison, and Patrick were there as well as Sherlock, to show that the non-episcopal part of the meeting had an amount of capacity among them fully equal to that found in the bishops. When the Prince of Orange and Mary accepted the sovereignty, Sherlock's old instincts as a clergyman, who had doubtless preached in favour of divine right of kings, was too strong for him. When we remember the wonderful declarations to which the clergy of that day had subscribed—as, for example, that they believed that it was unlawful in any case to take up arms against the king—the wonder is, not that a man here and there should be found like Sherlock, with a conscience unable to transfer his allegiance from a king who had in fact been deposed by arms, to one who, in accordance with the views all but universally

taught by the clergy was a usurper who had laid his hands on the Lord's anointed, but that so few among the clergy should have been found to be constant to their old professions. Sherlock refused to acknowledge William III. and became one of the non-jurors. Thenceforward, for a time at least, he was the great favourite of the Jacobite party. Subsequently he saw his way to taking the oaths.\*

A few words are absolutely necessary on the early history of the church, and on the great order of priest-soldiers for which it was built. Speed, in his "History of Britain," tells us that the church was consecrated in 1185, by the patriarch of Jerusalem, in presence of a great number of Knights Templars. The Templars were at one time in England, as on the Continent, an extremely wealthy body. Their first church like their second seems to have been circular, and was outside Holborn Bars. Subsequently, they bought the land now occupied by the two Temples, and here built a monastery, which was called the New Temple, to distinguish it from the building which we have mentioned. The gardens of this New Temple were simply ground reserved for military exercises and the training of horses by the Templars. Meantime, the wealth of the order everywhere increased. The value of the property held by them throughout England must have been enormous. Matthew Paris says, they held in christendom upwards of 9000 manors, besides a large revenue from money. In England, Henry I. and Stephen gave largely to the order. Henry II. gave far more, including about twenty manors and churches. The Templars enjoyed many privileges and immunities. John exempted them from all taxes. They had the privilege of not being compelled to plead except before the king or his chief justice. Henry III. granted them free warren. They paid no tithes, and might, with the consent of the bishop, even receive them. The privilege of sanctuary was thrown round their dwellings.† The master of the Temple ranked as a sovereign prince, and had precedence of all ambassadors and peers. He sat in Parliament as the first baron of the realm. The estimation in which he and his Templars were held, and the fact that they had the privilege of sanctuary, caused the Temple to become "a storehouse of treasure." The wealth of the army, the nobles, the bishops, and of the rich citizens of London, as generally deposited therein, under the protection of the military friars. An incident related by Paris

\* We have been unable to obtain a list of the masters of the Temple from Sherlock down to our own time. If any of our readers can refer us to such a list, or furnish us with one, we shall be greatly obliged.

† See the "Knights Templars and the Temple Church." By C. G. Addison. Longman, Brown & Co. A book which should be in the hands of every Templar

shows that they were no unworthy guardians, and that they had as just a notion of the duties of trustees as ancestors of the modern Templars ought to have. Hubert De Burgh's money and jewels had been handed over to their care. When that nobleman was disgraced, the king endeavoured to seize them. He asked the master to deliver the treasure into his hands. The master refused. The king threatened. But threats and entreaties were equally unavailing. The king then pointed out that it had been fraudulently obtained from his treasury. They answered that, "money confided to them in trust, they would deliver to no man without the permission of him who had intrusted it to be kept in the Temple."

It is unnecessary to our purpose to trace the history of the Templars through the reign of Richard I. On his death King John came to reside in the Temple. Although not connected directly with the history of the church, our readers will pardon our mentioning the fact that that king was living in the Temple when he was compelled to sign Magna Charta. It requires no great imagination to recall the picture which Paris gives of the barons coming "in a very resolute manner, clothed in their military dresses, and demanding the liberties and laws of King Edward."

With the loss of Palestine the need for the services of the Templars was at an end. Then their very magnificence led to their downfall. They had always had more of the soldier about them than the priest. The suggestion conveyed in Gibbon's remark, that though they were prepared to *die*, they neglected to *live* in the service of Christ, is warranted by the evidence. Everywhere their exemptions from services, their wealth, their overbearing assumption of superiority, made them enemies. Like other institutions which have served their purpose, and have to be got rid of, that of the order of Templars had to go. The charges upon which the order was suppressed were frivolous, and the evidence was in many cases obtained by torture; but for all that everybody felt that it was well it should be suppressed. In 1312 the order was abolished by the Pope.

Nowhere so completely as in the church is it possible to recall these Knights Templars. There, at least, is the spot where the red-cross banner of the order was unfolded, where the knights assembled for worship, where their swords were placed upon the altar to be consecrated to the service of the Church. There, at least, King John and the barons, to whom we owe the great Charter, have been. Kings and legates have joined with Templars in this ancient building in the frenzied devotion which supported the fierce and long struggle with the infidel. Our fathers looked with awe upon a building within whose walls the novice to the holy vows of the



Temple, with closed doors, and in the first watch of the night, was admitted; and where nightly vigil was kept by the soldiers who had sworn to recover the holy sepulchre.

The portion consecrated in 1185 was The Round. The oblong portion was consecrated in 1240. The Round is in the semi-Norman style. The rounded arch and the short and massive column are gradually giving way to early English. The oblong is, as our readers know, a beautiful specimen of early English. On the floor of the Round rest mail-clad effigies, with their legs crossed in token that they had assumed the cross. They are not, as is commonly supposed, the monuments of Knights Templars. The latter were always buried in the habit of their order, and are represented in it on their tombs. This habit was a long white mantle, with a red cross on the left breast. The monuments seem to be those of secular warriors, who, by virtue of a rule of the order, had been admitted "associates of the Temple." One of them is to the Earl of Essex; a second to the Earl of Pembroke, protector of England during the minority of Henry III.; others represent two of his sons; one of whom—although the dates look awkward—takes rank among the barons who compelled John to sign the Charter.

The church was dedicated to the Virgin. The banner of the Templars was called *Beau-Seant*, "which," says Favinc, "is in French, *Bien-Seant*, halfe white and halfe blacke, because they were and showed themselves wholly white and fayre towards the Christians, but blacke and terrible to them that were miscreants." This banner our readers will remember on the ceiling or vaulting. The black is only one-third of the whole. Another device, the cross raised above the crescent, is copied from an old seal of the Templars, dated 1320, and now in the British Museum. In different parts of the church also are the lamb and flag, and the winged horse. The former every one recognises as the Holy Lamb. The latter seems to have arisen from a mistake. The earliest device of the Templars was two knights on the same horse. These appear to have been mistaken in the reign of Elizabeth from an imperfect impression of a seal for wings, and the members of the Inner Temple have adopted the blunder.

## VIII.—CRIME IN THE METROPOLIS.

**T**HE gloomy picture so frequently presented to us by the pessimists of the periodical press, of a metropolis in which deeds of violence are unrepressed, and where robbery, murder, and crime increase from year to year, is, we are glad to see,

entirely placed in the background by the official return of the Commissioner of Police of the Metropolis. The criminal returns for 1871 are not so inviting in appearance as the crude and fanciful statements of our contemporaries, but they possess the especial charm to Englishmen that they are strictly true. They are published without one word of comment, and the bare statistical facts are left to speak for themselves. Eloquently, these simple figures tell of an advancing education controlling crime, while earnest, true-hearted charity reforms and rehabilitates the criminal. The additional attention bestowed by our Legislature in recent years upon criminal law reform is early bearing fruit. What further may be done seems to us to be shadowed forth by a consideration of the figures themselves.

While the population of the metropolis has been nearly doubled since the establishment of the metropolitan police, there has been an actual decrease in crime. For example, in 1831, 72,824 persons were apprehended; while in 1871 the number had lessened to 71,961, being a decrease of 863. It may be said that the number of persons caught does not accurately represent the amount of crime committed; and this undoubtedly is so. We can, however, only form any estimate by the facts we do know, and the police having been quadrupled since 1831, should be a sufficient guarantee it is not because crimes have been passed over by the constables that so few appear in our statistics. Assuming this to be correct with regard to offences generally, we may infer that the increased regard for decency and good order would lead to a larger number of persons being apprehended now for drunkenness, and disorderly conduct coupled with drunkenness, and that, therefore, the number of offenders would be greater. It is with great satisfaction we find the contrary to exist.

In 1833, the most distant return before us, we find—

Drunken charges before the magistrates	...	11,393
Ditto discharged by superintendents	...	18,487
Disorderly characters	... ..	5,721
Total		35,601

While the return for 1871 is :

Drunk and disorderly characters	... ..	13,016
Drunkenness	... ..	11,197
Disorderly characters	... ..	4,028
Total		28,241

Being a decrease of 7360, or more than one-fourth, a result

most gratifying, we should hope, to those temperance advocates, who constantly assure us that drunkenness is on the increase."

A still more gratifying assurance is conveyed by the return of "offences against property, committed with violence," for two quinquennial periods: the first year being 1862, and the last 1871. They are thus recorded:—

	1862.	1871.
Burglary ... ..	134 ...	109
" attended with violence to the person	— ...	—
Breaking into dwelling-house and stealing ...	105 ...	43
" " " with intent ...	6 ...	8
" within " the curtilage and stealing ...	1 ...	—
" into shops ... ..	16 ...	25
Robbery ... ..	123 ...	102
Assaults, with intent to rob ... ..	37 ...	13
Sacrilege ... ..	2 ...	—
Feloniously breaking into church and stealing	— ...	8
" " " with intent	— ...	—
	<hr/> 424 ...	<hr/> 308

Here again we have a reduction of nearly one-fourth of the total amount, while the same return shows the valuable working of the Prevention of Crime Act, or, as it is better known, the Habitual Criminals Act. In 1869, crimes of violence had risen to a total of 441, while there was every probability of a still further increase. The strong repressive powers vested in the executive police were immediately acknowledged by the criminal classes, for in the following year the number had fallen to 326, although for some years previous there had been a gradual advance. The system of supervision by the police, and the accurate registration and photographing of prisoners, though still in its infancy and requiring further development, have given to the police a greater knowledge of the previous lives of criminals and a considerable control over their actions; while the payment of the gratuity money to discharged prisoners, through the superintendent, has tended to teach the criminal that although the police will be his masters, yet, if he is honest, they may be his friends. The careful regulations of the Commissioner with reference to the manner of carrying out the Prevention of Crime Act, both as regards the reporting themselves by convicts under supervision, and proceedings against licensed victuallers and others for harbouring criminals, have prevented this undoubtedly severe measure from appearing to be harsh and oppressive to the classes on whom it operates. We believe that if the police, instead of the parishes, had the power of prosecuting houses of ill-fame, that authority and the Prevention of Crime Act would enable the Commissioner to

break up the nests from which proceed the worst villany in London.

We have dwelt thus far on the satisfactory nature of the returns. We regret, however, that there are matters which require still further exertion on the part of our Government, our criminal law reformers, and our police. Perhaps, that which most especially strikes the mind of the peruser of these returns is the fact, that of 71,961 prisoners, only 2354 persons could read and write well, while only 69 were even, from a police point of view, of superior instruction. If any statistics could show the benefit of a thorough education, these we submit must do so conclusively. Every one who has any knowledge of the causes of crime, and the means of prevention and repression, will, we feel assured, join with us in the assertion that nothing but compulsory enactment will ever cause the working classes to estimate education at its true value.

Once make the labourer understand that the State holds him alone responsible for the education as well as the support of his children, and we have mastered the great difficulty. Give every facility for industrial education, but do not forget to make the parents pay for it. Without undervaluing the good which reformatory and industrial schools have done and are doing, we cannot help entertaining a suspicion that the parents have rid themselves of their responsibilities far too lightly. It is a fact within the knowledge of most magistrates, that where one child has been taken into an industrial school, parents have used every endeavour to get the rest of their family so comfortably provided for. There is, so far as our knowledge goes, no provision by the State for the education and board of the honest child equal to that obtained for the criminal. This, and the facilities afforded by marine store-dealers and others to children for the disposal of stolen property, may account for the very large proportion of juvenile felons.

As civilization advances, we believe it has always been found that crime changes from violence to fraud, and these statistics do not contradict, but rather re-affirm, this assertion. In 1862, 112 persons were apprehended for fraud and conspiracy to defraud; while in 1871, 152 persons were taken into custody.

But these totals, startling as they are, do not by any means adequately represent the immense growth of this species of crime. At the present moment there exist in the metropolis organized gangs of swindlers, who, professing to carry on legitimate and lucrative trades in London, advertise in country papers for supplies of goods, give one another as references, and dupe the very poorest producers of their

goods. In the large majority of cases these people are not prosecuted. The dupes are too poor to belong to any trade society, the police have no legal staff to carry through so difficult and complicated a prosecution as a conspiracy to defraud, and so it is left to the chance vindictive feeling of any poor man to prosecute the thieves to conviction. He may succeed in obtaining the conviction, but what to him is the result? Defrauded of his goods, he obtains no compensation, and receives from the county not one halfpenny for his expenses. He has been compelled to employ advocates from the nature of the case. If it had been an ordinary case of fraud, with no difficulties, his expenses would have been allowed, but being a still deeper-laid plot against him, he, for the public good, ruins himself. The cheats know this, and trade upon it. They are fully alive to the fact that it is no part of the duty of the magistrate to institute prosecutions, nor could he fairly, in the discharge of his judicial functions, conduct a prosecution against the accused. He could not do so without, insensibly to himself perhaps, contracting in his mind a bias against the prisoner. And more than this, he has not the time to investigate a variety of cases, and decide which of them, in a legal point of view, would hold water. Beyond the 71,961 prisoners brought before the metropolitan magistrates in the year 1871, there were heard 59,869 summonses, while this, only to a very small extent, represents the additional duties which have been thrust upon the police courts by the legislation of each succeeding year, without the slightest addition to the staff. We believe that the great demand which, in the metropolis, has been made for a public prosecutor, is owing to this, that although we have occasionally a prosecution at the instance of the Treasury, there is no provision for the employment of the clerks of the justices, as in the country, for the proper conduct of prosecutions at sessions. These prosecutions, and many others, should be conducted by a legal department at Scotland Yard, who should have the power to summons witnesses to lay informations. The certainty that such prosecutions would be so conducted would, we feel assured, end the evil of which we complain. While the Post-Office, the Customs, the Inland Revenue have each their solicitor, it is not fair to the public, the magistrates, nor the police authorities that the conduct of the criminal law in a population so large as that of the metropolis should be left to non-legal minds, to gentlemen whose ability as administrators and military officers is undoubted, but who require and should demand of the Government the rightful scientific aid.

A. HERBERT SAFFORD.

## LEGAL GOSSIP.

THE Treasurer, Sir Thomas Chambers, with the consent of the Benchers, allowed the Hall and Parliament Chamber of the Middle Temple to be used by the International Prison Congress, which sat daily from the 3rd to the 13th of July. No more suitable building could have been found by the Congress. It is suitable in every way, as a convenient room, and well situated. The subject to be discussed closely approximates to the legal. The men who have taken part in the discussions are all men who have to administer criminal law. America sent two of her judges; Germany sent a judge and privy councillor, perhaps her most eminent professor of criminal law, and a number of others whose reputation is European; France, Belgium, Sweden, and Norway contributed each the director-generals of their prisons; and every country in Europe, except Portugal, was represented. The leading Courts of Quarter Sessions in England appointed representatives to be present: the only one which actually refused to do so being, we believe, that of Middlesex, which, from obvious causes, occupies a very inferior and probably the lowest rank among the county benches. Our Government was represented by Captain Du Cane. The gathering was distinctly one of experts. On Tuesday, the 9th, the leading delegates were received at a *soirée* by the Prince of Wales, the Senior Benchers of the Inn; and the Hall, beautifully decorated with flowers, the foreigners wearing their orders, is said never to have shown better.

The reports of the discussion which appeared in the newspapers were extremely meagre, and gave, as a rule, the most generally interesting and, therefore, the most stupid part of what was said. The truth is, that the subjects themselves were of so technical a character, that they were *not* generally interesting, and when an American lady representing a prison committee talked philanthropy, every word was welcomed as a godsend by the reporters. We must, however, protest against the fashion which is growing up, and of which in connection with this Congress there have been several examples, of newspapers furnishing leaders, by men who not only know nothing whatever of the subject, but who have not taken the slightest trouble to make themselves acquainted with the facts. The worst example that we have met with occurs in the *Examiner*, of July 13th, in an article headed "The International Prison Congress." Wherever a statement is made in this article,

it is as curiously opposed to the fact as it can possibly be. Every one who was present at the Prison Congress knows that the following sentence is just simply the reverse of what took place. "Thus we see, too, that, while foreign members of a prison congress exert their efforts chiefly to ascertain what is the proper view to be taken upon what is called crime, English members can speak of nothing but the number of lashes to be administered to English criminals, the number of prisoners to be kept in an English gaol, and the number of inspectors to be appointed for the supervision of English prisons; as if the English parish, the English 'cat,' and the two English inspectors supervising two hundred gaols were universal institutions without which no country or society could exist." The truth is, that the "distinguished and eminent persons," at whom this writer sneers, each of whom is probably more distinguished and eminent for his knowledge on the subject than the unknown and undistinguished writer, were mostly hard-headed prison officials, men who have to deal with practical facts, and out of whom it was impossible to get anything like sentiment. This writer intimates that they ought to have discussed "general principles." If they had, he, and the school to which he is trying to belong, would have talked about "platitudes," "solemn gossip ending in nothing but talk," and the like. Their object was to compare experience. A gathering of experts in all questions relating to the prevention and repression of crime, each member of which has probably thought out the general principles of prison treatment before the writer of the article in our contemporary was born, was likely to spend its time in the discussion of something in advance of the general-principle stage. Perhaps, however, the oddest part of the article in question is that in which this writer indicates his own "general principles." His first statement is as follows:—"The progress that physiology has made within the last fifty years has demonstrated that man is almost a mechanical production of surrounding circumstances." Then he adds: "People are beginning to understand that the criminal is not more guilty of his crime than the consumptive or the madman is guilty of consumption or madness. All three alike have been brought into the world with certain predispositions upon which surrounding circumstances have acted in a certain way and produced certain results. Therefore, all three must be dealt with in a similar manner." This, then, in the opinion of the writer, is one of the questions which a congress of prison experts should have spent time in discussing. The writer may be right or wrong in his theory. A man may be a criminal, because nature has made him one. But the question which the Congress had to consider was, how can crime be prevented

(an insoluble problem, if this writer's theory be correct); and how can the number of those who are already criminals be diminished? We claim to think that the discussion of such a question as that of the relative merits of the cellular, the Crofton, or the aggregate system of treatment—if the writer knows what these mean—was one which sensible men, and all but very young men who are learning to think by writing newspaper articles on any subject which may be allotted them, will regard as of infinitely more value than a discussion on the question; "Is man a mechanical product of surrounding circumstances?"

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The subject of corporal punishment came up at the International Prison Congress, and a representative from nearly every nationality represented expressed the opinion of his country on the subject. We must confess our utter surprise at the result. We learned, then, that literally every country in Europe, together with the United States, has got rid of the practice altogether, and that England is regarded as retaining in it a remnant of barbarity. When the subject was introduced, one speaker after another arose in quick succession to denounce the practice. These speakers, by an arrangement of the Executive Committee, represented each one nationality. It was the only question which aroused anything like passionate feeling among the delegates. Privy Councillor Steinmann, the representative of Germany, a typical Prussian, clear and hard-headed, determined to fight everything out on the plan he had brought with him, and apparently without a sentiment in him, grew quite demonstrative in ridicule of the supposition that you could deter men from brutality, or take the brutality out of them, by brutality of torture. A governor from one of our county gaols—Stafford, we believe—made a wretched defence of the system. He told a stupid anecdote of a man whom he had in prison, and who refused to obey. He told it with the object of showing that you must allow whipping as a last resource. He determined to subdue the man; did so by keeping him eight-and-forty hours without food until the man gave in; right enough probably; and *then*, that is, when the man was broken in, told him he should whip him, and did whip him. "Now," asked this speaker triumphantly, "what could I have done there but whip the man?" Of course, the next speaker pointed out that the man was already subdued, and that the whipping was, therefore, superfluous brutality.

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We had occasion in a recent number to call attention to the growing desire in England, among certain people, and especially among certain sentimental people, to extend the



practice of corporal punishment. Mr. Straight, M.P., introduced a Bill into the House to whip wife-beaters, whereupon a number of ladies—most of them, we believe, young ladies—signed a petition in its favour. This apparently gave rise to a counter petition against the Bill, signed by ladies, many of whom, at least, were not young. We cordially agree with the latter, though one would like of course to agree with the former. The arguments of the former are, we believe, purely sentimental, and mischievously so. "The man who would raise his hand against a woman," &c.; everybody knows the rest. "The wife-beater is a scoundrel, who can be appealed to only through his feelings." Perhaps the ladies will recall to mind that the husband, when he has had his whipping, will have to return to his wife. An imprisonment might be forgiven, but would a whipping? Besides which, as we said before, how can we expect to unbrutalize a man by treating him like a brute?

The Bill to Amend the Defects of the Jury Act of 1867 was, as our readers are aware, referred to a select committee, who, with a view to expedite the passing of the proposed measure contented themselves with examining two witnesses—practically speaking, only one—on the single subject of an exceptional law and practice as to juries being continued in the City of London. The Bill contemplated radical changes in the law; in fact, it attempted to affect number and unanimity; a desideratum which the united efforts of the Law Amendment and Juridical Societies for years past have failed to impress on the public. It would, therefore, seem strange that any hope of the Bill passing into law should be in the least entertained in the absence of evidence bearing on those points. The testimony of the Lord Chief Justice, or one or two puisne judges, would have been sufficient to throw some light on the subject, and have enabled the committee to either recommend the adoption of the provisions or the disapproval of them. The suggestions made by the Special Committee of the Law Amendment Society on Juries were, in substance, as follows: To secure uniformity as to the qualification of jurymen, and the obligation to serve, and to embrace as large a number of fit persons as possible; the lists simply designating each person according to his station, as belonging to the 1st or highest class, or the 2nd class; the lists to be made out and revised, as far as possible, as the voters' lists now are; and after being printed, to form the jury-book or register, to be sent in regular order in forming the jury panels. Special jurors exclusively taken only from class 1, or otherwise, to be allowed only by special order for special occasions; and the allowance to jurors for the attendance, both in civil and criminal

cases, to be made for actual loss of time, and not merely for service in the jury-box. This committee see no reason to doubt that the jurors' book ought to contain the names of a very much larger number of educated persons possessed of property than it does at present; that by assimilating as far as possible the machinery for making out and revising the jury-lists to that of making out the voters' lists, and a proper system of printing, the double object would be at once attained of preventing irregularity and malpractice in the registration of those who are qualified and liable to serve, and diminishing the cost of making up the jurors' book, affording the readiest and most economical means of securing an unobjectionable jury panel, and a due *rotu* of service, putting an end to the unfair evasions, exemptions, and malpractices at present tolerated.

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An extradition treaty between this country and Germany, for the mutual surrender of fugitive criminals, has been effected. The principal features in it are—The high contracting parties engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party, under the circumstances and conditions stated in the treaty. No German is to be delivered up by any of the Governments of the Empire to the Government of the United Kingdom; and no subject of the United Kingdom to be given up by the Government thereof to any German Government. The prisoner on arrest is to be brought before a competent magistrate, who is to examine him and to conduct the preliminary investigation of the case, just as if the apprehension had taken place for a crime committed in the same country, and the authorities of the State applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other State, or copies thereof, and likewise the warrants and sentences issued therein, provided such documents are signed or certified by a judge, magistrate, or officer of such State, and are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, or some other minister of State.

It would appear, therefore, that if a German committed an offence in this country and escaped to his native land, he would not be sent back to England for trial. This, of course, does not mean that he would escape, but that he would be dealt with by German law. This is a breach of the old rule corresponding to the *lex loci contractus*, by which we in England refused to take cognizance of a crime committed on foreign shores. The reason of the old rule was

obvious. The place where the crime is committed must, in the great majority of cases, be that where evidence and witnesses can most readily be collected. In these days of quick travelling and international communication it is possibly better that each subject shall be tried under his own laws. But we seriously doubt whether the change is desirable; whether, for example, Müller, if he had escaped to Germany, could have been tried so fairly in that country as he was in England.

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It is seldom that we have occasion to notice a *fracas* between judge and advocate, and it is with some reluctance that we feel called upon to do so now. On a trial which took place recently on the Western Circuit, the judge, Mr. Baron Martin, ruled that a question put by the counsel (Mr. Lopes), in cross-examination of a witness, was irrelevant; whereupon the learned counsel persisted in his right to repeat it. A rather sharp altercation then took place, and Mr. Baron Martin, with some warmth, said, the question should *not* be put. In summing up the evidence, the learned judge remarked that, for the first time in his experience he had been told by a learned counsel that he would persist in putting a question which he (the judge) had ruled was an improper one to put. If it were not for a judge presiding at a trial the court would be a bear-garden. One man would get up and insist on this, and another man would get up and insist on the other, and the whole business would be stopped. The course for counsel to pursue was this: if a judge made a mistake, he could go to the court out of which the record proceeded, and complain. That was the only remedy counsel had. The fact was, some people thought it displayed a good deal of courage to beard a judge; but it was not so. A judge had great power—too great to be used. He (the judge) had unlimited authority in the court to fine or imprison for any contempt of court; but the jury must observe how unlikely it was that a judge should use it. It was not courage, therefore, for counsel to take any other course but the legitimate one in dissenting from a judge.

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The principle of arbitration between masters and workmen in the matter of trade disputes, under the Act passed a few Sessions ago, has just been adopted by the master builders and the masons on strike. A recommendation of the Committee of the Social Science Association on Labour and Capital, signed by nine Members of Parliament, among whom were half-a-dozen well known for their prominence in advocating the claims of the labouring classes, suggested that a court of

arbitration should be at once constituted, consisting of an equal number of the representatives of employers and employed, who should, at their first meeting, elect an umpire or referee, and that all matters in dispute should be referred to such court, whose decision should be final, it being agreed that, pending such award, both parties may maintain their present position. To this the masters and men yielded, feeling that it would have been madness to have declared against such a proposal, backed up by such names. Practically, therefore, this strike is at an end, and the issue of the Court of Conciliation will amicably, and, it is to be hoped, finally and satisfactorily settle all their differences. We would recommend that the other societies on strike should avail themselves of the machinery which this legally-constituted court provides.

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We do not think it is a characteristic of the working classes, or even of the middle classes, to copy the more wealthy and affluent in their private or public enjoyments. In fact, a great gulf is recognised, and social distinction is probably as great in this country as any other. Notwithstanding, there is reason to be jealous of undue exceptions favoured by law in the interests of the richer classes. Thus, in the Court of Queen's Bench, recently, in an appeal case, under the Betting-house Act, Tattersall's was quoted in behalf of the respondent; whereupon Mr. Justice Blackburn remarked that he rarely heard a case of this kind argued that Tattersall's was not mentioned. He would say nothing as to whether betting at Tattersall's was or was not lawful; but of this he was clearly of opinion—that the appellant was found committing an offence within the third section of the Act. Though we do not venture to give an opinion whether Tattersall's is or is not illegal, yet we cannot help thinking that the existence of that establishment, with its world-wide and well-understood reputation, supported as it is by the upper ten thousand, looks very much like the existence of one law for the rich and another for the poor.

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#### IRELAND.

The decision of the House of Commons, so far as any decision will be arrived at, in the matter of the Galway County Election Petition, and Mr. Justice Keogh, is not difficult to anticipate; and although we necessarily write before its actual announcement, we are not afraid of being found in any material respect at variance with it. The issue which Mr. Justice Keogh had to try was, truly enough in the words of Mr. Butt (although that honourable gentleman may possibly object to this conversion of his words), whether the landlords or the priests were to hold the county; and such being the nature of the issue, we affirm, repeating the words

of the learned judge himself, that it was necessary, with a view to the proper trial of that issue, to take a rapid glance at the historical, geographical, and moral position of the county preceding and contemporaneous with the election. These were the embers to which Mr. Plunket, a later speaker in the debate of the 25th ult., alluded—the embers out of which so suddenly has sprung the fire that has so nigh enveloped Mr. Justice Keogh since his celebrated judgment. The contest between the two rival candidates for Galway County has, in fact, brought back upon us the once familiar but now forgotten conflict between priestly assumptions and pretensions on the one hand, and civil and religious liberty on the other. There was a time when it was not unusual, even in England, for the decisions of the courts of justice to carry with them great political consequences; and in those times, now apparently gone past for England at least, the popular excitement which preceded and attended the announcement of the opinions of the judge was not greatly different from the excitement which has surrounded the present Galway County case. It is only necessary to instance the trial of the seven bishops in the reign of James II., or the still earlier trials of the Stuart period, when the fanatical temperament of that sacerdotal dynasty of kings attempted to overawe the popular liberties of this loyal kingdom. The conflict which was then raised was a conflict between the claims of absolutism on the king's side, and the claims of constitutionalism on the people's side; and the latter class of claims having, it is needless to call to mind, triumphed eventually over the former class, their triumph was justified, and has been perpetuated as well by the universal tendency of contemporaneous and modern sentiment in the same direction as (and not less) by the uninterrupted prosperity, both individual and national, which has attended upon and followed from it. Those struggles, as we have indicated, seem to have passed away for England; the recent case of *Hibbert v. Purchas*, and the earlier case of *Westerton v. Liddell*, which were each of them calculated to excite a more than average amount of popular interest, will pass, or have passed over, without so much as even ruffling the uninterested bosom of the English nation, or doing more than test the steadfastness of Dr. Lushington in the earlier, and of the Judicial Committee of the Privy Council in the later, case. But while the liberties of England now are, and long have been, sufficiently secured to dispense with this resort to popular pressure and excitement, the liberties of Ireland are still far from being so. The priesthood in the latter country has always maintained so intimate an alliance with, and influence over, the conduct and imagination of the lower orders of the Irish people, as to have very

sensibly retarded the prosperity and constitutional freedom of that country. It would be useless here to inquire what are the causes which have made the Irish priesthood able to exert so powerful an influence. Doubtless amongst them the foremost place must be given to the influence of race and the peculiar history of Ireland. The same instincts which confined the spread of Protestantism to the Teutonic races, and still keeps the Celtic races of the Continent under priestly influence, are felt in Ireland also. The hostility of the conquering race, and its deliberate attempt to extirpate the old faith, only served to make its influence the stronger, and more than anything else we have to thank the obstinate intolerance of our fathers for the influence of the modern Irish priest. No candid observer now, however, would charge us with oppression of any form towards Ireland, or with unreadiness to make concessions.

Of the judgment itself, and of the discussion in the House, we shall have occasion to speak in our next. It will be sufficient here to state, that while no one can deny that it is full of errors of taste, substantially it was just; it pointed out offences, and offenders, and must, if justice is what Ireland wants, be productive of benefit.

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At the opening of the Donegal Assizes at Lifford, last week, the following address to Mr. Justice Keogh, from the members of the North-West Bar, *apropos* of the Galway election judgment, was read by Mr. McCausland, Q.C. :—

“My Lord,—We, the North-Western Bar of Ireland, take the opportunity afforded by your lordship being the going Judge of Assize, to address you upon a subject which seems to us to be not merely of personal, but of imperial interest. We have observed with satisfaction that the grand jurors of every county through which your lordship has passed on this circuit have recorded their protest against the recent attacks upon her Majesty’s judges in the person of your lordship, and against the attempts that have been made to control judicial judgments by popular fury and violent agitation. We, whose lives have been passed in the study of jurisprudence, and assisting in the administration of the law, feel that no man or body of men have a greater interest than ourselves in securing for the Bench the most perfect freedom of word and thought. Therefore it has been with the deepest concern we have seen during the last two months persons, whose position should place them above all passion and prejudice of ignorance, attacking with wild menacing invective a judge for having delivered a judgment, the justice of which is not impugned, and thus exciting their less intelligent fellow-countrymen to acts of turbulence and outrage. The wisdom of our fathers made the

judges of the land independent of the Crown and the executive. We feel that security is incomplete, unless modern agitators be taught they cannot substitute with impunity the violence of the mob for legal and constitutional modes of action. It is not necessary for us to express our personal respect for your lordship. We believe it is already known to you, but we cannot conclude our address without bearing our testimony to the strict impartiality, the keen insight, and untiring patience which have ever marked your judicial career, and we trust it may be long our privilege to practise before a judge to whose uniform courtesy and kindness the Bar and suitors owe so much."

Judge Keogh, in reply, said—"Mr. M'Causland and gentlemen of the North-West Bar, I thank you most heartily for the warm and thoughtful address you have presented to me. It recalls in touching terms the many years you have been known to me, both on this circuit and individually. To enjoy the confidence of those amongst whom our lives are spent is one of the greatest pleasures of man, and without it life is worthless. Your address assures me that I possess that confidence personally and judicially undiminished, and this expression of sentiment from such a body as yours, prompted by generous instincts, amply compensates me for the attack made upon me by the interested and misguided. I again offer you, collectively and individually, my sincerest thanks. I shall never forget this mark of esteem and attachment, and I trust the intercourse between us, from which I have derived the greatest satisfaction, may be often renewed upon this circuit."

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"All's well that ends well," is Shakespeare's title to a play which terminates happily, though at one time the prospects of the issue were not at all hopeful. A lawsuit at the Tipperary Assizes, Clonmel, the other day, ended in a not less agreeable manner, the Benedict being the plaintiff, and the proposer of a novel mode of settling a legal question. The action was one of title, and brought to recover possession of land in the occupation of a defendant who was described as "good looking." Before the case had proceeded far, the learned counsel stated that it had just struck him that there was a pleasant and easy way to terminate this lawsuit. "The plaintiff appeared," said he, "to be a respectable young man, and this is a very nice young woman. They can both get married and live happily on the farm. If they go on with the proceedings it will all be frittered away between the lawyers, who, I am sure, are not ungallant enough to wish the marriage may not come off." The young lady, on being interrogated, blushed, and stated she was quite willing to marry the plaintiff, and the plaintiff "most undoubtedly" acquiesced. A verdict was

subsequently entered for plaintiff, on condition of his promising to marry defendant within two months, a stay of execution being put on the verdict till the marriage ceremony was completed. Probably the parties in the Divorce Court know too much of each other to render a similar course possible there.

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A Select Committee of the House of Lords have considered the Landlord and Tenant (Ireland) Act of 1870. The principal objections taken to the Courts, as they exist, appear to be—"1. That the number of chairmen of counties, and the diversity of their judgments, render the primary tribunal unsatisfactory. 2. That the appeal to the judge of assize is also unsatisfactory, and that there should be an absolute right of further appeal from his decision to the Court for Land Cases Reserved. 3. That the constitution of the Court for Land Cases Reserved is itself unsatisfactory, from the number of its judges and the occasional and irregular character of its sittings." The Committee decline to recommend any change in the constitution of the first Court, but agreed that a suitor should have an absolute right to proceed to the Supreme Court. They declined to interfere with the arrangements of the Court for Reserved Cases. Difficulties have arisen in the working of the Act as regards the Ulster customs, and the Committee recommend that a case be reserved for the Court of Appeal. We do not despair of this really great measure working well.

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We extract the following from the *Irish Law Times*.—"It is with feelings of deep regret that we announce the death of the Hon. Henry George Hughes, third Baron of the Court of Exchequer, which took place on Monday last, at Bray. Some three or four years ago, Baron Hughes suffered much from ill health, and was compelled to reside abroad for a time, but recently it was hoped that his health had been completely restored. During the present year, however, the learned judge became again seriously ill, and was unable to go on circuit at the present assizes. About ten days ago he removed to Bray for change of air, and it was there that the melancholy event took place. The late Baron was called to the Bar in 1834, and obtained a silk gown so early as 1844. His rise into leading equity practice was very rapid. He was distinguished by a thorough and most intimate acquaintance with the practice of the Court (upon which he published a valuable treatise), in addition to considerable legal knowledge, and a remarkable power of grasping complicated facts, and placing them before the Court in a clear and lucid manner. After he had been called within the Bar, he devoted himself



almost exclusively, to the Rolls' Court, in which he enjoyed an enormous practice. The powers of mind to which we have referred qualified him in an eminent degree for the transaction of the class of business with which the Rolls Court was at that time mainly occupied; he thus naturally acquired influence with the presiding judge, and commanded the confidence of suitors. There were few of the numerous motions in the Rolls Court in which Mr. Hughes was not engaged, and his general Chancery practice was very extensive. In 1850, when he had been but sixteen years at the Bar, Mr. Hughes was appointed to the post of Solicitor-General, which he vacated in 1852, upon the advent to power of the Conservative party. He held the same office in 1858, until his appointment to the judicial bench in the year 1859. As a judge, Baron Hughes gave great satisfaction to the profession and the public. Courteous, painstaking, upright, and eminently sagacious, he seldom failed in arriving at a right conclusion. He was particularly successful in unravelling complicated facts, and in detecting attempted fraud. The late judge was possessed of considerable landed property at Aghnacloy, in the County Longford, and enjoyed the reputation of being an excellent landlord. Mr. Hughes represented this county in Parliament for 1856-1857. He married a daughter of Major L'Estrange, and one of his daughters is the wife of the Right Hon. Judge Morris."

Baron Hughes was interred in the Kill-o'-the-Grange Cemetery, and was followed to the grave by some of his brethren on the Bench, and by a large number of legal and other friends.

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#### SCOTLAND.

IN a recent number we called attention to a case in the High Court of Justiciary, involving the question of the extent of the Lord Advocate's powers as public prosecutor. The case has now been fully argued, and a decision has been given. The Lord Advocate, it will be remembered, claimed the exclusive right of conducting, by himself or his deputed, all public prosecutions for crimes within Scotland, and held that a private party could not prosecute without his consent, which he considered himself entitled to withhold, without being liable to answer for it, except in his place in Parliament. The private prosecutor, in the present instance, applied to the Lord Advocate for his consent: this was refused by his lordship, and therefore the present bill was brought before the Court, to have it found that his lordship was bound to give his consent, or that it might be dispensed with. Unfortunately we are unable, at the last

moment of going to press, for want of space, to give our full notes on this important question; but we propose to discuss it at length on a future occasion.

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The Law Agents (Scotland) Bill has now been read a second time in the House of Commons, and is pretty certain to become law this Session unless the pressure of other business has the effect of shunting it. It is decidedly popular with Scotch lawyers, with the exception of a somewhat numerous and influential section of the society of solicitors in the Supreme Court, who consider their professional gains endangered. They are, we think, short-sighted, for the effect of the Bill will be to open the Supreme Court to the public, and to give it so much work that the gains of these gentlemen, who will still continue to conduct the causes in the court, will be trebled. The country solicitors will be pleased to have the additional privilege, and the greater status, of being agents in the Supreme Court, but they cannot afford to throw up their local clientage and connection for the uncertainties of a metropolitan business. Practically, the only result of the Bill will be to legalize arrangements between agents for sharing the profits of litigation. This has all along been the English practice, but it is contrary to certain absurd decisions of the Scotch Supreme Court. Arrangements of this kind will necessarily put an end to the present *competition* between the Supreme Court and the Sheriff Courts. At a meeting of the Scottish Law Amendment Society recently, the leader of this party proposed the abolition of the Bar as a compensation to himself and his friends for the *loss* they say that they are to sustain through the Bill. The party mustered in strong force, and went within one or two votes of carrying their proposal. Even if they had carried it the Bar need not have been seriously alarmed, since the Scottish Law Amendment Society is anything but a power in the land. We believe it is fast approaching its end; it never, indeed, had any of the conditions of healthy vitality, and was, to all appearance, virtually intended from the beginning rather for the glory of a few individuals than the amendment of the law. The few individuals are still unglorified, and the law has not in the least been amended. The profession of solicitors in Scotland are proud of the Bar, which they find of great utility; and notwithstanding what has occurred at the Scottish Law Amendment Society, there is no danger that Scotland will be deprived of a profession which for the last three hundred years has contributed more to the intellectual greatness of the country in every department of literature and science, than all other professions put to-

gether. The Bar need not be alarmed, for even if the change should take place they must be the gainers. It is only the public who can lose by the transaction.

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A great deal of business is being done in the Court of Session in spite of all the talk that takes place about fundamental changes. The judges are all apparently in good health and in fair working order, although some of them are getting so very old that one would think that a quiet country life would suit their views better than the excitement of the forum. It is rumoured that three of them are to retire at the end of this session.

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In volume 44 of "The Scotch Jurist," p. 87, under date November 27, 1871, there stands this startling rubric, "Held, in accordance with the laws of France, America, and other maritime countries, *except England*, that cash advanced for ship's disbursements against freight is not equivalent to payment of freight." English jurists had better look promptly and narrowly to the case, and the important point therein raised and decided. The elaborate decision of Dr. Patrick Fraser, Sheriff of Renfrewshire, is well worth consideration. After travelling over continental and American jurists, he remarks, "In the whole series of English decisions there will not be found a single reference to those writers on maritime law who had systematized the science before it had become the subject of much discussion in courts of law. The only authority cited has always been the *dictum* in Shower's anonymous case (*temp.* Charles II.), and in citing this the English Courts seem to have considered themselves absolved from supporting the rule by reference to principle." "The authorities of writers on maritime jurisprudence and the rules of foreign codes are all contrary to the English rule. The lawyers of all other countries have given an opposite opinion." Lord President (Inglis) at great length supports the views of Sheriff Fraser, and lays it down "that all the nations of the trading world, with the exception of England, concur in the same view. But we must not forget that in such questions the decisions of English Courts and the practice of England are not more binding on us than the laws and customs of France, Germany, Italy, and America. I feel therefore bound to say, that the law and practice of the other nations of the great trading community is, in my judgment, in accordance with sound legal principle, and that the English rule is not." His lordship adds, "In these circumstances it cannot, I should think, be doubtful that the error will be redressed either by a judgment of the House of Lords or by legislation."

## BOOK NOTICES.

[\* \* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

**The Magisterial Synopsis: A Practical Guide for Magistrates, their Clerks, Attorneys, and Constables.** By George C. Oke, Chief Clerk to the Lord Mayor of London. 11th Edition. London: Butterworths. 1872.

MR. OKE's book is so well known to our readers that it would be superfluous to explain its character and scope. The new edition is an exact reproduction of the last, with the addition of later cases and *résumés* of the legislative enactments to the end of 1871. The three years which have elapsed since the publication of the tenth edition have been fruitful in amendments of our Criminal Law. The Prevention of Crime Act; the Lodgers' Goods Protection Act; various amendments in the law of master and servant, the forfeiture for felony, and other similar alterations, are in this new book faithfully chronicled by Mr. Oke. While, however, we accord most cheerfully the fullest praise to the author for great carefulness and laborious work, we would suggest that the increased size, and therefore additional expense of each succeeding edition, is, in our opinion, disadvantageous. We feel bound to call attention to this, as the compiler of the work before us, if we may judge by the preface, seems to take a somewhat different view.

We are told, for example, that "the growing popularity of this work, and its almost universal use by magistrates, their clerks, and the legal profession, wherever the British laws are administered, having again resulted in the rapid disposal of the large impression of the previous edition, a demand is made for a new one"—the eleventh since 1848.

Now, this is undoubtedly a compliment to the compiler and probably a considerable pecuniary advantage; but we must ask him to remember that the continual purchase of new editions is no inconsiderable penalty on justices' clerks, a class of men who are not usually over-paid, while to constables the great increase in price places the book out of their power to procure. A careful perusal of the present issue leads us to the belief that an appendix to the last edition would have answered the purpose, and its price would have rendered it available to the poorest of Mr. Oke's admirers. Both in the synopsis and in the new edition

of Burn's Justice, we fail to perceive that the increased bulk has added to what was formerly their special advantage, perspicuity of style, and ease of reference.

**The Jurisdiction and Practice of the County Courts, in Equity, Admiralty, Probate, Administrative Cases, and in Bankruptcy.**  
By James Edward Davis, of the Middle Temple, Barrister-at-Law.  
London: Butterworths. Dublin: Hodges, Foster & Co. 1872.

THE present forms the second volume of the author's well-known "Practice and Evidence in Actions in County Courts," the 4th edition of which we reviewed some while ago.

Anything that comes from the pen of an author so well known and so highly esteemed as Mr. Davis, commands and deserves the best attention that any public critic can bring to bear upon the subject.

There are two views to be taken of the present work—of course, we mean the whole work as it lies in the two volumes before us—and in both we venture to say that this laborious work stands very high, if it does not stand absolutely alone. In the first place, we regard it as a digest of County Court law and practice, and absolutely indispensable to all country practitioners. It is itself a library upon the particular subject, and containing, as it does, every sort and kind of information, the only matter for the critic to consider is whether that information is so collected as to be easily and readily placed within reach of the practitioner.

Upon the whole we think the arrangement satisfactory. There are many who prefer, that where the law, as it exists, is the result of statute, or of a group or series of statutes, that the best plan is, to give the statute or statutes *in extenso*, and the notes upon the sections in order as they occur; others prefer what may be termed the subjective method of treatment, where, under a particular head or title the whole of the law relating to that particular head or title is collected, whatever may be the sections of the Act, or Acts, or rules, relating to such subject matter.

Mr. Davis follows this, the subjective method, and we think that for the vast body of solicitors throughout the country, who desire a book for quick and easy reference, this is on the whole a good plan. But, of course, the whole value of a work so planned depends upon the skill, knowledge, and industry of the compiler, and the confidence his readers may possess that each particular head is thoroughly exhausted, and that nothing material is omitted. In Mr. Davis, the profession know they possess an author whom they can trust absolutely, feeling assured that everything that skill and industry can do has been done. To a barrister the work will be also valuable, as a "circuit" or chamber book of reference; and, in one respect, it will be especially valuable to the many young men joining either branch of the profession—it will save the purchase of a "Bankruptcy Book of Practice," and a "County Court Practice" as well.

Perhaps there is no branch of practice expanding to a greater extent than that of bankruptcy. Questions of every form and shape are discussed now in bankruptcy, and the present volume, did it

relate to bankruptcy only, would be worth purchasing, as Mr. Davis has brought the cases down to the last moment, and has had the benefit of the already existing and valuable works of Yate Lee, Robson, and Williams (Brothers). We do not think that we say too much when we affirm that in the present work, the barrister or the attorney has the best, because the most compendious, work on the County Court system in our legal literature.

The Substance of the Argument delivered before the Judicial Committee of the Privy Council, by Archibald John Stephens, LL.D., one of Her Majesty's Counsel, in the case of *Sheppard v. Bennett*; with an Appendix, containing their Lordships' Judgment. London: Rivingtons. 1872.

THE great importance of the Bennett case fully justifies the publication, in a separate form, of the very able and learned argument of Mr. Stephens. The interest which attaches to the argument arises not merely from its being an elaborate and exhaustive statement of the learning connected with the questions before the Court, but from the circumstance that while the judgment was adverse to the party for whom Mr. Stephens appeared, it fully recognised the views propounded by the latter, with respect to the charges against the respondent, as expressing the true doctrines of the Church of England. Mr. Stephens succeeded perfectly in showing what the doctrines of the Church are on the matters in question; but he failed to convince the Court that the expressions used by the respondent, when leniently interpreted, were excluded expressly or impliedly by the Articles and Formularies; and unless so excluded, recent decisions clearly showed that they were legal. This was the principle on which the Court proceeded in the Gorham case and in the *Essays and Reviews* case. On the other hand, where the doctrines charged as heretical are excluded expressly or impliedly by the Articles and Formularies, the defendant will be condemned. This was so in Heath's case, and also in Voysey's case, although in the latter the Court clearly went beyond what was necessary in stating the grounds of its judgment.

It is not desirable under the existing circumstances of the Church of England that there should be any other prosecutions for maintaining false doctrines. They are not likely to do any good, and they may possibly do much harm. Taking warning by the fate of Heath and Voysey, few clergymen are likely to contradict expressly the Articles and Formularies; but if any further charges of heresy are brought before the Courts, the question will most probably be as to whether the defendant has maintained views impliedly excluded by them. In such a case it will be of little use for counsel to state on the most unquestionable authority what the doctrines of the Church are. The simple question will be, whether the Articles and Formularies exclude the views charged as illegal. With the fullest appreciation, therefore, of the learning displayed by Mr. Stephens in the present argument, we cannot but think that a good deal of it was wasted on the Court. They passed it by in their judgment, and decided in favour of the respondent on the ground that he might be

considered not to have plainly contradicted the Articles and Formularies of the Church, although his views were not sanctioned by them. They were *déhors* the Articles and Formularies, at least, when favourably interpreted, and there was an end of the matter.

It was obvious from the first that Mr. Stephens had difficult ground to maintain on the question of spiritual presence. At an early part of his argument, having observed, in opposition to what had been laid down by Sir R. Phillimore, that the 28th article explicitly states that faith is the mean of beneficial reception, thereby excluding all other means, we find the following interpellation: "Lord Justice James: Do you mean that 'faith' is the only mean by which it is taken? Mr. Stephens: Yes. Lord Justice James: If the bread and wine were given by a layman, would the body of Christ be given in any sense of the word, according to the doctrine of the Church of England? Mr. Stephens: There must be consecration. Lord Justice James: Then faith is not the only mean? Mr. Stephens: Faith is the mean, and consecration is a condition precedent." The answers of Mr. Stephens can scarcely be considered as satisfactory, and it is obvious that at this stage there was one acute and powerful mind in the Judicial Committee, which saw clearly where the real difficulty lay with which the learned gentleman had to contend.

On the other two charges against the respondent, the case was less doubtful. It was an easier task to show with respect to them that his language, in its natural meaning, contradicted the Articles and Formularies of the Church of England. The Court, however, although with much difficulty, put such a construction on his language as saved him from condemnation. But the decision of the Court on these charges, as also on the first, does not lessen the value of Mr. Stephens's argument as an expression of the affirmative doctrines of the Church of England on the matters which were in question.

**A Series of Works on Commerce.**—Vol. I. The Natural History of Commerce.—Vol. II. The Technical History of Commerce.—Vol. III. The growth and Vicissitudes of Commerce.—Vol. IV. Recent and Existing Commerce. By John Yeats, LL.D. London: Virtue & Co. 1872.

This promises to be an excellent series, if we may judge from the two volumes, the second and third, which have reached us. We had examined the books as ordinary specimens of historical literature, and had formed a favourable opinion of them before the prospectus of the series fell into our hands. We then learned that the principal design of the series was, that it should be used for the purposes of education in schools. Dr. Yeats has given great attention to the question of technical education. Like all men who have had experience of the excellent science and commercial schools of Germany and other parts of the Continent, he has come to the conclusion, that we in England are very much behindhand. Especially is this the case as regards schools for those boys who are under instruction with a view to going into trade. Dr. Yeats points out, that we have no trade schools (*Handelsschulen*) such as those which are to be

found in many places on the Continent, and that as a natural consequence, we have little or no literature especially designed for this class of schools. Possibly Dr. Yeats does not know that we have a few, though only a few, trade schools—one, for example, at Bristol, established by the late Canon Mosley—which are working satisfactorily. And yet while we have little of this kind of information in an accessible form, we have in our Blue-books and elsewhere probably a greater store of information than exists in any other nation. Dr. Yeats declares that—"It is with the hope of aiding in some measure to remedy this acknowledged deficiency, that the series of works whose scope and character are here briefly epitomized has been undertaken. In their preparation scientific clearness and accuracy of detail have been sought, combined with a style and mode of treatment so far popular as to interest English youths in the study of a subject with which the prosperity of their country is closely connected. While the treatises are intended to be practical in their character, they will be found so far theoretical also as to indicate the ultimate physical, economical, and moral principles which underlie and explain individual facts; and though designed primarily with a view to educational purposes, it is believed that they will be found useful to the student of maturer years, and to the man of business who desires to have a more than empirical knowledge of what is daily passing under his eyes." The first treats of the "Natural History of Commerce," and contains an account of the raw materials of commerce and industry. This we have not seen. The second takes in hand the "Technical History of Commerce." The third of the series deals with "The Growth and Vicissitudes of Commerce." It is dedicated to Dr. Hodgson, the recently-elected Professor of Commercial and Political Economy in the University of Edinburgh, a man of great intellect, and of singular clearness of thought and of speech. The growth of commerce in various nations is carefully traced, and an immense quantity of information brought together on the subject. In only very few cases are we inclined to differ from the author; as when he states that land traffic preceded water traffic. We believe, on the contrary, that it will be found that everywhere the rivers were the first high roads of commerce. All the early settlements were settlements in the valleys of rivers or on sea coasts. The truth is, that in almost any part of the world the difficulties presented by nature, in the way of land transit, are so great, that they require a considerable advance in civilization before they can be overcome. Instead of the fact being that "man did not at first trust to the unknown waters, even of rivers," we believe that no instance can be found of any race so backward in civilization as not to have invented some kind of boat. The aboriginal Tasmanian was perhaps as complete a savage as any above the tree-tribes of certain parts of Asia and Africa. He wore no clothing, had no bow or arrow, used as a spear a small native shoot hardened in the fire, built no hut or tent, and worse than all, if those who knew him best are to be believed, had no conception of property, could not really see the difference between *meum* and *tuum*, and carried out his views in regard to the spears which others had made, equally as he did in



regard to the women. But for all that he had learned that a log, especially if he could find a hollow one, would float well, and would enable him, by taking advantage of tide or stream, to make more rapid and easy progress than he could do on land. It is difficult, too, for those who have not seen a country in a state of nature, to understand how almost insuperable are the difficulties in the way of land transit, and how, in comparison, few are in the way of river or coast transit. *A priori*, therefore, we should expect to find that land traffic followed river traffic. And we believe that the history of every portion of the globe would show that this had been the order.

We have spoken of the above, not because we wish to find fault, but because the general accuracy of this volume makes it worth while to call attention to anything from which we dissent. We have only, in conclusion, to add that the volume is singularly interesting; and while it will convey much useful information to either boy or man who reads it, it will be a favourite with any intelligent boy into whose hands it may be put.

**A Short Review of the Penal System of the German Criminal Code, in force from January 1, 1872, throughout Germany. By Dr. Ed. Zimmermann. London: Trübner. 1872.**

THIS unpretending pamphlet, for the production of which we are indebted to the International Prison Congress, will be of great value to criminal law reformers, both in England and throughout Europe. While we have been arguing for years on the possibility of codification of statutes, and are slowly and painfully erecting a patchwork, the Government of Germany have, within three years and a half from procuring the assent of the Confederation Council of the German States, not only produced a code complete and exhaustive of the subject, but within four years made it the law throughout the entire empire. The magnitude of the work cannot fail to impress us when we recollect that the collation of the criminal law statutes of England and Wales has as yet been found too much for our draftsmen. We are forcibly reminded of the homely proverb, "Where there's a will there's a way," when we find that the German code not only embodies the penal laws from the time of the Emperor Charles V., in 1532, but embraces eight complete systems in force in twenty-two different political independencies, and each system, of course, with its full contingent of obsolete, of repealing, of amending, of consolidating, and other statutes of written and unwritten law, so that, as Dr. Zimmermann truly remarks, "the different criminal codes and statutes in force at the same time, in the various parts of Germany, would form a formidable library, representing a mixture of principles, from the time of the torturing inquisitor of the Carolina, down to the time and views of Beccaria, Feuerbach, Franklin, and Bentley." Well may our writer boast of the fact that his countryman, Dr. Jeonhardt, within one year had transmitted to the Government not only the draft of the new penal code, but the "motives" and various reports on capital punishment, imprisonment with hard labour, and on many other equally difficult subjects. From January

of the present year the whole population of Germany, numbering some 40,000,000 souls, will be governed by a criminal statute, which it has been Dr. Zimmermann's work to condense, for our information, into a treatise of little over twenty pages.

From this summary we learn the German method of dealing with convicts under licence to be at large, the various systems of procedure, the secondary consequences of punishments, such as the deprivation of civil rights, and the working of the police with reference to public prosecutions. Our limited space warns us that we cannot lay before our readers the many valuable hints for future legislation which Dr. Zimmermann's little book contains, but we cannot forego a quotation showing the German method of dealing with vagrants. "Any tramp, beggar, rogue, or vagabond neglecting to maintain the persons whom he is bound to maintain, and leaving them to public support; any prostitute continuing her trade against the prohibition of the police; any receiver of alms from idleness, refusing to perform fit work required from him by the proper authority; any person not getting employment, and unable to show that that happened without his fault, undergoing any punishment by confinement for the offence here designated, may be employed by force to perform any work for which they are fit in such prison, or out of prison, separate from free labourers." On the conviction for such offences, it may at the same time be pronounced that *after* having undergone their punishment, they are to be transferred, handed over to the superior police authority, who thereby is empowered "to employ him in a workhouse for a term not exceeding *two years*: in case of begging, however, the offender ought to have been repeatedly convicted within the last three years," and so on. We leave this matter to the Charity Organization to consider, being content with simply pointing out the advance made in the German treatment of vagrants. In conclusion, we have to thank the author of this pamphlet for the labour, care, and accuracy he has bestowed upon it, and to recommend it earnestly to the careful consideration of magistrates and all connected with the administration of criminal law. We should be glad indeed to receive a similar summary of the criminal law of each nation which sent representatives to the International Congress.

Jurisprudence du Conseil des Prises pendant la Guerre de 1870-1871. Par Henri Barboux, avocat. Paris: Henry Sotheran. 1872.

Annotazioni alle Leggi Criminali per l'Isola di Malta e sue Dipendenze. Per cura Dell'avv. Giuseppe Falzon. Malta. 1872.

THE latter of the two books noted above (being the second volume of the Anglo-Maltese Press publication in the matter) is of peculiar interest at the present time, from its connection with the recent Congress on the Reformation of Prison Discipline. The former work is also of much present interest. It is calculated, besides, to be of more than ordinary usefulness—a remark which we do not however make of it in depreciation of the other work. But, for ourselves, the "*Conseil des Prises*" comes with peculiar attractions, as well for its subject matter generally as for the recency of the greater part of the

decisions which it notices, and not less for its admirably logical and lucid method. To quote the words of the author's preface, "A great interest attaches to the labours of the Conseil des Prises of 1870. It was, therefore, desirable that its decisions should be offered to the public. They are not all reproduced in the present volume; only those of them are here produced in which some principle admitting of generalization is embodied. These latter decisions are sufficiently numerous to illustrate the most interesting parts of the subject; they have, moreover, been distributed in the logical order of the questions which they elucidate, and they have been accompanied with a brief statement of the cases which are respectively applicable to each." We particularly welcome M. Barboux's little volume.

**The Artist and the Author: A Statement of Facts by the Artist, George Cruikshank.** London: Bell & Daldy. 1872.

THIS is an interesting addition to our quarrels among authors; for though Mr. Cruikshank is best known as an illustrator, yet he claims here, as he has done before, to be something more—to have been the *author* of well-known books. The history of the controversy to which this *brochure* refers must be fresh in the memory of most of our readers. After Mr. Dickens's death, the question was again raised, of what share contributor and artist, respectively, had in the production of "Oliver Twist." We say "again raised," because not only had the statement that the artist claimed to be the originator of that novel appeared in print years before Mr. Dickens died, but it was certainly a matter commonly talked about, and, so far as we know, never contradicted by Dickens. This claim on the part of Mr. Cruikshank might have been allowed to pass, but that the artist, last April, declared himself to be the originator of "The Miser's Daughter," which was written by Harrison Ainsworth, and illustrated by George Cruikshank. Mr. Ainsworth met this claim with a "positive contradiction;" and added, that Mr. Cruikshank appeared "to labour under a singular delusion in regard to novels he had illustrated." In reply, Mr. Cruikshank expressed his regret at the defective state of Mr. Ainsworth's memory, and promised to give a complete account of the professional transactions between that gentleman and himself. A repetition of his assertion by Mr. Ainsworth closed the correspondence in the *Times*. The whole controversy may be put thus: In his declaration, Mr. Cruikshank asserts that he is the author of "The Miser's Daughter." Ainsworth pleads, never indebted, or traverses the declaration. The replication speaks of the very great surprise at the denial; and the rejoinder is a "flat contradiction" to the original assertion. Whereupon issue is joined, and the public are called in as judges. Our judgment as representing a portion of the public will be very short. Our first notion of the claim was, that it could not be substantiated. But the evidence so far has completely changed our view. After a careful perusal of Mr. Cruikshank's statement, we say, unhesitatingly, that we believe it bears internal evidence of truth; that he has proved every assertion he has made; and that, as between him and

Mr. Ainsworth, he has a right to be regarded as the author of the novel in question.

**The Book of Church Law ; being an Exposition of the Legal Rights and Duties of the Parochial Clergy and the Laity of the Church of England.** By the Rev. John Henry Blunt, M.A., F.S.A., Author of "Directorium Pastorale," and Editor of the "Annotated Book of Common Prayer," "Dictionary of Theology," &c. Revised by Walter G. F. Phillimore, B.C.L., Barrister-at-Law, and Chancellor of the Diocese of Lincoln. Rivingtons, London, Oxford, and Cambridge. 1872.

THIS book contains an account of the law as it relates to the sacraments of the Church, to the parochial clergy, parochial lay officers, churches and churchyard, and the endowments of the clergy. The Appendix contains the canons of 1603 and 1865, the Church Discipline Act of 1840, the Benefices Resignation Act of 1871, the Ecclesiastical Dilapidations Act of 1871, and the Sequestration Act of 1871. It is well printed, systematically arranged, has good headings, and an excellent index. Its style is readable and clear. We have tested several chapters, and have found them to answer the tests well. That, for example, on baptism, especially the section dealing with the question of what persons are qualified to administer baptism, is accurately done. It is one on which clergymen themselves continually blunder. The law is undoubtedly as Mr. Blunt and Mr. Phillimore state it, that valid baptism may be administered by a layman. This is the doctrine which the Church of Rome holds now, as, indeed, the Christian Church has always held. One or two obscure passages in our own Prayer-book, especially the rubric relating to the private baptism of infants, "when great need shall compel," where the baptism has to be administered by "the minister of the parish, or in his absence by any other lawful minister that can be procured," have led many to a belief that baptism cannot be administered by a layman. It is very curious that there had been no doubt as to the validity of baptism by laymen in the English Church till the time of the Puritans. It was at their instance that the phrase "lawful minister" was substituted for "one of them," meaning one of the persons present. It is difficult to see what was the design of the Puritans in attempting to put an end to a practice which, from the Puritan point of view, must have struck at the claim to exclusive powers set up by the clergy. Probably they would have said that it was more seemly that baptism should be administered in church, and that the administration of the rite in private houses encouraged the superstitious notion that infants dying unbaptized could not enter heaven. However this may be, they succeeded in having the words of the rubric altered to their present form. In spite of the change of words, the law, however, has always remained the same, and no ecclesiastical lawyer would now doubt that baptism by a layman was, according to the law of the Church of England, valid. The book will be useful to clergymen, lawyers, and churchwardens, and is certainly fully equal to any work on the same subject yet published.

**The Prevention of Crimes Act, 1871 ; and the Act to Amend the Criminal Law relating to Violence, Threats, and Molestation ; with Notes, Critical and Explanatory. By James A. Foot, M.A. London : Shaw & Sons, Fetter Lane. 1872.**

**THE Criminal Law Amendment Act** was originally a portion of the **Trades Union Act**, introduced into the House of Commons at the beginning of last session. A committee of the House divided the Bill into two portions: one dealing with the civil clauses, the other with the criminal. The Act is carefully drawn, and even an editor admits that it requires no annotation. The **Prevention of Crimes Act** is the **Habitual Criminal Act** in a new shape. Various errors were found in the older edition, which rendered it in some respects doubtful or even unworkable. Nevertheless, it had been found to work well. The principle which it had introduced into our law, though not so fully developed in the Act as in the Bill, was yet recognised: that when a man had, by his habitually criminal conduct, rendered his conduct open to suspicion, he should be held to have forfeited his right to be considered innocent, and that in certain cases the burden of proof should be shifted from the accuser to the accused. The Act practically says to such a man: "We know you to have been a thief, and if we find you under suspicious circumstances, we shall compel you to prove your innocence." This principle, which we hold to be thoroughly sound, is, of course, preserved in the Act of last year. Thus, the 7th section enacts that when a person has been twice convicted, he shall be held liable to imprisonment for a year within seven years of having served his last sentence, if a court of summary jurisdiction concludes that there are reasonable grounds for believing that the person so charged is getting his living by dishonest means; if he is found on a building or other premises, without being able to account, to the satisfaction of the court, for his being there, and in other suspicious cases. Many other provisions of the Act are also of great value. It is sufficient to say of the little book before us, that it has a few notes, and that these are accurate; and that it presents in a convenient shape and size the provisions of the Act.

**Catalogue of the Mendham Collection : being a Selection of Books and Pamphlets from the Library of the late Rev. Joseph Mendham. Printed for the Incorporated Law Society. 1871. Compiled by Mr. John Nicholson, Assistant Librarian, Lincoln's Inn. 1872.**

**THIS** is an index to a perfect mine of information to any one who takes interest in the questions in dispute between the Churches of England and Rome, or who desires to make himself acquainted with the polemical theology of the last two centuries. Such a volume is evidently unsuited for the purpose of lengthy review. We have, however, examined the catalogue, and are convinced that a great deal of care has been taken in its preparation. The first division of the book gives the names of the authors, arranged alphabetically. The second has the subjects classified alphabetically. Mr. Nicholson, by whom we see from the preface the catalogue was

complied, is entitled to the thanks of all who may have occasion to consult the Mendham Collection.

Comic Questions and Answers in Various Terms. By G. H. K. London: Hatton & Son, 22a, Chancery Lane. 1872.

HERE is sixpennyworth of fun, and something really worth investing in and looking through. The man who can extract humour out of law has always been held in esteem. There are questions in conveyancing, equity, and common law. Here are a few specimens; under *Feoffments*:

"Q. Does anything now lie in livery?

"A. Yes! a policeman.

"Q. Give an instance where personal property becomes landed property?

"A. A portmanteau taken off a boat and placed on a pier.

"Q. In a marriage settlement, what covenants should the intended husband ask for?

"A. Quiet enjoyment—free from encumbrances."

Under *Common Law*:

"Q. Why is courtship and matrimony like an action at law?

"A. Because you sue, prepare your declaration, go to plead-  
(h)er, settle, and it isn't till after issue that the trial begins."

AMONG the legal periodicals we receive we may mention one, the *Maryland Law Reporter*, published daily, which is an instance of an effort, we believe, never attempted in our own country. It contains reports of cases, native and foreign, with general legal intelligence very creditably selected. The *Legal Opinion* of Harrisburg, Pennsylvania, is another of this class of journals, but published less frequently.

NOTICES OF BOOKS received late must stand over till the next issue; also an article on the "Law of Libel."

## BAR EXAMINATIONS.

The Council of Legal Education have awarded the following exhibitions to the under-mentioned students, of the value of thirty guineas each, to endure for two years:—Constitutional Law and Legal History, Mr. George Serrell, student of Lincoln's-Inn; Jurisprudence, Civil and International Law, Mr. William Duthoit, student of the Inner Temple; Equity, Mr. George Serrell, student of Lincoln's Inn; the Common Law, Mr. John Gilbert Kotze, student of the Inner Temple; the Law of Real Property, &c., Mr. George Serrell, student of Lincoln's Inn. The Council of Legal Education have also awarded the following exhibitions of the value of twenty guineas each, to endure for two years, but to merge on the acquisition of a superior exhibition:—Equity, Mr. Robert Welch Mackreth, student of Lincoln's Inn; the Common Law, Mr. Sidney Woolf, student of the Middle Temple; the Law of Real Property, &c., Mr. Sidney Woolf, student of the Middle Temple.

## APPOINTMENTS.

Mr. J. Coke Fowler, Stipendiary Magistrate, of Merthyr Tydfil, has been appointed Stipendiary Magistrate of Swansea, and Mr. Albert de Rutson will succeed him at Merthyr Tydfil; Mr. Montague Bere, Q.C. (Recorder of Bristol), County Court Judge of Cornwall; Mr. J. E. Rogers, Recorder of Wells; Mr. L. H. Courtney, Barrister-at-Law, Professor of Political Economy in University College, London; Mr. W. J. Payne, Barrister-at-Law, Coroner for the City of London, and Borough of Southwark; Mr. John Jones, Registrar of the Swansea County Court; Mr. John Taplock, Coroner for the City of Chester; Mr. Robert Harfield, Coroner for the County of Hants; Mr. Hugh Reilly Semper, Attorney-General for the Leeward Islands.

IRELAND.—The following gentlemen have been appointed Queen's Counsel: Mr. John M'Mahon, of the North-East Circuit; Mr. John Alexander Byrne, of the Home Circuit; Mr. William Moore Johnson, of the Munster Circuit (Law Adviser); Mr. Samuel Walker, of the Home Circuit; Mr. William Drennan Andrews, of the North-East Circuit; Mr. Francis Travers Longworth Dames, of the Home Circuit; Mr. William O'Brien, of the Munster Circuit; Mr. Gerald Fitzgibbon, jun., of the Munster Circuit; Mr. Edward Gibson, of the Leinster Circuit; Mr. Andrew Marshall Porter, of the North-East Circuit.

## OBITUARY.

*June.*

- 20th. MARDON, William, Esq., Solicitor, aged 71.
- 24th. BEVAN, G. Dacres, Esq., County Court Judge, aged 76.
- 27th. GREY, William, Esq., Barrister-at-Law, aged 65.
- 28th. ROBERTS, W. Henry, Esq., Barrister-at-Law, aged 57.
- 28th. WALKER, Edward, Esq., Solicitor, aged 71.
- 29th. DOBSON, William F., Esq., Barrister-at-Law, aged 60.
- 30th. MORRIS, L. E. W., Esq., Solicitor, aged 74.
- 30th. POWELL, J. Rogers, Esq., Solicitor, aged 64.

*July.*

- 1st. DUGMORE, William, Esq., Q.C., County Court Judge, aged 71.
- 3rd. ATKINSON, Henry, Esq., Solicitor, aged 84.
- 6th. WEATHERHEAD, J. Thomas, Esq., Solicitor.
- 7th. DINSDALE, Frederick, Esq., County Court Judge.
- 8th. GROVER, J. L., Esq., Barrister-at-Law, aged 72.
- 11th. HALL, Samuel, Esq., Solicitor, 48.
- 12th. BAGGALLAY, Richard, Esq., Barrister-at-Law, aged 24.
- 13th. HARRISON, Alexander, Esq., Solicitor, aged 64.
- 14th. DANIEL, Edward, Esq., Solicitor, aged 61.
- 16th. WALKER, Isaac, Esq., Solicitor, aged 33.
- 17th. ADAMS, E. Richard, Esq., Barrister-at-Law, aged 64.

# THE LAW MAGAZINE AND REVIEW.

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No. VIII.—SEPTEMBER, 1872.

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## I.—THE PERSONAL CHARACTER OF OBLIGATIONS IN ENGLISH LAW.

### II. CONTRACT: EFFECTS ON THIRD PERSONS.

THE original and simplest form of contract is that which is made between certain persons, and the effects of which are strictly confined to those persons or their legal representatives.\* It is still the most frequent, and may be taken as the general type. In such a case the persons who actually negotiate the contract are the same who are bound by the consequent obligation; moreover they appear as individual persons acting each in his individual capacity, and not as members of a class answering to a general description.† Assuming this as the rule, we have two conceivable kinds of departure from it.

1. Where the persons who act in concluding the contract do not coincide with the ultimate parties to it: that is, where immediate rights or duties are created in persons not parties to the transaction.

2. Where the parties are not completely ascertained at the time of making the contract: that is, where there is a contract.

(a.) Either with any person indefinitely who shall satisfy a certain condition or answer a certain description.

\* *I.e.*, those who succeed to their legal existence as representing them by force of some general operation of law, independent of the particular transaction.

† Savigny, "Obligationenrecht," sec. 53, vol. 2, p. 16. The general principles being identical, I follow Savigny's arrangement, and several paragraphs are in effect free translations from him.



(b.) Or with the person who for the time being shall satisfy some condition or possess some attribute which may continue to subsist in a succession of different persons.

All these variations from the normal type of contract are treated as exceptional, and cannot be introduced except with certain limitations and in certain classes of cases. This will appear by taking in order the several branches of the rule and the exceptions which are recognised.

1. There is no doubt that in general a contract cannot be made to confer rights or impose duties on a person not a party to it. As to duties, it is clear on principle that individuals cannot be allowed at will to subject others without their assent to personal liabilities.\* It is not so immediately obvious why it should not be competent for them to confer rights on third parties; and, in fact, the law was for a considerable time far from completely settled on this head. It was held sometimes that any third person for whose personal benefit such a contract was made might sue upon it;† sometimes that near relationship at all events was a ground of exception;‡ though the weight of authority seems to have been on the whole in favour of the view which ultimately prevailed.§

But (to use the words of a judgment which finally overruled the older authorities relied on for the supposed class of exceptions in favour of near relationship) "it is now established that no stranger to the consideration can take advantage of a contract although made for his benefit;" so that if one person makes a promise to another for the benefit of a third, that third person may not maintain an action upon it, even if the parties expressly agree that he may.|| And it was laid down by the Court of Chancery

\* It is true that in quasi-contracts (which we still persist in calling by the cumbrous name of contracts implied in law) the one party may be placed by acts of the other of which he is at the time wholly ignorant in a position analogous, but only analogous, to that of one who has entered into an actual agreement.

† Dictum of Buller J., 1 B. & P., 101 n. "If one person makes a promise to another for the benefit of a third, that third may maintain an action upon it."

‡ *Dutton v. Poole*, 2 Lev. 210, Vent. 318, 322, approved by Lord Mansfield, Cowp. 443, is the type of these anomalous cases. It was not decided without much difference of opinion at the time.

§ See Evans, Appx. 4 to Poth. Obl., a short but very well considered essay; judgment of Eyre C.J., in *Company of Feltmakers v. Davis*, 1 B. & P., 98, who inclined to think B might sue on a promise made to A for his, B's, benefit by laying the promise as made to himself and giving in evidence the promise actually made to A.; and note a, 3 B. & P., 149; the older authorities are collected in Vin. Ab. 1, 333-7, Assumpsit Z; two or three of these are cases of agency, which (as will presently be observed) is no real exception.

|| *Tweddle v. Atkinson*, 1 B. & S., 393.

many years earlier to the same effect, that "when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other.\* On the other hand, it does not appear that an arrangement made between the contracting parties for their own convenience has ever been allowed to give a right of action to a person not a party; the person suing must show a promise made immediately to himself.† But as regards contracts under seal, the rule of the common law has always been clear and inflexible (even where simple contracts admit,§ or have been supposed to admit,‡ of exceptions), that on a deed made between parties no stranger can have an action, or join in any action for non-performance of covenants contained in it.¶ "Those parties only can sue or be sued upon an indenture who are named or described in it as parties."

The principle has been carried out consistently and even rigorously in modern times. An agreement for hiring the tolls of certain fen lands at a rent "to be paid to the treasurer of the commissioners," gave no right to the treasurer to sue for payment of the rent, for the contract was with the commissioners only, independent of the further objection that the true meaning of the agreement was to secure payment to the treasurer *for the time being*, which it was admitted would be bad as an attempt to contract with an uncertain person.¶ In an action on a by-law of a company imposing a fine to be paid to the master and wardens for the use of the master wardens and company, the right to sue was

\* *Colyear v. Mulgrave*, 2 Keen, at p. 98. The right of the parties themselves is perhaps over-cautiously expressed. It is in truth but an instance of the "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration" (per Byles J., 5 O.B., N.S., 265): it is presumed that the party who wants a thing done finds some benefit in it (8 A. & E., 743), and there need not be any apparent benefit at all. The doctrine is not new: cp. Ro. Abr. 1, 593, pl. 7, Y.B. 17 E. 4, 5: if I promise to pay *vis.* a week for the commons of another "*la ley intend que il est un tiel per que service jeo aie avantage.*" In other words, that which a man has with his eyes open chosen to treat as valuable is conclusively taken as against him to be of the value he has put upon it. But this belongs to the general doctrine of consideration.

† *Price v. Easton*, 4 B. & Ad., 433.

‡ *Beckham v. Drake*, 9 M. & W., at p. 95, per Parke B.; 1 Wms. Saund., p. 477.

§ *Gilly v. Copley*, 3 Lev. 140, on a demurrer: as to the end of the cause itself the reporter adds: "I suppose the parties agreed, for I never heard more on't."

¶ *Lord Southampton v. Brown*, 6 B. & C., 718.

¶ *Pigott v. Thompson*, 3 B. & P., 147.

determined to be in the master and wardens only.\* And an agreement by co-adventurers amongst themselves that the amount of calls due from any one of them shall be considered as a debt due to an officer of the partnership, who shall have power to sue for it, is in violation of the law, and gives no right of action to such officer.†

On the whole then the rule is firmly established; and there is good ground in reason for it. The obligation of contracts is a limitation imposed on what would be in its absence the lawful freedom of action of the party bound by it, and the law will not enforce such limitations beyond what is required to carry on men's ordinary affairs: now, it cannot be said that for this purpose it is generally necessary‡ to give the parties to a contract the power of conferring rights on third persons.

*Exceptions.*—The exceptions real or apparent to this rule are now to be shortly considered.

1. The most obvious is Agency. A contract made by an agent within his authority or even made without authority and subsequently ratified is binding on the principal: and this at first sight looks like an exception to the rule confining the legal effect of contracts to the actual parties. But the exception is only apparent, for the true party is the principal,

\* *Company of Feltmakers v. Davis*, 1 B. & P., 98. In a case the converse of this, there being a joint contract by several persons for a payment to be made to one of them, the Court of Exchequer inclined to think "the action ought to have been by all upon the promise made to all, though only one was to receive the money:" *Chanter v. Leese*, 4 M. & W., 295; but no judgment on that point. *Jones v. Robinson* (1. Ex. 454), is rather the other way: that case was in effect as follows:—the purchaser of a business from two partners promised them in consideration of the assignment of the partnership effects to him to pay the debts of the partnership; one of the late partners who had himself advanced money to the partnership was not repaid, and thereupon sued the purchaser on the promise made to both partners; and it was held well.

[But the decision is not easy to understand. For—

1. It seems hardly doubtful on principle that both the late partners must have joined as plaintiffs, if the partnership debt the defendant refused to pay had been due to a stranger.

2. The circumstance of the suing partner himself having been the creditor ought to have made no difference, for there was no separate promise to pay him in his capacity of creditor. How far this did in fact influence the judgment is not clear.]

*Spurr v. Cass*, L.R., 5 Q.B., 656, goes on the ground of agency, and is, therefore, not decisive on this point.

† *Hybart v. Parker*, 4 C.B., N.S., 209; Cp., *Gray v. Pearson*, L.R., 5 C. P., 568.

‡ Savigny, Obl. 2, 76; D. 44, de O. et A. 11; 45, 1, de v. o. 38, sec. 17. Inventæ sunt enim hujusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur nihil interest

and the agent is only the instrument by which the intention of the principal is expressed.

There are several conceivable degrees of agency according to the relative importance to the agent's part in the transaction; but the same principle runs through all.

If I discuss with another party an offer made by him, and we come to no final agreement; but afterwards I send a messenger to signify my assent, the messenger has only to deliver that, and is not concerned to know the matter to which my assent relates; he is just as much a passive instrument as a letter would be.

Nor does it make any difference in the nature of his instrumentality if the terms of the message are so full and explicit that he understands what it is about, but still has no choice. Again, if I empower him to exercise a strictly limited discretion (as to propose giving a certain price, and increase it up to a certain limit if necessary) it is impossible to treat this as a substantial distinction. Again, if we go yet a step farther and consider what happens when I employ the agent not merely to act, but to judge, and leave the choice of several courses to his discretion, it still appears that he is in the same situation touching the ultimate contract as the mere messenger. For though it is in his discretion to determine amongst several possible alternatives that one which is to constitute the intention on my part to be declared in the final contract, yet the intention is mine when determined. I may tell him to buy these or those goods for me according to the best of his judgment, but it is I who am the real buyer of the goods he decides upon.

In short, it matters not for this purpose whether the agent is the bearer of only one certain resolve of the principal, or of several alternative resolves amongst which he is to choose.\*

The case is somewhat less simple when the agent contracts nominally for himself, but really for an undisclosed principal. But here the rule of law still rests upon the ground, "that the act of the agent was the act of the principal, and the subscription of the agent the subscription of the principal."† The principal has effectually and truly contracted, and "the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another."‡ Accordingly "if an agent makes a contract in his own name, the principal may sue and be sued on it,"§ except in the case of contracts under seal, when a technical doctrine, applicable

\* Savigny, *Obl.*, sec. 57 (2, 57-59); *Cp. ib.* sec. 53 (2, 19).

† *Per Parke B.*, *Beckham v. Drake*, 9 M. & W., 96.

‡ *Ib.* p. 91, *per Lord Abinger C.B.*

§ *Cothay v. Fennell*, 10 B. & C., 671.

to deeds only, prevents this.\* And the fact of the agent expressly signing his own name makes no difference in this respect.† The peculiarity is that the introduction of the principal as a party is possible only, not necessary. In fact, there are two alternative and mutually exclusive‡ obligations, the principal being a party in one, the agent in the other. “Whenever an express contract is made, an action is maintainable upon it either in the name of the person with whom it was actually made or in the name of the person with whom in point of law it is made,”§ and by the other contracting party against either of them.|| The alternative character of the obligation is made clearer by considering the case of a contract made with an agent in the agent’s name, the principal also being made known: then the other contracting party has still a right to sue the agent or the principal at his election.¶ As for the analogous cases where parties not named in a transaction conducted by some of their number, are nevertheless treated as parties to it, “all questions between partners are no more than illustrations of the same questions as between principal and agent.”\*\*

The legal aspect of the matter is the same when the principal’s authority is given by subsequent ratification, and this whether the other party at the time of making the contract knows that he is dealing with an agent or not.††

2. There is another class of apparent exceptions when contractual relations exist between two persons and one of them acquires new rights by the dealings of the other with a third person; as in the case of principal and surety.‡‡ But these new rights, though immediately acquired in consequence of a transaction to which the person acquiring them is no party, are really incidental to the prior contract to which he was a party, and may therefore be properly referred to it; so that the case is analogous to a conditional contract depending on a collateral event, the difference being that here the condition is annexed to the contract, not by the will of the parties but by judicial rules.

Generally speaking, §§ A and B may make a contract con-

\* *Beckham v. Drake*, 9 M. & W., 95. † *Ib.* 91.

‡ *Leake on Cont.*, 300, 304. § *Cothay v. Fennell*, 10 B. & C., 6.

|| The limitations to which this is subject are not material for the present purpose. ¶ *Culder v. Dobell*, L.R., 6 C.P., 486.

\*\* *Beckham v. Drake*, 9 M. & W., 98; per Parke B.

†† *Bird v. Brown*, 4 Ex., 798.

‡‡ Pothier, Obl. s. 89, who treats this as a real exception. The doctrine as to co-sureties rests on the general principles of quasi-contract: 1 Wms. Saund., 267 f. (The equitable principle of *Dering v. Lord Winchelsea*, 1 Wh. & T., L. C., 89, 95, is differently expressed but in substance the same, and therefore gives rise to no difficulty here.)

§§ *I.e.*, subject to the restraints imposed by public policy, which need not be now considered.

ditional on any collateral event; and they may choose for that purpose the event of a certain transaction taking place between C and D, or between A and B, as well as any other; and this may or may not be connected with the principal matter of the the contract. Then the mutual rights of A and B under their contract depend on and are to be determined by a transaction between different parties; but their foundation is not in that transaction, but in the agreement of the parties themselves. But the creation or modification of the rights arising out of a contract may be annexed to a collateral event by the law as well as by the agreement of the parties, and will still be no less referable to the original contract. However the event invested with such consequences by the law will naturally be something affecting the matter of the principal agreement, and thus a confusion may arise at first sight which cannot present itself in the simpler case above stated.

3. Again, the powers of a majority of creditors in bankruptcy proceedings and compositions to bind the rest may be considered as forming an exception to the rule in question.\* But it is to be observed that such proceedings are really not so much independent transactions as steps in a judicial process, or an arrangement carried out by machinery made capable by special legislation of taking its place, the ultimate result of which, as of every litigation carried out to its end, is a complete transformation of the previously existing rights on which the process was founded.

4. There exists, however, a real and important exception in the case of trustees. The equitable obligations of a trustee are partly in the nature of contract, partly analogous to the class of obligations known in the common law as duties founded on contract: and he may become bound by these to persons, who not only are not parties to the contract from which their rights are derived, but are not and cannot be in existence when it is entered into, and whom, indeed, it often taxes the utmost ingenuity of judicial interpretation to ascertain.

It is not usual either in practice or in books † to regard the relations of trustee and *cestui que trust* in this light; nor perhaps is there very much to be gained by it in considering the equitable jurisdiction apart from the general body of law, since Equity has developed a terminology for its own peculiar purposes which has attained a very creditable amount of definition, at least taking into the account the difficulties it

\* Pothier, Obl., sec. 88.

† Mr. Story in his work on Contracts has a chapter on Trustees, but gives no explanation of the ground on which it is inserted, no does he discuss this aspect of the matter.

had to contend with in starting from random talk about conscience. But if we want to be in a position to compare accurately the operations of Common Law and of Equity (which it may before long become necessary to do), it is important to have a clear view of the bearing of general legal \* ideas on the special institutions of Equity.

We are accustomed to speak of equitable estates, interests, and ownership. But it must not be forgotten that the analogy consists only in the practical result to the beneficiary. He obtains through the medium of his trustee advantages of the same kind as are incident to actual ownership and other real rights: but his actual rights are not merely subject to a different jurisdiction but of a different nature. Speaking broadly, equitable ownership is in truth a personal obligatory relation between the trustee and the beneficiary. Without discussing this in detail, it may be observed that the doctrine, now more firmly established than ever, of purchase for valuable consideration without notice being "an absolute, unqualified, unanswerable defence"† in equity is alone sufficient to show that this point of view is the right one. For when a right, good against all the world, such as legal ownership, is in question, the existence of notice may indeed be a ground of interference against the person affected with it, but the absence of notice is in itself immaterial and cannot, save in certain exceptional cases, produce any positive advantage.‡

The converse doctrine as to the effect of giving or omitting to give notice to the trustee on assignments of equitable interests are also important in this point of view. Comparing the position of the original debtor on an equitable assignment of a debt with that of the trustee on an assignment of an equitable interest, it is easy to see that the essential character of the two transactions is the same. The trustee is in the same relation to his apparent *cestui que trust* as a debtor to his apparent creditor or a lessee to his apparent reversioner. It falls under the "rule of general jurisprudence not confined to

\* One must either use the adjective *legal* in two senses, viz. sometimes (as here) corresponding to law in general, sometimes to Common Law as opposed to Equity, or have recourse to the cumbrous term *juristic*, which I think ought not to be introduced into English if ambiguity can by any other possible means be avoided.

† Per James L. J., in *Pilcher v. Martin*, L.R., 7 Ch. 269, where an attempt to give a new artificial development to the doctrine of constructive notice is completely disposed of.

‡ The equitable obligation towards the *cestui que trust* of other persons deriving title from the trustee with notice, must be considered as quasi-contractual. Of course those rights must be distinguished which are truly real rights as between themselves at all events though not generally recognised by the common law: such are the rights arising from equitable liens and equitable encumbrances created by the owner of the legal estate.—See, e. g., *Newton v. Newton*, L.R., 4 Ch., 145.

chooses in action . . . that if a person enters into a contract, and, without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation : ”\* and all the distinctions as to the circumstances under which priority is or is not gained by notice are or ought to be matters of deduction from this rule. The other class of cases as to equitable assignments, which rests on the principle that a man cannot assign any interest except such as he has,† do not really interfere with its generality. The rights of a purchaser of an equitable interest are of course equally personal, being derived from the original personal obligation between the trustee and the beneficiary, and it is only as “the implied agent of the *cestui que trust*,”‡ that he has any recognizable interest before the novation is complete.

It is hardly necessary to observe that the personal character of the whole law of trusts is grounded not merely in theory, but in the historical origin of the institution ; and that, while subject to some qualifications in its wider bearings, it is still carried out to various collateral consequences with an inflexible logic sometimes involving no small hardship.

It would be a matter of some interest, and probably also of some difficulty, to determine the true character of the relation between persons claiming adversely to one another as *cestuis que trust* under the same disposition ; but this does not fall within the scope of the present discussion.

We shall next proceed to consider the exceptions to the second branch of the principal rule ; those classes of cases, namely, in which contracts with or between indeterminate persons are allowed.

FREDERICK POLLOCK.

## II.—THE GERMAN PENAL CODE.

THE Penal Code for the German Empire was published by Imperial Statute, dated Berlin, the 15th of May, 1871, to come in force throughout the German Empire on the 1st day of January, 1872 (Collection of the Statutes of the German Empire, No. 24, page 127, *et seq.*, published on the 14th June, 1871), in substitution for the Penal Code of the North German Confederation (published on the 8th of June,

\* Per Willes J., in *De Nicholls v. Saunders* L.R., 5 C.P., 593.

† Lewin on Trusts, pp. 496-7 (5th ed.).

‡ Lewin, 501.



1870, by the introductory Statute dated 31st May, 1870, to come in force in the North German Confederation on the 1st day of January, 1871), substantially identical with the above code for the Empire.

The extension of the Criminal Code for the North German Confederation to the other German States was already prepared by the Conventions with Baden and Hesse, dated 15th November, 1870; with Wurtemberg, 25th November, 1870; and Bavaria, dated 23rd November, 1870.

By the German Constitution adopted by the said Conventions, it was settled that the Penal Code, together with the introductory Statute, should come in force in Hesse (south of the Maine) on the 1st of January, 1871; in Baden and Wurtemberg, on the 1st of January, 1873; and the Imperial Statute, dated 22nd April, 1871, made certain provisions for the introduction of the Penal Code in Bavaria on the 1st day of January, 1872. The alteration of the Penal Code of the North German Confederation, therefore, was merely a formal one, adapted to the change of the German Constitution.

#### INTRODUCTORY PROVISIONS.

1. Any act declared punishable by death or imprisonment with hard labour, or by imprisonment in a fortress, for a term exceeding five years, is a felony.

Any act declared punishable by imprisonment in a fortress for a term not exceeding five years, or by a fine exceeding fifty thalers, is a misdemeanour.

Any act declared punishable by confinement, or by a fine not exceeding fifty thalers, is an offence.

2. An act is punishable only if such punishment were prescribed by law before the commission of such act; if different laws have been in force from the time of the commission of the act, up to the time of judgment, the more lenient law is to apply.

3. The penal laws of the German Empire apply to all criminal acts committed within the territory of the same, whether committed by a subject or by a foreigner.

4. As a rule, no prosecution is to take place for any felony or misdemeanour committed in a foreign country (ss. 102, 298). Under the penal laws of the German Empire, however, may be prosecuted—

1. Any foreigner who in a foreign country committed a treasonable act against the German Empire, or one of its Confederate States (ss. 80-86, 146, 147, 149).
2. Any German who in a foreign country committed a treasonable or traitorous act against the German Empire, or one of its Confederate States, or who offered an insult to one of its Confederate Princes, or committed an

offence against the coinage (s. 80-93, 94, 95, 98, 99, 146, 147, 149).

3. Any German who in a foreign country committed an act which, by the laws of the German Empire, is considered a felony or a misdemeanour, and is declared punishable by the laws of the place where the same was committed.

The prosecution may also take place if the perpetrator was not yet a German at the time when he committed such act. In that case, however, a request is necessary of the competent authority of that country where the criminal act has been committed; and the laws of the foreign country are to be applied so far as the same are more lenient.

5. In the case of ss. 3 and 4, no prosecution is to take place—

1. If by the courts of the foreign country a final judgment with reference to such act has been given, and either a verdict of “not guilty” has been passed, or the punishment pronounced has been executed (s. 37).
2. If the prosecution or the execution of the punishment is barred by limitation under the laws of the foreign country, or if the punishment has been remitted.
3. Or if the application of the party injured for punishment, requisite according to the laws of the foreign country, has not been made.

6. Offences committed in a foreign country are to be punished only in case that it is so provided by special laws, or by State Conventions.

7. A punishment executed in a foreign country is to be taken in account in the punishment to be pronounced, if for the same act another conviction has been pronounced within the territory of the German Empire.

8. Any country not forming part of the German Empire is to be considered as a foreign country within the meaning of this Criminal Code.

9. A German is not to be surrendered to a foreign country for a prosecution or punishment.\*

10. The general penal laws of the German Empire apply so far to military persons as the military laws do not otherwise provide.

11. No member of a Diet, or of a Legislative Chamber, of a State forming part of the German Empire, may be made responsible, except to the Assembly to which such member does belong, for any vote or for any utterance made in the exercise of his office.

\* See, however, Extradition Treaty between Great Britain and Ireland and the German Empire, dated 14th May, 11th June, 1872.

12. Truthful reports of the proceedings of a Diet or of a Legislative Chamber of a State forming part of the German Empire, remain free from any responsibility.

PART 1.—OF THE PUNISHMENT OF FELONIES, MISDEMEANOURS, AND OFFENCES GENERALLY.

*Section 1.—Of Punishments.\**

13. The punishment of death is to be executed by decapitation.

14. The punishment by imprisonment with hard labour, may be for the duration of life or temporary. The longest term of a temporary imprisonment with hard labour is that for fifteen years, the shortest that for one year. Where the law does not specially direct that the imprisonment with hard labour is during life, the imprisonment is temporary.

15. Persons condemned to imprisonment with hard labour, are to be forced to the performance of labour performed in the house of correction. They may be employed at works outside the prison, especially at public works, or at works under control of the public authorities. The latter kind of employment is only admissible, if the prisoners can be kept separate from free labourers.

16. The longest term of imprisonment is for five years; the shortest, for one day.

Those who are condemned to imprisonment may be employed in the prison, in a manner appropriate to their capacities and circumstances, and if they desire it they must be so employed.

17. The imprisonment in a fortress may be during life or temporary.

The longest term of imprisonment in a fortress is for fifteen years; the shortest, one day. Where the law does not especially declare the punishment by imprisonment in a fortress to be for life, it is a temporary punishment.

The punishment by imprisonment in a fortress consists of confinement, with supervision of the occupation and manner of living of the prisoner; it is to be executed in a fortress, or in other places designated for such purpose.

18. The longest term of confinement is for six weeks; the shortest for one day, s. 77.

Punishment by confinement consists of simple personal detention.

19. In all cases of imprisonment, a day is taken as twenty-four hours, a week as seven days, the month and the year according to the almanac.

\* Imprisonment with hard labour; imprisonment in a fortress; imprisonment and simple confinement, are respectively distinct terms.

The duration of a punishment by imprisonment with hard labour, is to be pronounced only by full months, the punishment by any other kind of imprisonment is to be pronounced only by full days.

20. In cases where the law makes optional the punishment by imprisonment with hard labour, or by imprisonment in a fortress, the punishment by imprisonment with hard labour is to be inflicted, only if it has been ascertained that the criminal act has its foundation in dishonourable principles.

21. A term of eight months' imprisonment with hard labour, is to be considered equal to an imprisonment for one year, and a term of eight months' imprisonment is to be considered equal to one year's imprisonment in a fortress.

22. The punishment by imprisonment with hard labour, as well as by imprisonment, may be executed for its whole duration, or for any part of the time of punishment in such manner of solitary confinement, that the prisoner is constantly kept separated from other prisoners.

The solitary confinement is, without the consent of the prisoner, not to exceed the term of three years.\*

23. Those who are condemned to a longer term of imprisonment with hard labour, or imprisonment, may with their consent conditionally be set at liberty, provided that they have completed three-fourths of the term of punishment inflicted, or at least however one year, and provided that their conduct has been satisfactory during that time.

24. The preliminary dismissal may be revoked at any time on account of bad conduct of the dismissed, or if he is acting contrary to the conditions upon which his dismissal was granted. The effect of such revocation is, that the time passed between the preliminary dismissal and the re-capture, is not taken into account in calculating the time of punishment.

25. The decision as to a preliminary dismissal as well as to its revocation, emanates from the highest superintending Department of Justice. Before any resolution is come to as to the dismissal of a prisoner, the prison authorities are to be heard. A prisoner preliminarily dismissed, may be provisionally arrested where such arrest is urgently necessary for the public security by the police authorities of the place, where the prisoner so dismissed is staying for the time, and in such a case, a decision as to the final revocation of the dismissal is to be applied for forthwith.

\* The German Diet passed a resolution, on the 4th March, 1870, requiring the Chancellor of the Empire to have a Bill proposed by the Confederate Council, by which the execution of any imprisonment should be regulated by law, and by which a central body should be established, for the control of all matters relating to penal or reformatory establishments.

If a provisional arrest is followed by a definite revocation, the latter is treated as made on the day of the arrest.

26. If the time of punishment has elapsed without any revocation of the provisional dismissal, the term of imprisonment is to be considered completed.

27. The lowest amount of a fine in cases of felony or misdemeanour is one thaler, and in case of an offence, it is the third part of a thaler.

28. A punishment by fine which cannot be levied, is to be enforced by imprisonment; and if it has been imposed for any offence, it is to be enforced by confinement.

If in case of any misdemeanour a fine only has been imposed, or pronounced payable in the first instance or optional with imprisonment, the punishment may be enforced by confinement if the fine pronounced does not exceed the sum of 200 thalers, or the imprisonment substituted in lieu of such fine does not exceed six weeks.

If besides a fine, imprisonment with hard labour was pronounced, the imprisonment in lieu of fine is to be imprisonment with hard labour in conformity with s. 21.

The party convicted may by the payment of such part of the fine as has not been satisfied by the imprisonment, liberate himself from the latter.

29. In calculating the imprisonment to be inflicted in lieu of a fine imposed in the case of felony or misdemeanour, the amount of from one to five thalers, and in the case of an offence, the amount of from one-third of a thaler up to five thalers, is to be considered equal to one day's imprisonment.

The shortest term of imprisonment in lieu of a fine, is one day; the longest term, in case of confinement, six weeks; and in case of imprisonment, one year. If, however, the term of the imprisonment pronounced, optional with a fine, does not amount to the longest term mentioned above, the imprisonment, in lieu of the fine, is not to exceed the longest term of imprisonment declared admissible.

30. A fine may only be levied on the estate of a deceased person, when the judgment against the deceased became final during his lifetime.

31. A conviction to imprisonment with hard labour has, for its legal consequence, the permanent disqualification for service in the German Army, or the Imperial Marine; and the permanent disqualification to hold any public office, ss. 33, 35.

As public offices are here considered, the offices of a barrister, or advocate, solicitor, notary, and of juryman or assessor (Schoffe).

(As to difference between office and officer, see s. 359.)

32. Besides the punishment of death, or imprisonment with

hard labour, the loss of political rights may be pronounced ; and in the case of imprisonment only, when the term amounts to three months, and the law either expressly admit the loss of political rights, or when the imprisonment was pronounced in lieu of imprisonment with hard labour, on account of extenuating circumstances.

The duration of the loss of political rights, in cases of punishment by imprisonment with hard labour for a limited time, is not less than two years, and not exceeding ten years. In cases of imprisonment not under one year and not exceeding five years.

33. The judgment pronouncing the loss of political rights, implies the permanent loss of any rights the convicted party may enjoy through any public election. It likewise implies the permanent loss of any public office, of dignities, titles, orders, and badges of honour, ss. 81, 83, 84, 87, 91, 94, 95.

34. The judgment pronouncing the loss of political rights further implies the disqualification for the time stated in the judgment—

1. To use the cockade of his State.
2. To enter the German Army or the Imperial Marine.
3. To hold any public office, dignities, titles, orders, or honorary badges.
4. To give a vote in any public matter ; to vote in any election, or to be elected ; or to exercise any other political right.
5. To be a witness to the execution of any deed.
6. To be a guardian, co-guardian, trustee, official assistant, or member of a family council, except in matters touching a descendant, provided that the superintending Court of Minors, or the family council give their consent.

35. In cases where punishment by imprisonment, together with the loss of civic honorary rights, could have been declared, disqualification to hold any public office, for the term of one year, or not exceeding five years, may be pronounced (*see* ss. 128, 129, 331, 339, 341, 352, 355, 357, 358).

If disqualification to hold public office has been pronounced, the permanent loss of a public office hitherto held follows as a legal consequence.

36. A judgment pronouncing the loss of civic honorary rights generally, and disqualification to hold any public office especially, takes the effect from the moment when it becomes final. The term of duration is to be calculated from the day when the imprisonment of any kind, together with the loss of such rights, was pronounced, has been served, is barred by limitation, or has been remitted.

37. If a German has been punished in a foreign country

for any felony, or misdemeanour, which according to the laws of the German Empire, would or could have been followed by the loss of civic honorary rights generally, or of the loss of certain civic honorary rights, fresh proceedings may be instituted, in order to pronounce such consequences against the person found guilty under such proceedings.

38. Besides an imprisonment of any kind, placing under the supervision of the police may be pronounced in all cases where that has been provided by law. (*See* s. 44, A 2, ss. 115, 116, 122, 125, 146, 147, 180, 181, 248, 256, 262, 294, and 325 ; also ss. 45, 57, No. 5 and 76.

The higher police authority of the State is empowered by such judgment, after having heard the prison authorities, to place the prisoner under the supervision of the police for a term not exceeding five years.

This term is to be calculated from the day on which the imprisonment has been served, or was barred by limitation, or was remitted.

39. The placing under the supervision of the police has the following effects:

1. The residence at certain places of the person convicted may be prohibited by the higher police authority, s. 361, No. 1.

2. The higher police is empowered to expel a foreigner from the German territory, after he shall have been placed under police supervision by final judgment.

3. Domiciliary searches are not subject to any restriction as to the time when they may be made.

40. The products of a premeditated felony or misdemeanour, or objects which have been used in, or were intended for the commission of such premeditated felony or misdemeanour may be confiscated if they belong to the principal, or to an accessory of the criminal act, ss. 152, 295, 360, 367, 369.

Such confiscation is to be pronounced in the judgment.

41. If the contents of any writing,\* picture, or representation are punishable, it is to be pronounced in the judgment, that all copies as well as all plates, or forms intended for their production are to be made useless.

The preceding enactment, however, applies only to copies in the possession of the author, printer, editor, publisher, or bookseller, and such copies as are publicly exposed or publicly offered for sale.

If a part only of the writing, picture, or representation is punishable, and if a separation is practicable, it is to be pronounced that only the criminal parts, and that part of the

\* The term writing includes both printed and written matter. *See* New York Penal Code.

plates and forms on which these parts are contained, are to be rendered useless.

42. If in the cases mentioned in the ss. 40, 41, the prosecution or conviction of a certain person is not practicable, the directions given in the said paragraphs may be independently pronounced in the judgment.

*Section 2.—Of Attempts.*

43. Any person having carried out his intention to commit a felony or a misdemeanour by acts implying the commencement of the execution of such felony or misdemeanour is punishable for attempt, if the intended felony or misdemeanour has not become perfect.

The attempt of a misdemeanour, however, is punishable only in such cases where the law expressly prescribes a punishment, ss. 107, 120, 141, 148, 162, 169, 240, 242, 246, 253, 263, 289, 303, 305, 339, 350, 352.

44. A felony or misdemeanour attempted, is to be punished more leniently than that completed.

If the completed felony is declared punishable by death, or by imprisonment with hard labour for life, the punishment of imprisonment with hard labour is to take place for a term not under three years, in addition to which placing under the supervision of the police may be pronounced.

If the completed misdemeanour is declared punishable by imprisonment for life in a fortress, such imprisonment in a fortress for a term not under three years is to take place for an attempt.

In other cases the punishment may be reduced to one-fourth of the term of imprisonment, or of the fine by which the completed felony or misdemeanour is declared punishable.

If imprisonment with hard labour for a term of less than one year has thereby been incurred, the same is to be commuted into imprisonment, in accordance with the provisions contained in the 21st paragraph.

45. If, in case of a completed felony or misdemeanour, the loss of civic honorary rights may or shall be pronounced besides the punishment, or the placing under the supervision of the police is declared admissible, the same rules are to apply in punishing an attempt.

46. An attempt at such is not punishable if the author—

1. Has given up the perpetration of the intended act, without having been prevented from such perpetration by circumstances beyond his control; or
2. At the time when the offence was not yet discovered, by his own act has averted the consequences which would result from the completion of the felony or



misdemeanour, at a time when the crime was not yet discovered.

### *Section III.—Of Participation.*

47. If several persons jointly commit a punishable act, every one of them is to be punished as principal (Thäter).

48. Any person who by gift or promise, by threats, by abuse of authority or power, by intentional creation or support of a mistake, or other means, did deliberately induce another to the commission of a criminal act perpetrated by him, is punishable as an accessory before the fact (Anstifter), ss. 85, 110, 111, 159, 160.

The punishment of such accessory before the fact is to be determined according to the law, which is to apply to the act to the commission of which he knowingly contributed.

49. Any person who knowingly aided the principal in the commission of the felony or misdemeanour, by advice or assistance, is punishable as an abettor.

The punishment of an abettor is to be determined in conformity with that law which applies to the act in the commission of which he knowingly aided, to be mitigated, however, in conformity with the principles laid down for the punishment of attempt, ss. 143, A 2.

50. If the law increases or mitigates the criminality of an act, according to the personal position or situation of the person committing the same, such particular circumstances are to be taken into consideration with regard to the principal or the accomplice, or instigator, accessory, or abettor, to whom they are respectively applicable.

### *Section IV.—Of Reasons which Exclude or Extenuate Guilt.*

51. A punishable act does not exist if the offender at the time of the commission of the act was in a state of unconsciousness, or in a morbidly disturbed state of mind, by which the action of his free will was precluded.

52. A punishable act does not exist if the principal offender was forced to commit such act by irresistible power or by threats, combined with a present danger to life or limb of himself or his belongings, which could not be averted otherwise.

In the sense of the present code, relations by consanguinity or by affinity in the ascending or descending line, adopted and foster parents and children, married persons, brothers and sisters, and their husbands and wives, and parties betrothed, are to be considered as "belongings."

53. A punishable act does not exist if the act was necessitated by self-defence.

Self-defence is that defence which is necessary in order to avert from himself or another a present unlawful attack.

An excess in self-defence is not punishable, if the perpetrator exceeded the limits of defence from fright, fear, or terror.

54. Besides the case of self-defence, a punishable act does not exist if the case was committed by the perpetrator in a case of need, happening without his fault, for saving himself or his belongings from an impending danger of life or limb, which could not be otherwise averted.

55. Any one at the time of the commission of an act who has not completed the twelfth year of his age cannot be criminally prosecuted for the same.

56. An accused person who has committed a punishable act after completion of his twelfth year, but not having yet completed his eighteenth year, is to be acquitted, if in committing such act he had not sufficient intellect for understanding its criminality. In the judgment, directions are to be given whether he is to be restored to his family, or to be transferred to an educational or reformatory institution. He is to be retained in such institution so long as the superintending authority of such institution shall consider fit, in no case, however, beyond the twentieth year of his age.

57. To an accused person who has committed a punishable act after the completion of his twelfth, but not his eighteenth year, and in committing the same had sufficient intellect for understanding its criminality, the following provisions are to apply:—

1. If the act is declared punishable with death, or by imprisonment with hard labour during life, imprisonment for a term from three to fifteen years is to be pronounced.
2. If the act is declared punishable with imprisonment in a fortress during life, imprisonment in a fortress for a term from three to fifteen years is to be pronounced.
3. If the act is declared punishable with imprisonment with hard labour, or another mode of punishment, the punishment to be pronounced is to be between the lowest amount of the punishment declared legally applicable, and one-half the highest amount of the punishment declared legally applicable.

If the punishment applicable is imprisonment with hard labour, imprisonment of a like duration is to take its place.

4. If the act constitutes misdemeanour or offence of a particularly light character, a reprimand may be pronounced.
5. Neither the loss of civic honorary rights generally, nor of any particular civic honorary right, nor placing

under the supervision of the police, is to be pronounced.

The punishment of imprisonment is to take place in establishments or rooms specially intended for the carrying into effect of sentences of imprisonment upon young persons.

58. A deaf and dumb person, not possessing sufficient intellect for understanding the criminality of any act committed, is to be acquitted.

59. If a person in committing an offence was ignorant of circumstances legally requisite to establish the criminal fact, or which increase its criminality, such circumstances are not to be imputed to him.

In the punishment of acts committed from mere culpable negligence, this provision is to apply only so far as the ignorance itself is not the consequence of culpable negligence.

60. The detention undergone during the criminal investigation may, in passing judgment, be wholly or in part taken into account in awarding the punishment.

61. An act which is to be prosecuted only at the complaint of another party is not to be prosecuted if the party entitled to make complaint does not make his complaint within three months. This term is to begin with the day upon which the party entitled to complaint became cognizant of the fact and of the offending person.

(See ss. 102, 104, 123, 170, 172, 176, 177, 179, 182, 189, 196, 232, 236, 237, 240, 241, 247, 263, 288, 289, 292, 299, 194, 300, 303, 370, Nos. 4 to 6.)

62. If one of several parties entitled to make complaint neglects the said term of three months, the right of other persons so entitled is not prejudiced thereby.

63. The complaint cannot be divided. The judicial prosecution is to take effect against all parties participating in the act (principals and abettors), and likewise against the accessories after the fact (s. 257), if a complaint has been made only against one of the persons.

64. After the publication of the sentence pronouncing a punishment, the complaint cannot be withdrawn (ss. 176, 177, 194).

The withdrawal of the complaint in due time against one of the above-mentioned persons has for its consequences the cessation of the proceedings against all of them.

65. Any party injured, who has completed his eighteenth year of age, is absolutely entitled to make complaint for punishment.

So long as the party injured is under age, his legal representative is entitled to make the complaint, independently from the right of the party injured.

If there is a guardian appointed to insane persons and to deaf and dumb persons, he is entitled to make the complaint.

66. The prosecution and the execution of punishment is barred by limitation.

67. In cases of felony the prosecution is barred by limitation, if punishable with death, or by imprisonment with hard labour during life—in 20 years.

If punishable with imprisonment of any kind for a term not exceeding 10 years—in 15 years.

If punishable with shorter imprisonment of any kind—in 10 years.

The prosecution for misdemeanours declared punishable with imprisonment not exceeding three months, is barred by limitation in five years. That of other misdemeanours in three months.

The prosecution for offences is barred by limitation in three months.

The limitation begins to run on the day on which the act was committed, without regard to the time when the result of such act appeared.

68. Any proceeding of the judge directed against the perpetrator for the act committed, interrupts the course of limitation.

The interruption takes effect only with regard to the person to which such proceedings have reference.

After the interruption, a fresh limitation begins to run.

69. If the commencement or the continuation of any criminal proceedings is dependent on a preliminary question to be decided in other proceedings, the course of limitation is in abeyance until the determination of such proceedings.

70. The execution of punishments finally adjudged upon is barred by limitation if the punishment:—

1. Of death or imprisonment with hard labour, or imprisonment in a fortress during life has been pronounced, in 30 years.
2. By imprisonment with hard labour for life, for longer than 10 years has been pronounced, in 20 years.
3. By imprisonment with hard labour, or by imprisonment in a fortress, or simple imprisonment for longer than five years, has been pronounced, in 15 years.
4. By imprisonment in a fortress or simple imprisonment not under two and not exceeding five years, or a fine of more than 2000 thalers has been pronounced, in ten years.
5. By imprisonment in a fortress, or confinement up to two years, or a fine of more than 50, or up to 2000 thalers, has been pronounced, in five years.

6. Of confinement or fine not exceeding 50 thalers has been pronounced, in 2 years.

The limitation begins to run on the day on which the judgment became final.

71. The execution for the levy of a fine pronounced besides imprisonment of any kind, is not barred by limitation at an earlier period, than the execution of any imprisonment.

72. Any act of the authority competent to execute a punishment and an arrest of the convicted person for the purpose of execution, interrupts the course of limitation. After the interruption of an execution of the punishment, a fresh limitation begins to run.

*Section 5.—Of the Concurrence of Several Criminal Acts.*

73. If one and the same act comprises several offences against the criminal law, that law only is to apply which directs the severest punishment, and if there are several kinds of punishment, that law which directs the severest punishment.

74. Against him who, by several independent acts, committed several felonies or misdemeanours or repeatedly committed the same felony or misdemeanour, thereby making himself liable to several punishments by temporary imprisonment, a collective punishment is to be pronounced, forming an enlargement of the severest punishments to which he became liable.

If different kinds of imprisonment should concur, then an enlargement of the more severe kind of imprisonment is to take place.

The whole punishment is not to amount to the term of all the single punishments, and is not to exceed the term of 10 years, in case of imprisonment with hard labour, or the term of 10 years in case of imprisonment, the term of 15 years in case of imprisonment in a fortress.

75. If the punishment by imprisonment in a fortress concurs with imprisonment, separate judgments are to be pronounced as to each punishment.

If an offender has made himself liable to several terms of imprisonment in a fortress, or to several terms of imprisonment, in that case as regards punishment of the same kind, it is to proceed, as if that kind of punishment only had been pronounced.

In such case; the whole duration of the punishment is not to exceed 15 years.

76. A judgment pronouncing a collective punishment, does not preclude the declaration of loss of civic honorary rights even in case that this should be legally declared admissible or requisite, in one of the several criminal acts committed.

77. If confinement is concurrent with any other kind of imprisonment, a separate judgment is to be pronounced as to the former.

If the offender made himself liable to several terms of confinement, a collective term is to be pronounced altogether, not exceeding the term of three months.

78. Fines incurred for several offences, are to be adjudged for their full amount without a distinction, whether the offender has become liable to the same only, or to any punishment by imprisonment of any kind besides.

In adjudging imprisonment in lieu of several fines, the longest term of the former is not to exceed two years, and if the several fines have been inflicted for misdemeanour only, it is not to exceed three months, (s. 29).

79. The provisions contained in the 74th to 78th paragraphs apply also to cases where a verdict has been passed for a criminal act committed before a former conviction, provided that the punishment pronounced has not yet been carried into effect, or barred by limitation or remitted.

### III.—ROMAN EQUITY.

BEING COMMENTS OF MR. MAINE'S\* THEORY.

THE reader is aware that there is in history a pretty large group of problems, which one generation hands down to another, as a legacy of mysteries, which it is hopeless for any man to attempt to solve. Historical riddles there are which have perplexed our grandfathers, and are likely to torture generations yet to come; dark conundrums, with no hint or opening yet dreamed of in our philosophy towards their final solution. An interesting list of some of these problems is given by Thomas De Quincey in one of his latest published papers. What, for instance, became of the ten tribes of Israel? Did Brennus and his Gauls penetrate into Greece? Who, and what are the gypsies? Who built Stonehenge? Who discovered the compass? What was the Golden Fleece? Was the siege of Troy a romance or a grave historical fact? Was the Illiad the work of one mind, or (on the Wolfian hypothesis) of many? What is to be thought of the Thundering Legion? of the miraculous dispersion of the Emperor Julian's labourers before Jerusalem? of the burning of the Alexandrian library? &c. Who wrote the *Εἰχὼν Βασιλῆς*? Who wrote the Letters of Junius? Was the Fluxiona

\* Now Sir Henry Sumner Maine.

Calculus discovered simultaneously by Leibnitz and Newton? or did Liebnitz derive the first hint of it from the letter of Newton? To these may be added: Who wrote the "Treatise of Equivocation?" published some years ago from a manuscript supposed to be given by Archbishop Laud to the Bodleian Library? What was the origin of the Court of Chancery in England? And, as a question of no less interest, What was the origin of Roman equity?

In contributing towards the solution of this last problem, Mr. Maine says, that the equity of Rome was a much simpler structure than the equity jurisprudence of modern times, and its development from its first appearance can be much more easily traced. Probably, of all the questions in ancient law, this, relating to the origin of Roman equity, is the most interesting and important. As the root of several conceptions which have exercised profound influence on human thought, its importance cannot easily be measured. At the same time, it opens up a wide field for the most absorbing speculations, in what has been termed "the philosophy of the history of law." Enough traditional errors have gathered round several questions analogous to this, which a general ignorance of Roman law has hitherto sanctioned and perpetuated. The task of placing in a clear light the origin of such conceptions as the law of nations, the law of nature, and equity, is undertaken by Mr. Maine with singular ability; but with a view to raise inquiry in the mind of the student, I propose to place before him a few comments on Mr. Maine's theory, as step by step he unfolds it, in the third chapter of his "Ancient Law." He says—

"The Romans described their legal system as consisting of two ingredients. 'All nations,' says the Institutional Treatise, published under the authority of the Emperor Justinian, 'who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enacts is called the civil law of that people, but that which natural reason appoints for all mankind is called the law of nations, because all nations use it.' The part of the law 'which natural reason appoints for all mankind,' was the element which the edict of the prætor was supposed to have worked into Roman jurisprudence. Elsewhere it is styled more simply *jus naturale*, or the law of nature; and its ordinances are said to be dictated by natural equity (*naturalis æquitas*) as well as by natural reason. I shall attempt to discover the origin of these famous phrases, 'law of nations,' 'law of nature,' 'equity,' and to determine how the conceptions which they indicate are related to one another."

It is here proposed to trace historically the birth of the

idea among the Romans of the law of nations, that is, the law common to all mankind, to trace the relation of that idea, to the still later-born idea, of the law of nature; and lastly, to show how both these ideas touch and blend through the primitive idea of Roman equity. It must be understood that the object of this speculation is not an attempt to trace the origin merely of the *phrases* 'law of nations,' 'law of nature,' and 'equity,' but the ideas themselves as they were suggested to the mind of the primitive Roman by certain historical events and circumstances. In other words, this theory attempts to show what it was originally, to which the Romans, for the first time, applied the phrases 'law of nations,' 'law of nature,' and 'equity,' and it is, therefore, essentially based upon facts either historically attested, or legitimately inferred. In considering this theory, however, I propose to leave out of consideration Mr. Maine's valuable remarks on the idea of a law of nature, as it originated among the Romans (or rather, as they borrowed it from Greek philosophy), and to confine myself to the *jus gentium* and *æquitas* alone, as being one and the same system: the idea expressed by the word *æquitas* being, as Mr. Maine holds, only descriptive of the process by which the *jus gentium* was evolved. Before proceeding to his statements, as to how this idea of a *jus gentium* gradually dawned upon the mind of the Roman, I draw attention to the phrase 'law of nations,' as it occurs in the passage quoted from the Institutes of Justinian. Not only is the phrase itself a striking one, but its definition as given in the Institutes is most remarkable, and must be kept constantly in view as having an important bearing on Mr. Maine's theory. What then is the *jus gentium* as defined in the Institutes?

"All nations," says the Emperor's treatise, "who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enacts is called the civil law of that people, but that which natural reason appoints for all mankind is called the law of nations, because all nations use it." The law which natural reason appoints for all mankind, is to be found in use among all mankind, though the converse of the proposition is not necessarily true, that the law found in use among all mankind is the law which natural reason appoints. So far from being a mere play upon words, the distinction suggested here may be traced in the language of the juriconsults throughout Roman jurisprudence. The human reason, as the source of universal law, was early recognised, and became a theme upon which writers, such as Cicero, dwelt with considerable force. "Ratio imperans bona et honesta," "Quod naturali ratione dictante honestum est," "Jus non excogitatum a nobis, aut ab aliis introductum, sed



ingenitum et innatum," were but commonplace sayings, expressive of the sovereignty of human reason as the dictator of law. The Greek conception of the law common to all mankind, was in most respects identical with this, *ὁ πανθρώπων νόμος πάντες, φύσει κοινὸν δίκαιον καὶ ἄδικον, ἅν μηδεμὶς κοινῶν ὡρὸς ἀλλήλους ἢ, μηδὲ οὐκ ἐξ ἑκείνου.*\* The ancient division of all law into either *Φυσιχὸς* or *Νομιχὸς*, expresses the same ideas as are to be found in the institutes. Scarcely does the ancient idea differ from our modern conception of the law common to all mankind. "For, as reason and reflection," says the Duke of Argyll, "are common to man, and are as important parts of his nature, as the highest of his instincts, so laws founded on the right exercise of the reason are natural laws in the highest and best sense of all."† The characteristic of the law, therefore, spoken of in the institutes as the law of nations, is, that it is dictated by natural reason. The mere universality of a law does not bring it within the category. The problem therefore is, whether the law of nations, as defined in the institutes, is the conception of an advanced philosophy, or was it originally regarded as such? The most prominent question which suggests itself to the student of Mr. Maine's theory is, whether the *jus gentium*, in its primitive and original meaning, was considered to be the law which natural reason appoints for all mankind, or did the phrase literally mean what Mr. Maine suggests, namely, the law found by observation to be in common use among the various Italian tribes who were *all the nations* then known to the Romans? In other words, did the *jus gentium* include literally all the customs, rules, and usages obtaining among the Italian tribes, or was it primitively considered the dictate of natural reason, which the prætor as a judge worked into the jurisprudence of Rome? Let us see how Mr. Maine answers the question:—

"The most superficial student of Roman history must be struck by the extraordinary degree in which the fortunes of the republic were effected by the presence of foreigners, under different names, on her soil. The causes of this immigration are discernible enough at a later period, for we can readily understand why men of all races should flock to the mistress of the world; but the same phenomenon of a large population of foreigners and denizens meets us in the very earliest records of the Roman State. No doubt the instability of society in ancient Italy, composed as it was in a great measure of robber tribes, gave men considerable inducement to locate themselves in the territory of any community strong enough to protect itself and them from external attack, even though protection should be purchased at the cost of heavy

\* Arist. 1, Rhet. 13, "Taylor's Civil Law," p. 100.

† "Reign of Law," People's ed., p. 333.

taxation, political disfranchisement, and much social humiliation. It is probable, however, that this explanation is imperfect, and that it could only be completed by taking into account those active commercial relations which, though they are little reflected in the military traditions of the republic, Rome appears certainly to have had with Carthage, and with the interior of Italy in pre-historic times. Whatever were the circumstances to which it was attributable, the foreign element in the commonwealth determined the whole course of its history, which, at all its stages, is little more than a narrative of conflicts between a stubborn nationality and an alien population. Nothing like this has been seen in modern times; on the one hand, because modern European communities have seldom or never received any accession of foreign immigrants, which was large enough to make itself felt by the bulk of the native citizens; and on the other, because modern States, being held together by allegiance to a king, or political superior, absorb considerable bodies of immigrant settlers with a quickness unknown to the ancient world, where the original citizens of a commonwealth always believed themselves to be united by kinship in blood, and resented a claim to equality of privilege, as a usurpation of their birthright. In the early Roman republic the principle of the absolute exclusion of foreigners pervaded the civil law no less than the constitution. The alien or denizen could have no share in any institution supposed to be cœval with the State. He could not have the benefit of quiritarian law. He could not be a party to the *nexum*, which was at once the conveyance and the contract of the primitive Romans. He could not sue by the sacramental action, a mode of litigation of which the origin mounts up to the very infancy of civilization. Still, neither the interest nor the security of Rome permitted him to be quite outlawed. All ancient communities ran the risk of being overthrown by a very slight disturbance of equilibrium, and the mere instinct of self-preservation would force the Romans to devise some method of adjusting the rights and duties of foreigners, who might otherwise—and this was a danger of real importance in the ancient world—have decided their controversies by armed strife. Moreover, at no period of Roman history was foreign trade entirely neglected. It was, therefore, probably, half as a measure of police, and half in furtherance of commerce, that jurisdiction was first assumed in disputes, to which the parties were either foreigners, or a native and a foreigner. The assumption of such a jurisdiction brought with it the immediate necessity of discovering some principles on which the questions to be adjudicated upon could be settled, and the principles applied to this object by the Roman lawyers

were eminently characteristic of the time. They refused, as I have said before, to decide the new cases by pure Roman civil law. They refused, no doubt, because it seemed to involve some kind of degradation to apply the law of the particular State, from which the foreign litigant came. The expedient to which they resorted was that of selecting the rules of law common to Rome, and to the different Italian communities in which the immigrants were born. In other words, they set themselves to form a system answering to the primitive and literal meaning of *jus gentium*, that is, law common to all nations. *Jus gentium* was, in fact, the sum of the ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil. Whenever a particular usage was seen to be practised by a large number of separate races in common, it was set down as a part of the law common to all nations, or *jus gentium*. Thus, although the conveyance of property was certainly accompanied by very different forms in the different commonwealths surrounding Rome, the actual transfer, tradition, or delivery of the article intended to be conveyed, was a part of the ceremonial in all of them. It was, for instance, a part, though a subordinate part, in the mancipation or conveyance peculiar to Rome. Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance which the juriconsults had the means of observing, was set down as an institution *Juris gentium*, or rule of the law common to all nations. A vast number of other observances were scrutinized with the same result. Some common characteristic was discovered in all of them, which had a common object, and this characteristic was classed in the *jus gentium*. The *jus gentium* was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among various Italian tribes."

We have here the historical fact of the presence of a large alien community on Roman soil, to whom the pure Roman civil law was not applicable. Their presence necessitated, according to Mr. Maine's theory, the discovery of some novel rules and principles, which the prætor collected by a certain elaborate process, which is described with considerable minuteness. The process itself of collecting usages and rules of law common to the Italian tribes, suggested, according to this theory, the idea of the *jus gentium*, and this again came to be looked upon afterwards as the law of nature. Both these conceptions are found connected with the idea of *æquitas*, which, in the light of this theory, is a word literally expressive of the

process by which the *jus gentium* was evolved. At present, let us look at this process as it is described.

The exact position of the *peregrini* on Roman soil during the earlier periods of Roman history cannot easily be traced. Certain it is that, at the time spoken of by Mr. Maine, their numbers had considerably increased. Half as a measure of police, and half in furtherance of commerce, therefore, the assumption of jurisdiction over them became a pressing political necessity. But what were the steps adopted to meet this necessity? The *jus civile*, or enacted law, was not applicable to foreigners, and Mr. Maine describes the prætor as if in search of a new law for them. The immediate necessity arose "of discovering some principles on which the questions to be adjudicated upon could be settled." But the inquisitive reader may be tempted to ask whether a *discovery* was necessary at all. The law which natural reason appoints for all mankind was surely at hand, and available to meet this immediate necessity. All that the prætor might have done in the adjudication of cases between foreigners, or between a citizen and a foreigner, was to apply to them (to use a homely phrase) sound, common-sense law. Whatever was best in natural reason and good conscience, was applicable to these *peregrini*, who, coming in as refugees from the depredations of robber tribes, could not have brought with them any clear notions of settled customs, or of systematic laws. What need, therefore, was there for a *discovery* of rules and principles to govern them, if that word is at all applicable in this connection? Indeed, Mr. Maine himself has already said that "the law which natural reason appoints for all mankind was the element which the edict of the prætor was supposed to have worked into Roman jurisprudence." If this was so, what necessity or opening was there for such a discovery as Mr. Maine speaks of? It is precisely at this point, however, that Mr. Maine (notwithstanding his previous statement) departs from the definition of the *jus gentium* as given in the Institutes, and presents the primitive idea as bearing not the shadow of a resemblance to that definition. Having once departed from the conception as expressed in the Institutes, he never returns to it again.

But if a discovery of principles was necessary, let us glance at the process by which these principles were detected and obtained. The civil, or enacted law of Rome, was not applicable in cases arising between foreigners themselves, or between foreigners and native citizens. The quiritarian law was not available here, nor was the foreigner entitled to sue by the sacramental action. He was not able to bargain for or transfer property by the solemn form of the *nexum*, which was at once the conveyance and the contract of the primitive

Roman. What was to be done? Nothing in Roman law existed to meet this wholly novel necessity. "The expedient to which they resorted," says Mr. Maine, "was that of selecting the rules of law common to Rome, and to the different Italian communities in which the immigrants were born." The language used here may cause the student some slight embarrassment. For if there was a law already "common to Rome," and to the different Italian communities, the element which was supposed for the first time to have been worked into Roman jurisprudence by the prætor already existed in that jurisprudence. But the process is again somewhat differently described, when it is said, that the *jus gentium* was in fact "the sum of the common ingredients in the customs of the old Italian tribes;" and, again, that it was "a collection of rules and principles determined by observation to be common to the institutions which prevailed among the various Italian tribes." Mr. Maine's meaning, however, is clear, when he illustrates his theory by the instance of the Roman mancipation, and the changes that overtook it. Amid the many forms of conveyance in use among the *peregrini*, the prætor observed that tradition or delivery was an element in all of them; and this, therefore, became the common rule in conveyances, and a part of the *jus gentium*. But let us contrast the *jus gentium* as it is defined in the Institutes of Justinian, and the primitive idea regarding it as represented by Mr. Maine. The law which is dictated by natural reason is the law of nations. What reason dictates in one man it dictates in another, and the uniform rule of reason is therefore universal. This obviously is the law common to all mankind, dictated by natural reason, as the Institutes represent it. But the primitive idea of the *jus gentium* in Mr. Maine's theory, was not that it was derived from natural reason at all, but merely that it was found in common use among the various Italian tribes, who were *all the nations* that the Romans had the means of observing. "Whenever," says Mr. Maine, "a particular usage was seen to be practised by a large number of separate races in common, it was set down as part of the law common to all nations, or *jus gentium*." In the Institutes, the mere universality of a law did not suffice to bring it within the category of the *jus gentium*; according to Mr. Maine, whatever was merely universal was included in the *jus gentium*. In their foundation the conceptions are different, and it is difficult to say whether Mr. Maine intends to imply that the doctrine of the Institutes was a development of the primitive idea. We can hardly conceive a natural transition from the one conception to the other. In Mr. Maine's theory no history of such a transition is traced. On the contrary, when the primitive notion of the *jus gentium* was exalted by the ideas which

attached to it subsequently as the law of nature, it was looked upon as presenting merely that "symmetrical order" which was characteristic first of the physical, and then of the moral world. Nowhere does the conception rise to the level which it attains in the Institutes; and if Mr. Maine's theory be correct, the history of the transition from the one idea to the other would perhaps be the most curious and interesting. But let us now see how Mr. Maine connects the idea of the *jus gentium* with *æquitas* :—

"It has generally been supposed that *æquitas* is the equivalent of the Greek *ισότης*, i.e., the principle of equal or proportionate distribution. The equal divisions of numbers, or physical magnitudes, is doubtless closely entwined with our perceptions of justice; there are few associations which keep their ground in the mind so stubbornly, or are dismissed from it with such difficulty by the deepest thinkers. Yet in tracing the history of this association, it certainly does not seem to have suggested itself to very early thought, but is rather the offspring of a comparatively late philosophy. It is remarkable, too, that the 'equality' of laws on which the Greek democracies prided themselves—that equality which, in the beautiful drinking song of Callistratus, Harmodius and Aristogiton are said to have given to Athens—had little in common with the 'equity' of the Romans. The first was an equal administration of civil laws among the citizens, however limited the class of citizens might be; the last implied the applicability of a law, which was not civil law, to a class which did not necessarily consist of citizens. The first excluded a despot; the last included foreigners; and, for some purposes, slaves. On the whole, I should be disposed to look in another direction for the germ of the Roman 'equity.' The Latin word *Æquus*, carries with it more distinctly than the Greek *ἴσος*, the sense of *levelling*. Now, its levelling tendency was exactly the characteristic of the *jus gentium*, which would be most striking to the primitive Roman. The pure quiritarian law recognised a multitude of arbitrary distinctions between classes of men and kinds of property; the *jus gentium*, generalized from a comparison of various customs, neglected the quiritarian divisions. The old Roman law, established, for example, a fundamental difference between 'agnatic' and 'cognatic' relationship; that is, between the family considered as based upon common subjection to patriarchal authority, and the family considered (in conformity with modern ideas) as united through the mere fact of a common descent. This distinction disappears in the 'law common to all nations,' as also does the difference between the archaic forms of property, things *mancipi*, and things *nec mancipi*. The neglect of demarcations and boundaries seems

to me, therefore, the feature of the *jus gentium* which was depicted in *æquitas*. I imagine that the word was at first a mere description of that constant levelling, or removal of irregularities, which went on wherever the prætorian system was applied to the cases of foreign litigants. Probably no colour of ethical meaning belonged at first to the expression, nor is there any reason to believe that the process which it indicated was otherwise than extremely distasteful to the primitive Roman mind."

In describing the elaborate process by which a *jus gentium* was evolved, Mr. Maine does nothing more than describe the birth and progress of Roman equity itself. The word *æquitas* only depicted a characteristic of that process, namely, a levelling or removal of irregularities. By this is meant, I suppose, the gradual process of simplification which the old Roman law underwent in the hands of the prætor. Much of the formality and cumbrous ceremonial which loaded the primitive jurisprudence gradually disappeared. The mancipation was stripped of the solemn symbols which surrounded it. The artificial distinction of property into *mancipi* and *nec mancipi* was removed. The corpus of early Roman jurisprudence, on the whole, was deprived of much of its grotesqueness, and a system was formed in which simplicity and order were the chief characteristics. This was the idea which the word *æquitas*, in Mr. Maine's theory, conveyed to the primitive Roman mind. There was, of course, no colour of ethical meaning attaching to it. Primitive equity, or the *jus gentium*, is not, therefore, what the institutes describe it to be—the law which natural reason appoints for all mankind.

But this levelling was but an insignificant feature of the prætorian system. The prætor not only corrected, as it was supposed, the existing law, but added to it and expanded it. Here, therefore, we must look for a different application of the word *æquitas*. It probably signified nothing more than a levelling, but of a kind which reduced the law to the universal standard of natural reason—not merely the removing of irregularities in the existing law, but the formation and development of a law dictated by human reason, and applicable equally to all nations—equally to the Roman citizen and the hordes of *peregrini* on Roman soil. The word may also mean the equality in the administration of justice which Aristotle speaks of in his division of justice into distributive and commutative. Dr. Whewell points out that Aristotle explains his division by a geometrical illustration. Distributive justice makes A's share to B's share (of wealth, or honour, or the like), as A's claim to B's claim, and is thus a geometrical proportion. Corrective justice, on the other hand, takes from B to give to A, so that their shares, which have

not the equality required by the contract, may be made equal; and thus establishes an arithmetical mean between them. It is not difficult to see that these two kinds of proportion would coincide if applied in similar cases: for if A and B have by contract claims which are as 2 and 1, this division is at the same time the proportion which distributive justice requires, and the equality which corrective justice directs. Mr. Maine, however, says that the idea of an equal division of numbers or physical magnitudes, as entwined with our perceptions of justice, does not seem to have suggested itself to very early thought, but is rather the offspring of a comparatively late philosophy.

Having thus connected the *jus gentium* with *æquitas*, Mr. Maine says something of the instrumentality by which the principles of the *jus gentium* were incorporated with the Roman law, and the period in history in which this important change took place:—

“Something must be said of the formal instrumentality by which the principles and distinctions associated; first, with the law common to all nations; and afterwards with the law of nature, were gradually incorporated with the Roman law. At the crisis of primitive Roman history which is marked by the expulsion of the Tarquins, a change occurred which has its parallel in the early annals of many ancient states, but which had little in common with those passages of political affairs which we now term revolutions. It may best be described by saying that the monarchy was put into commission. The powers heretofore accumulated in the hands of a simple person were parcelled out among a number of elective functionaries, the very name of the kingly office being retained and imposed on a personage known subsequently as the *Rex Sacrorum*, or *Rex Sacrificulus*. As part of the change, the settled duties of the supreme judicial office devolved on the prætor, at the time the first functionary in the commonwealth, and, together with these duties, was transferred the undefined supremacy over law and legislation, which always attached to ancient sovereigns, and which is not obscurely related to the patriarchal and heroic authority they had once enjoyed. The circumstances of Rome gave great importance to the more indefinite portion of the functions thus transferred, as with the establishment of the republic began that series of recurrent trials which overtook the State, in the difficulty of dealing with a multitude of persons who, not coming within the technical description of indigenous Romans, were, nevertheless, permanently located within Roman jurisdiction. Controversies between such persons, or between such persons and native-born citizens, would have remained without the pale of the remedies provided by Roman law,



if the prætor had not undertaken to decide them, and he must soon have addressed himself to the more critical disputes, which in the extension of commerce arose between Roman subjects and avowed foreigners. The great increase of such cases in the Roman courts, about the period of the first Punic war, is marked by the appointment of a special prætor, known subsequently as the Prætor Peregrinus, who gave them his undivided attention. Mean time, one precaution of the Roman people against the revival of oppression, had consisted in obliging every magistrate whose duties had any tendency to expand their sphere, to publish, on commencing his year of office, an edict or proclamation, in which he declared the manner in which he intended to administer his department. The prætor fell under the rule with other magistrates; but as it was necessarily impossible to construct each year a separate system of principles, he seems to have regularly republished his predecessor's edict, with such additions and changes as the exigency of the moment, or his own views of the law compelled him to introduce. The prætor's proclamation, thus lengthened by a new portion every year, obtained the name of the *edictum perpetuum*, that is, the continuous or unbroken edict. The immense length to which it extended, together, perhaps, with some distaste for its necessarily disorderly texture, caused the practice of increasing it to be stopped in the year of Salvius Julianus, who occupied the magistracy in the reign of the Emperor Hadrian. The edict of that prætor embraced, therefore, the whole body of equity jurisprudence, which it probably disposed in new and symmetrical order, and the perpetual edict is, therefore, often cited in Roman law, merely as the edict of Julianus."

When was it, then, that Roman equity had its birth? Of the circumstances of its origin Mr. Maine has said enough. It was nothing more than the result of a pressing political necessity. But the period when this necessity arose is hardly stated with any degree of precision in this theory. The Prætor Urbanus was appointed A.U.C. 387, and a little more than a century later (*viz.*, in the year 511), the Prætor Peregrinus was appointed. It would appear that the jurisdiction of the Prætor Urbanus extended over Roman citizens exclusively, and not over the *peregrini*. He tried private causes (*privata causæ*), and was the guardian of the civil law. "Juris disceptator qui privata judicet judicative jubeat, prætor esto; is juris civilis custos esto; huic potestate pari, quot cunque senatus creverit populus jusserit, tot sunt."\* If such be the case, did the idea of a *jus gentium* or of equity dawn upon the mind of the primitive Roman, after the

\* Cic de Leg., iii. 3.

appointment of the Prætor Peregrinus? Mr. Maine himself is not quite precise on this point, for he says, in another part, that "the first notions of a *jus gentium* may have been deposited in the minds of the Roman lawyers, long before the appointment of a Prætor Peregrinus,"\* but as to the precise period we are not informed in this theory.

It is already evident to the student that Mr. Maine regards the primitive *jus gentium*, or (which is the same thing) the primitive *æquitas* of the Romans as a system, (1) pressed upon their attention by a political necessity; (2) that the principles of this primitive equity were discovered by a comparison of the various customs of the Italian tribes; and (3) that they originally had no ethical meaning. Probably the primitive idea of *æquitas* bore exactly that relation to the *jus gentium* which is discovered and traced in Mr. Maine's theory. At the same time, it may be open to substantial proof that this *jus gentium*, or prætorian equity, had its origin at a much earlier period than that assigned to it by Mr. Maine, that this equity system was inaugurated long previous to the appointment of even the Prætor Urbanus, and, indeed, that it is coeval with the administration of the law itself among the Romans. If this was so, the process by which it was evolved differed from that described by Mr. Maine, and the character of Roman equity from the beginning bore essentially an ethical feature. If the process described by Mr. Maine should even find sanction in the express language of the Roman juriconsults, or in the theories of the early interpreters of Roman law, it presents features so improbable that the student must call for a different explanation of the origin of the *jus gentium* from what this process suggests. Mr. Maine's view of the origin of Roman equity is essentially historical. Equity is supposed to take its rise from the fact of the presence of foreigners on Roman soil, and the process by which it is evolved looks very much like a practical study of comparative jurisprudence, by the successive prætors who reared that equity system. Now, probably, it is easy to give a different explanation of the origin of this equity, without displacing any of the historical facts upon which Mr. Maine builds his theory.

Suppose, then, we should commence by citing, as Mr. Maine does, the well-known words of the Institutes: "All nations, who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enacts is called the civil law of that people, but that which natural reason appoints for all mankind is called

the law of nations, because all nations use it." "Quod naturalis ratio inter omnes homines constituit id apud omnes peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur." Lord Bacon, therefore, aptly says, in his argument on the jurisdiction of the Marches, "There is no law under heaven which is not supplied with equity, for *summum jus, summa injuria*, or as some have it, *summa lex, summa crux*. And therefore all nations have equity." From these words it is evident that what the Institutes mean by "equity," is supposed to be coeval with law in the history of all nations, and its fountain or source to be natural reason. The words also imply that universally it is not possible to govern a people by its own particular or enacted law merely, but in administering law, the written statute, with its limited application, and the impromptu judgment of the administrator of justice, with its universal application, must and do operate together.\* Before the prætor was called upon to administer justice, what was the law exclusively administered to Roman citizens? The enacted law of Rome was surely not sufficient to meet the requirements of all the cases which came up for adjudication. The administration of law by the magistrate and the judge at all times called for rules dictated by natural reason; and we may suppose a whole body of case-law existing in Roman jurisprudence from the very earliest times. It is certain that much of this *jus non scriptum* found a place in the Twelve Tables, together with some of the enacted laws of the early Roman kings. The *edicta magistratum* and the *responsa prudentum* may be said to represent that element in Roman jurisprudence, which from the time that law commenced to be administered in Rome, always supplied and corrected the deficiencies and defects of whatever existed in the shape of mere enacted law. It is probable that by the law dictated by natural reason, and common to all mankind, was meant therefore nothing more than that element in law,

\* The twofold element described in the Institutes as making up the laws of a people, is probably composed, on the one hand, of the enacted or written law—the bare letter, or *strictum jus*; and on the other hand, the unwritten element, which, as originating in the reason of the judge, is supposed always to correct and expand the written law. The first is the law which a people enacts, the second is the law which natural reason dictates. "The *strictum jus*," says Phillimore, "represents the influence of the aristocracy, the *bonum et æquum*, by which its rigor was mitigated, the working of the popular principle; on the one side was the letter of the law, the rigor of its doctrine deduced with inflexible severity—ancient tradition and obstinate forms; on the other, a more liberal construction, a system pliant and adapting itself to various exigencies—indulgent, and showing a disregard of forms when they oppose the claims of justice and the essential interest of society. Thus we may trace throughout, in the history of the Roman law, the rule and its mitigation, the evil and its remedy."

which is made up of the rules which natural reason suggests, and by which the adaptation of law to social wants is carried on. It is in fact, "equity," by which word Mr. Maine says he means "any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles." If this equity, therefore, was administered by the side of the original enacted law, it is difficult to trace it beyond the time when the prætor commenced to preserve it in his edict. The origin of many magistracies, and their gradual formation as well as their gradual decline under the emperors, are, according to Thibaut, involved in much obscurity. Probably not much trace of prætorian equity itself would have been left in the pages of history, had not the expedient of the written edict been early adopted. The object of the edict, emblazoned as it was on the album of the prætor, was probably twofold; on the one hand, to help to promulgate the law, and on the other, to preserve it. Now, to understand Mr. Maine's theory, it is necessary to suppose the administration of nothing but enacted law before the time of the prætor, and the non-existence of anything like a body of rules by the side of this enacted law to help to adapt it to the progressive social wants of the people. But can we imagine a state of society such as Rome presented, governed purely by a set of rigid statutes, which at that time were even the most scanty and meagre that could be found in any community? All nations that are governed by laws and customs, are governed partly by their own particular laws, and partly by the law common to all mankind, dictated by natural reason or natural equity.

Let us advance a step farther, and suppose such a political necessity as Mr. Maine argues upon, viz., the necessity of administering law to foreigners, to whom the enacted law of Rome would not be applicable. The presence of these foreigners, it is certain, pressed upon the attention of the Roman magistrate long before the period referred to by Mr. Maine. The fact, however, of their presence on Roman soil as the time of the appointment of the prætor, affords Mr. Maine ground for supposing that the necessity immediately arose of discovering some new principles, applicable, for the first time, to this new state of circumstances. It is just as probable, on the other hand, that the large increase of foreigners at the time of the prætor only lent an impetus to the development of that part of Roman jurisprudence, which the prætor, so far from inaugurating, found had been in progress ever since the administration of law had a name in Rome. The political necessity, which Mr. Maine speaks of, most probably brought into prominence the system by which

the law was expanded and developed, but which hitherto had not much credit by the side of the venerated written or enacted law of Rome. "Jus autem civile est," say the Pandects, "quod ex legibus, plebiscitis, senatus consultis, decretis principum auctoritate prudentum venit. Jus prætorium est, quod prætores introduxerunt adjuvandi, vel supplendi, vel corrigendi juris civilis gratia propter utilitatem publicam; quod et honorarium dicitur, ad honorem prætorum sic nominatum." Now, it may be asked whether the necessity for this correcting of, and supplying the civil law, arose only when the political necessity arose on which Mr. Maine builds his theory. Was the enacted law from the beginning so complete, that it answered social wants and social opinions in every stage of their progress?

But let us see how the political necessity of administering justice to strangers is met, according to Mr. Maine. The prætor, he says, took to comparing the customs and institutions of the *peregrini*. Whatever historical warrant there may be for supposing such a process to have taken place, it appears highly improbable and unnecessary. "Whenever a particular usage," says Mr. Maine, "was seen to be practised by a large number of separate races in common, it was set down as part of the law common to all nations, or *jus gentium*. Thus, although the conveyance of property was accompanied by very different forms in the different commonwealths surrounding Rome, the actual transfer, tradition, or delivery of the article intended to be conveyed, was a part of the ceremonial in all of them. It was, for instance, a part, though a subordinate part, in the mancipation or conveyance peculiar to Rome. Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance which the jurisconsults had the means of observing, was set down as an institution *juris gentium*, or rule of the law common to all nations." Now, let the student pause here, and consider the illustration which Mr. Maine puts forward of his theory, in the case of the mancipation. Precisely here it is that the greatest difficulty arises in accepting that theory. Several interesting descriptions of the *mancipatio* may be found among writers, but the following, perhaps, is the most simple and graphic: "Mancipation was a solemn sale, where, in the presence of five witnesses and of the *libripens*, who held the scales, the seller delivered the thing in question to the purchaser, who received it with these words: 'Hanc ego rem ex jure quiritium meam esse dico, eaque mihi est empta hoc ære æneaque libra;' and threw a piece of money (*as*) into the scale (*libra*) of the *libripens* who stood by." Another expression for the same proceeding, which occurs in the Twelve Tables, is *nexum*, or *nexus*. The buyer took hold of the object of his purchase, *i.e.*, when it was a

movable, and uttered an appointed form of words. He then struck the balance with the money, and gave it to the seller as price. The conditions of the bargain (*lex Mancipii*) were at the same time pronounced by the interested parties, and the Twelve Tables made them binding. Although Cicero informs us that a breach of the conditions of the *mancipatio* was punishable under the Twelve Tables, it is evident that this particular mode of conveyance was not the only one in use for the transfer of property. The *in jure cessio*, consisted in the surrender of property before an authorized magistrate. It required three persons: the *jure cedens*, that is, the proprietor; the *vindicans*, that is, the person who was to acquire the property; and the *addicens*, that is, the magistrate who pronounced the law, in Rome the prætor. This mode of conveyance, like the *mancipatio*, was instituted in the Twelve Tables, and extended to *res Mancipi* as well as *res nec Mancipi*. The person to whom the property was to be transferred, seized it and uttered a certain form of words. The magistrate asked the proprietor if he wished to vindicate, and if the latter was silent, or declined, the magistrate adjudged the property to the other.

In all these forms the student finds present a solemn ceremonial, which, to the primitive Roman was, in Mr. Maine's view, an object of respect or admiration. "The parts of jurisprudence," he says, "which the Roman looked upon with affection, were exactly those which a modern theorist leaves out of consideration, as incidental and transitory; the solemn gestures of the mancipation; the nicely adjusted questions of the verbal contract, the endless formalities of pleading and procedure." But it is a question, probably of some difficulty, whether, with a rapidly advancing civilization, and the growing necessities of society, the admiration for this cumbrous formality had any permanence whatever. The fact is, that under the rule of the prætor (more prominently than before it), several portions of the bare ceremonial of the earlier law were dispensed with. The *mancipatio*, for instance, underwent considerable change. According to Mr. Maine, this change was brought about by the prætor, who, in the case of the *peregrini*, was not able to enforce the rights arising out of contracts and conveyances, the existing forms of which were binding only upon Roman citizens; and not upon strangers. What, then, was to be done? Mr. Maine, as we have already seen, says that the prætor attempted to discover the usage common to all the neighbouring tribes, and applied that common usage (literally, law common to all mankind) to the case of strangers upon Roman soil. With reference to the conveyance of property, the forms, he says, varied considerably among the various commonwealths surrounding Rome, but in

all of them the actual transfer, tradition, or delivery of the article intended to be conveyed was a part of the ceremonial. This common element was discovered by the prætor from observation of the various surrounding customs, and thus mere tradition or delivery was held sufficient to pass property among the *peregrini*, and this form of conveyance, stripped as it was of all the formalities of the old law, was put down as an institution *juris gentium*, or rule of the law common to all mankind.

Now, what I would suggest as a questionable feature in Mr. Maine's theory, is not the fact that tradition simply, under prætorian equity, was classed as an institution *juris gentium*, but the process by which it came to be adopted and so classed. Was it just as Mr. Maine describes it? Was it necessary for the prætor, in order to discover whether tradition or delivery was a common element in the conveyance of property among the different commonwealths surrounding Rome, to have studied and observed the usages of each of those commonwealths? Can we for one moment suppose—however rude or primitive may have been the devices adopted in early Roman law—that the idea of a conveyance could for a moment have been conceived by the primitive Romans or the *peregrini* separable from the idea of tradition or delivery? The actual transfer of a thing is surely all the end and purpose of a conveyance, surrounded even, as it was in the *mancipatio*, with solemn formalities and a legal ritual. This being so in common reason, we can understand very well how the prætor, in fixing upon a mode of conveyance for the *peregrini*, should (without going through the process described by Mr. Maine) have stripped the *mancipatio* of all its trappings, and chosen alone the essential element in it, viz., tradition or actual delivery. Otherwise, it would be a violent assumption to say that in order to find whether tradition or delivery entered into the various modes of conveyance in vogue among the Italian tribes, the prætor should have been put to the tedious process of examining each of these modes; or that, searching for a common ingredient amid various forms of conveyances, he should have stumbled upon tradition as that ingredient. His natural reason—that natural reason which dictates the law common to all mankind would have informed him that wherever forms of conveyance are known on the face of the earth, tradition or delivery, *ex necessitate*, enters into all of them. Mr. Maine says that tradition was a subordinate part in the *mancipatio* or conveyance peculiar to Rome. It will be apparent that when the thing to be conveyed was movable, the actual delivery always took place, while the words and gestures merely accompanied the delivery. If even it can be said that delivery formed a subordinate part in the *mancipa-*

tion, the object of mancipation ultimately, if not immediately, was tradition or actual delivery of the thing to the purchaser.

But the student may be asking, of what importance is it whether the prætor undertook the tedious task of comparing usages among the various Italian tribes, or whether he judged by natural reason what would or would not be found in those usages? It will be remembered that the *jus gentium* as defined by the Institutes of Justinian, was the law which *natural reason* appoints for all mankind; whereas, in Mr. Maine's theory, it was the law merely found common among the communities surrounding Rome. But if we look at the illustration which the mancipation affords, we have sufficient warrant for saying, that "tradition" became a rule *juris gentium*, not because it was *discovered* as entering into the various forms of conveyance among the *peregrini*, but because it was judged in common reason to be, *ex necessitate*, the universal rule among all nations. This view of the subject materially affects Mr. Maine's attempt to associate the origin of equity with an historical event, which, again, was a pure contingency. He says that the *jus gentium* was forced upon the attention of the primitive Roman by a political necessity—the necessity of administering law to foreigners. Now, it is probable that the vast changes which gradually were worked upon early Roman jurisprudence, the most prominent of which was the disappearance of much of the rude formalities of the primitive law, came about by the pressure of advanced social opinions and social necessities. It may well be doubted whether the solemn forms and ceremonies which attended the carrying out of contracts at any time were considered more than a useless burden. They were merely rude devices to preserve evidence of the fact of the actual fulfilment of contracts. At no time can they be said to have been regarded otherwise. In the *mancipatio*, for instance, the presence of five witnesses was necessary. The scales, the money, and the nicely adjusted questions and answers, were not really considered the gist of the contract or conveyance, but so many artificial proofs of the real character of the transaction which they attested. In the early history of most communities such artificial devices abound, but are always found to give place to more simple expedients. The 60th chapter of the Law of the Ripuarian Franks, for instance, ordains that the contracting parties shall summon children to be present at their agreement, and shall pull the ears of these witnesses, and strike them on the face, in order that they may the better recollect what they have seen and heard.\* The

\* "Si quis villam aut vineam vel quamlibet possessiunculam ab alio comparaverit, et testamentum accipere non potuerit, si mediocres res est, cum sex testibus, et si parva cum tribus, quod si magna cum duodecim, ad locum traditionis cum totidem numero pueris accedat, et



delivery of a rod, or virge of a straw (*festuca*), the branch of a tree (*ramus*), a clod of earth (*cepes*), by one party, declaring at the same time his intention to the other, was the most common symbol of consent among the Franks. The symbol mentioned in the book of Ruth will occur to the reader: "To confirm all things, a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel." By the Roman it is evident that the formalities of the *mancipatio* very soon came to be disregarded. As standing in the way of *bona fide* contracts of honour, they came even to be ridiculed. If the prætor never had to administer law to foreigners, the old *mancipatio* would have been displaced by common consent, as an institution of bygone ignorance. We may judge of the state of public opinion regarding these solemnities, when in some scenes of the comedies of Plautus they are held up to popular derision. A good-natured fellow honestly buys slaves without observing the forms of *mancipatio*, and thinks he has made a capital bargain, when an accomplice of the seller appears, and claims the slaves as his own, so that the buyer is cheated out of his price. "To check these frauds," says Lord Mackenzie, "the prætor allowed the buyer to plead the *exceptio rei venditæ et traditæ*, not only against the seller, but all other persons who derived right from him."\* If this be so, we can understand how the *mancipatio* yielded to the pressure of advanced social opinions and necessities, rather than to the political necessity to which Mr. Maine refers.

The process, therefore, which Mr. Maine says was a levelling process, employed by the prætor, was in fact really such, but it was the levelling of all irregularities to the simple standard of human reason. The jurisdiction which the prætor assumed over the *peregrini* was half as a measure of police, as Mr. Maine himself observes. Now, in administering criminal law, must we suppose, on Mr. Maine's theory, that the prætor was put to the necessity of making a comparison of the institutions of the surrounding commonwealths, in order to discover some common usage as to the definition and punishment of crimes? And yet it is probable that the interference of the Roman magistrate with the *peregrini* was more as a measure of police than otherwise. But we may ask whether there are any circumstances in the history of the past which afford a parallel to the phenomenon in Rome, of swarms of foreign immigrants upon her soil? There is an interesting

sic præsentibus eis pretium tradet, et possessionem accipiat, et unicuique de parvulis *alapas* donet et torqueat aurículas ut si in post-modum testimonium præbeant." *Lex Ripuar*, tit. 60, de *Traditionibus et Testibus adhibendis*. See "Phillimore's Hist. of the Law of Evidence,"

inquiry raised by Selden as to the position of the "stranger" and "sojourner" under the Hebrew Civil Polity, which in some measure offers an analogy to the Roman episode. The *gere shangnar*, or "strangers of the gate," as they are styled by the Jewish doctor, were a class of *peregrini*, who swarmed from the surrounding districts into Judea, and though not accounted proselytes, lived among the Jews, debarred from the rights of the Mosaic economy, but yet enjoying security under a few simple ordinances. The presence of these strangers must at all times have forced upon the Jew the necessity of applying to them certain rules and principles of law, which were strictly not mosaic, and we find various provisions made for them in the Pentateuch. Their position was different from that of proselytes, who became Jews in all respects *το λοιπον Ιουδαιον*. Induced to immigrate into Judea, where they engaged chiefly in servile labour, they found themselves secure from the depredations of the Moabites, the Ammonites, and the various tribes whose names were a terror among the Jews themselves. In the days of Solomon, when the Jewish kingdom found itself allied to the splendid court of Egypt, and was a power among the nations, the number of these strangers increased to a very large extent. One hundred and fifty-three thousand and six hundred of them are said to have dwelt among the Israelites at this time. The Talmudical rabbis agree in thinking that this vast multitude could not have been permitted to live among the Israelites without being put under the obligations designed for proselytes of the gate—that is, without submitting to and obeying the seven precepts which the rabbis pretend God gave to Noah and his sons, and which, according to them, comprised the law of nature common to all mankind.\*

But if we come down to the events of the present day, we find the British nation under the necessity of administering law, as in India, among various races, claiming separate laws and governed by divers customs. Under the magic name of "equity and good conscience" justice is administered without forcing or applying to the people the endless technicalities which load purely English law, and without searching among their various usages for a common ingredient, which the prætor, as in Mr. Maine's theory, was compelled to do. If a contract for the sale of goods is to be enforced among the Hindus, the judge does not bind them to the provisions of the Statute of Frauds, nor does he apply to them any technicalities whatever, but inquires whether a contract or obligation really did exist, and enforces it much in the same way as the prætor enforced the *obligationes honorariæ* among the

\* Selden. de Jure Naturæ et Gent., lib. ii. cap. iii.

hordes of strangers that were to be found on Roman soil. In the whole of this theory the necessity of comparing usages and laws, in order to discover a common ingredient in them (which suited the phrase "law of nations"), is not shown to have existed, and, as a theory, creates considerable difficulties.

What then was the origin of the phrase, law of nations, or law common to all mankind? There is no doubt that the first difficulty which presents itself in answering this question is the ambiguity which lurks in the phrase itself. The phrases *jus civile*, *jus gentium*, *jus honorarium*, *jus prætorium*, are invested with various meanings among the juriconsults of Rome. What these meanings are, the student would do well to find out and distinguish. Meanwhile it may be remarked that the phrase, as used in the passage quoted from the Institutes, is probably intended to stand for that element in Roman jurisprudence which found its origin in the individual judgment and discretion of the magistrate and the prætor in all cases coming before them, as distinguished from the enacted law whose application was limited, and whose origin was only traceable to the elaborate machinery of State legislation. The body of rules, therefore, dictated by the prætor was pre-eminently the law applicable to all nations. It suited in its reasonableness the Roman citizen equally well as the stranger on Roman soil. Probably there is a similarity in the application of English case law, which we are in the habit of describing as a "body of reasoned truth rigidly and carefully evolved," to foreigners. In India, for instance, the principles of English law are largely applied to natives. "You may ask," says Mr. Maine, in his work on "Village Communities," "what authority have these borrowed rules in India? Technically, they have none whatever; yet though they are taken (and not always correctly taken) from a law of entirely foreign origin, they are adopted as if they naturally commended themselves to the reason of mankind."\* So possibly, with the large discretion vested in the prætor, the law which he evolved was adopted as if it naturally commended itself to the reason of mankind, and was therefore considered pre-eminently the law which natural reason dictates, as distinguished from the technical enacted law of Rome.

HENRY RAYMOND FINK.

\* "Village Communities in the East and West," p. 75.

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#### IV.—PROSPECTS OF LAW REFORM.

By ANDREW EDGAR, LL.D.

**T**HE debate on law reform in the House of Commons, on the 29th July, was in many respects remarkable. Some most important questions indeed were raised, which were very far from being adequately discussed: Some matters of great moment were merely alluded to without being properly stated. The speakers on the opposite sides looked on the subject introduced to the notice of the House by Mr. Vernon Harcourt from entirely different stand-points. One set could see only the advantages which they considered would arise from an organic change in our judicial system; another set could see only the difficulties which any considerable change involved. There was no regular joinder of issue on any definite matter between the parties; and the division, which was the result of the debate, can scarcely be considered as showing the real views of the House on the important subject to which its attention had been called.

Notwithstanding all this, we think the debate is likely to be memorable in the history of law reform. If it was somewhat indefinite in its character and uncertain in its conclusions, it only reflected too truly the present aspect of the question to which it related. But next to seeing our way out of a difficulty, the most important thing is to see wherein the difficulty lies, and the debate can scarcely fail to throw some light on this. Whatever else it failed to bring out clearly, it at least showed that any wide and sweeping change in our judicial system is not to be thought of under present circumstances, and that the only wise plan is to attack practical evils without attempting theoretical consistency and perfection. If it has the effect of recalling law reformers from striving after what at present are impossibilities, and inducing them to make vigorous efforts to bring about judicious and practicable amendments, it may be remembered in years to come with scarcely less interest than Lord Brougham's great speech in 1828.

The mention of that celebrated speech suggests the very great difference in the position which the question of law reform occupies at the present time, from that which it has occupied up to a recent period. The most important changes which Lord Brougham proposed in 1828 did not involve any essential and radical alteration in the existing system. They were all conceived with reference to the plane of that system, and their object was to give new vigour and precision to its action. With the exception of what was done in bankruptcy

jurisdiction, all the great changes in judicature and in procedure, which were then proposed by Lord Brougham, and have since been carried into effect, have been assimilated without difficulty by what had been long established. The alterations that have been introduced have worked from the first with comparative ease, and now seem only natural parts of our system. The modern county courts have become a deeply-rooted institution, which no one would dream of abolishing; and, indeed, the tendency is rather to extend than to restrict their jurisdiction. Of the admission of parties to suits and actions as witnesses, it may be truly said that it works as harmoniously with the rest of our legal system as if it had existed from the time of King Alfred. The amendments in Common Law and Chancery procedure, however beneficial their operations may have been, cannot be considered as having brought any alien principle into the working of the Courts of Law and Equity. It is unnecessary to multiply instances, but it may be safely laid down that all the great changes which have been introduced into our legal system during a period of forty years, were designed merely as amendments of the existing fabric, and were intended to build up, and not to pull down.

It can scarcely be denied that we have now arrived at a stage in the history of law reform when changes of a wider character than any which have hitherto taken place are required, although it is not obvious why they should be on an entirely new principle. It is admitted on all hands that the judicature of this country is not in a satisfactory condition, and that its machinery is not adequate to the wants of the times. A mere increase of judges would not form the appropriate remedy for the evils which now exist. What is wanted is a better distribution of our existing judicial strength, and greater ease and freedom in its working. Throwing aside for the present the question of appellate jurisdiction, and some other questions, as collateral to the main issue, there are three important matters connected with our judicature which demand attention. In the first place, it is necessary that our judicial force should be made fully available for the ends of justice. No one can say that it is so at present in any of our courts, and especially in the Courts of Common Law, notwithstanding all the beneficial reforms which have taken place. In the second place, it is necessary that there should be greater facilities for the local administration of justice. Whatever benefits may have resulted from the County Courts, they have certainly not met this want adequately. Lastly, it is necessary that each court should have full jurisdiction over every matter of which it is seised. This, although many beneficial extensions of jurisdiction in the Equity and Com-

mon Law Courts have been introduced, is still very far from being fully and adequately effected.

Now all these objects must be accomplished, and they must be accomplished thoroughly. It is not so much public opinion, as the necessity of the case which requires them. The present system cannot go on as it is, and no more patching up will be of much use. But the question is, to what extent should changes go in order to bring our judicature into harmony with existing wants? Mr. Vernon Harcourt comes forward with a scheme founded on the first Report of the Judicature Commission, for the entire reorganization of our judicial system, certainly complete and consistent in itself, but in which everything is to be altered; the distinction between Courts of Law and Equity abolished; continuous sittings substituted for terms and vacations; and the circuits supplanted by districts. He takes down, in fact, the whole of the materials of the present system, and proceeds to reconstruct them on an entirely new plan. We have no desire to criticize this plan, and at once admit its merits. We do not think it necessary to question whether if such a scheme were carried into effect it would be likely to work well. But can it be carried into effect?

Is there force enough, political, social, or moral, in existence, which is available for this purpose? The Solicitor-General denies that there is; and although there is much in his speech which we could wish unsaid, we must acknowledge that on this point he occupies a strong position. It may be very true that the public, according to Mr. Vernon Harcourt's view, ought to interest themselves in the reform of our judicature, but unfortunately they do not do so. Law amendment can never be a popular question; not because there is any opposition to it in the public mind, but because it is regarded with the most perfect indifference. It was justly stated by the Solicitor-General, "that all the law reforms of the last forty years had been initiated and carried through by lawyers." No important alterations, we venture to think, in our system of judicature can be carried into effect without the support, or at least the concurrence, of the profession. Without making the interests of the profession everything in such a matter as this, they must at least go for something; and it is scarcely a subject for wonder, that men who depend for their livelihood on their practice under the existing system, should look with apprehension on a proposal for an entire change in our courts and in our procedure. The question of judicature, it must be remembered, touches the profession much more closely than it does the rest of the community. A saving in time and expense in legal proceedings may confer some benefit on a few suitors, but it will not affect materially the interests of the community at large. What-

ever system of judicature we have, must be worked by the profession, and they must be the chief gainers or losers by any changes which may take place. We do not think that in either branch of the profession is there the slightest feeling against any necessary change which will secure the due administration of justice, but we certainly think there would be a very strong feeling against any change which went farther than was strictly necessary.

The true theory of law reform, as of every other kind of reform, in such a country as ours, is to provide for the redress of admitted evils by modifications of our existing system. Nothing is more easy than to propose wide schemes, which are to sweep away everything, and to bring in an entirely new state of matters. But the ability to counteract such schemes is not the sort of ability required for a reform of our system of judicature. What is required is the power of seeing what are the parts which chiefly give a character to the whole, what are the things which specially produce the evils that are complained of, what are the specific remedies best fitted to redress those evils, and how to effect the *maximum* of benefit by the *minimum* of change. The beneficial results of a change are by no means proportional to the extent of such change, but depend entirely on its being suited to effect the objects sought. If we can make our present judicial strength fully effective, render the local administration of justice satisfactory, and give plenary jurisdiction to each tribunal in every matter that comes before it, without altering the essential character of our system, there can be no necessity for having recourse to a High Court of Justice, continuous sittings and districts. By shortening the long vacation, by reducing the number and extending the duration of terms, by holding more frequent assizes, by making provision for the proper administration of justice during vacations, by giving greater facilities for arbitration at an early stage of a cause, and improving the system generally, and by giving authority to every court to decide on all rights and duties arising out of, or connected with, the matter in dispute between the parties, and providing the means of working out its orders and judgments, all the real and substantial evils which are now complained of would be obviated. With respect to uniformity of procedure, the manner in which a system of plenary jurisdiction worked would show whether such uniformity was desirable, and if so, in what way it was to be effected.

A reform of our judicature on such a principle as here suggested is of course very much a matter of detail, and is not so striking as some of those which have been propounded; but it involves far greater difficulties, and such as none but accomplished and experienced lawyers are capable

of dealing with. Much consideration would have to be given to the causes of the present evils, and to the effects likely to be produced by any change proposed. The question throughout would be, how to combine the smallest amount of change with the greatest amount of improvement. Under the circumstances of the case, it is obvious that the smallest amount of change which can be contemplated will necessarily imply some very considerable alterations in the present system, but whatever they may be we do not think they will involve anything resembling a cataclysm and a recreation. The best course would be to issue a supplemental commission to the present Judicature Commission—whose past labours in any final settlement of the question will be found invaluable—requiring them to prepare a scheme on the principle we have stated. Even if we had to wait for some time for their Report, it would be better than to rush into hasty legislation on such a subject.

Hasty legislation, however, we scarcely anticipate. Before any scheme is sanctioned by Parliament it must receive a greater amount of professional support than any which has yet been proposed has obtained. Except on the question of appellate jurisdiction, there is no reason to suppose that the House of Lords would be more obstructive than the House of Commons, in so far as a reform in our general system of judicature was concerned. Such a scheme as that of Mr. Vernon Harcourt would have no chance in either House. Not even the strongest Government could carry a Bill embodying such a scheme, unless it had been clearly demonstrated, in the sight of all reasonable men, that nothing less sweeping and extensive would be adequate to the occasion. There is no pretence, however, for saying that this has been done either by the Judicature Commission or by Mr. Vernon Harcourt. The real and practical aspects of the question have never yet been discussed, and no solid ground has therefore been attained on which we can proceed to legislate. If common fairness were applied to such a matter, there would be no reason discoverable for charging the Government with lack of zeal and energy in respect to this subject. It would be more just to blame them for rashness in allowing such measures as the Lord Chancellor's High Court of Justice Bill, and Appellate Jurisdiction Bill, to be brought before Parliament.

On the whole, therefore, we are of opinion that the answers of the Attorney and Solicitor Generals to the charges of Mr. Vernon Harcourt were in substance satisfactory. The attempt of the latter to throw cold water on the whole question of judicature reform was certainly to be regretted, and the tone of despondency adopted by the former was by no means encouraging. But in the present state of matters it is not of



much consequence what the personal views and feelings of either of these gentlemen may be. As soon as any well-considered measure is proposed, in which the profession generally can acquiesce, there will be very little difficulty in carrying it through Parliament; and until such a measure is proposed the attempt to legislate will be vain. Considering the difficulties which are involved in the question of appellate jurisdiction, it is well worthy of consideration whether some such scheme as that recommended by the Lords' Committee, with certain necessary modifications, might not be adopted. If a really efficient Appellate Court can be obtained in this way, it matters little whether it comes up to certain theoretical notions of what a Final Court of Appeal ought to be. To take the Lords at their word would get rid of difficulties which seem almost insuperable, and would render other questions less complex. Entertaining the views which we have already stated as to the reform of our system of judicature, we cannot recommend the adoption of the scheme proposed in the second Report of the Judicature Commission. We speak with the utmost deference, but we see no prospect at present of any such plan being carried into effect. The only hope of reforming our system of judicature lies in bringing forward something of a much less extensive character, and dealing in a much less sweeping manner with present arrangements. The problem how to do this, and at the same time to apply a remedy to every real evil which exists, is still unsolved, and until it shall be pronounced insoluble upon authority which cannot be questioned, it will be impossible to carry into effect either the scheme of Mr. Vernon Harcourt, or that of the Judicature Commission.

We have confined our observations on law reform to the judicature question for several reasons. This is the question which presses most; and until it is settled, there will be little hope of doing much in any other line. It is not going too far to say that, as matters now are, the reform of our system of judicature is a condition precedent to any other kind of law reform. No other question besides is of so practical a character, or involves anything like the same immediate results. To the profession generally it is a matter of far more importance than all the other changes in our legal system that have been proposed, put together. Lastly, with reference to these, it may be considered as *instar omnium*. The same difficulties which surround it, surround all the others. In some respects it may be said to be less perplexing than some of the latter. The inquiries of the Judicature Commission, if they cannot be regarded as having settled the question, have at least thrown much useful light on various subjects, and afforded many valuable suggestions. We have endeavoured to offer a dim guess at the mode in which the matter might be

arranged, so as to produce a measure satisfactory to the profession, and likely to be sanctioned by Parliament. But such questions as those of codification, and the amendment of the law of real property, are still in the most nebulous condition. With respect to these matters, the very objects to be sought have not yet been ascertained, and it would therefore be absurd to discuss means and appliances.

It will be readily admitted by all who are not carried away by enthusiasm or by party feeling, that great difficulties lie in the way of any extensive reform in the law, and that no blame justly attaches to the present Government for having done so little. All the more obvious changes in the law which had formerly been proposed, have already been accomplished, and we have now arrived at a period when far more extensive changes are required. But these, from the difficulties which environ them, involve considerations which scarcely arose in former instances of law reform. That many of these difficulties will ultimately prove surmountable is scarcely to be doubted, but premature legislation is not to be thought of. In the meantime, however, it ought to be a consolation to the friends of law reform, that although little has lately been done in the way of legislation, a beneficial change in the law itself, of more value than a variety of alterations introduced by statute, has been effected by the courts themselves. Technicalities and forms have assumed their proper place, the astuteness of judges is employed to enlarge, not to narrow, remedies; and where a principle is obvious, decided cases no longer stand in the way of justice. And this tendency of the judges increases from year to year, and almost from term to term. We are not likely to see again on the Bench a judge of whom an epitaph could be composed like that quoted by the Attorney-General, in the debate to which we have referred, which described him as one who "*summâ industriâ et summâ diligentia, leges Angliæ ad absurdum reduxit.*"

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## V.—SUMMARY OF THE REPORT OF THE JUDICATURE COMMISSIONERS.

**T**HE second Report of the Commission, about which so many rumours have been current, has at length appeared. In the present number we propose to do little more than give a summary of its contents. It will be in the recollection of our readers that the first Report was deemed inadequate and

unsatisfactory, because the inquiry of the Commissioners, limited by their commission of September, 1867, had not contained any notice of the county and certain other courts. It dealt exclusively with the superior courts. To remedy this defect, a supplemental commission was issued in October, 1869. This authorized inquiry into the operation and effect of the present constitution of the Palatine courts, the county courts, and all other inferior and local courts, both civil and criminal. It will be remembered, also, that the first Report recommended the union of the various superior courts of law and equity into one great court, forming a High Court of Justice. It pointed also to the extinction of the assize system, and the establishment throughout the country of certain centres, at which there would be permanent branches of the high court, with locally resident judges, and local bars.

The present Report states that the Commissioners directed their attention, in the first instance, to ascertaining the principles upon which the inferior courts of civil jurisdiction should proceed. The question which they had to solve was, how the judicial and administrative force of the courts may be best disposed so as to do the largest quantity of work in the simplest, most expeditious, and most efficient manner.

The Commissioners remark that the subject-matters of litigation may be ranged under three heads :

(1.) Those requiring the highest legal ability. These can bear the expense of obtaining it, even though the parties and witnesses have to be moved to some distance. They can bear an elaborate and central tribunal.

(2.) Those where the matter in dispute is so small, that they will not bear any considerable expense for their decision. These require a cheap, simple, and local procedure and trial.

(3.) Those which are intermediate, between class (1) and (2). Every professional reader has known numbers of small cases where the points in dispute have been as intricate and difficult as in large cases. But these cases would not bear the expense of taking witnesses and parties to any considerable distance. These require a tribunal of higher character than that necessary for the decision of questions in class (2), and yet they cannot, by reason of the expense, be transferred to class (1).

How then does the Commission propose to deal with these three classes? We will anticipate the conclusions up to which the Report slowly leads, by saying, that it would remit cases in class (1) to the superior courts; that it would send those in class (2) to the county courts; and that cases in class (3) should be decided by the registrars.

This last obviously requires explanation. Again anticipating the argument, we may say briefly that the Report points out that in the present county courts the business done divides

itself naturally into two parts; first, that which closely corresponds to the business done in the superior courts; and second, all the small, undefended, and tally-shop business which occupies so much of the time of our county court judges. What the Commissioners propose is to raise the character of the county courts, by allowing them to take cases unlimited in amount and of every kind, and to take from them the mass of their small business.

The Commissioners point out that the county courts, since they were established in 1846, have been gradually extending the sphere of their operations. Their cheapness and convenience have attracted to them a large increase of business. This business is now of a very varied and anomalous character. They have common law jurisdiction up to 50*l*. They have equity jurisdiction in money matters up to 500*l*. They have jurisdiction over questions arising out of partnerships, in suits for specific performance, and in various other matters. Some of them have an admiralty jurisdiction. In salvage cases this extends to property saved amounting to 1000*l*., or to an amount claimed of 300*l*. They have now jurisdiction to give possession of premises between landlord and tenant; a jurisdiction in replevin, and in interpleader; a jurisdiction relating to the probate of wills, and grants of administration in certain cases. By various statutes they have also jurisdiction in other matters, some of them of considerable importance, but not immediately connected with the original functions of the courts. Thus, proceedings may be taken in the county court under the Friendly Societies Acts, 1855-1858; the Succession Duty Act, 1853; the Nuisances Removal Act, 1855; the Metropolitan Buildings Act, 1855; the Municipal Corporations Act, 1859; the Customs Consolidation Act, 1853; the Married Women's Property Act, 1870; the Merchant Shipping Acts; the Charitable Trusts Acts; and other statutes. By the County Court Acts of 1856 and 1867, the superior courts of law were empowered, under certain circumstances, to send for trial, and in some cases entirely to transfer to the county court, actions not of contract only, but of almost every description of tort (whether within the original jurisdiction of the county court or not), and without limit as to amount. Several of these Acts contain provisions as to costs, which in effect compel or induce plaintiffs to resort to the county courts instead of the superior courts.

Besides these various jurisdictions, the Bankruptcy Act, 1869, constituting the county courts local courts of bankruptcy, has added another jurisdiction, the most important of all. Questions of the utmost importance as to property, real or personal, whatever be their complexity or the amount involved, which, under the old system, would have been

litigated as special jury cases, or suits in equity, may now be disposed of in the country county courts, sitting as local courts of bankruptcy; and, however surprising it may appear, this jurisdiction is, to a great extent, necessarily exercised by the registrars, who are for the most part attorneys in the actual practice of their profession in the same district.

The effect of these changes is one with which the Bar is only too familiar. While the number of men called has been increasing rapidly year by year, business has been sent from the superior courts into courts where, as a rule, the aid of the higher branch of the profession is comparatively seldom required.

Since the passing of the Act of 1867, the writs issued out of the superior courts have considerably diminished. The writs issued in that year were 127,702. In 1868 the number fell to 83,174, being a decrease of 44,528, or nearly one-third. This decrease has been continued. The writs issued in 1869 were 81,778; in 1870 they were 72,660.

The Report points out that the result of all these various changes is, that the county court is a very different institution from what it was when first established under the Act of 1846. It is found in practice that some of its duties clash with others; that the smaller business is interfered with by the larger, and the larger by the smaller. As might have been expected, the consequence of the jurisdiction of the county courts having been given to them by so many Acts is, that the enactments are inconsistent with each other. The existing system is literally a thing of shreds and patches, constructed almost regardless of simplicity or uniformity. Here, for instance, are examples:—In its bankruptcy jurisdiction, the county court is practically a local court of first instance, with very extensive powers, and its jurisdiction is exclusive. Over common law claims, as the subject of an action, its jurisdiction is limited to 50*l.*, and the superior courts have concurrent jurisdiction in actions of contract when the amount claimed exceeds 20*l.*, and in actions of tort when it is above 10*l.* Indeed, the superior courts still have jurisdiction in cases where the claims are below these limits, but practically the jurisdiction of the county courts in such cases is made exclusive by provisions which preclude a plaintiff from recovering costs, if he sues in the superior courts. In equity matters every suitor has the option, up to 500*l.*, of proceeding either in the superior or the inferior court, the jurisdiction conferred on the county court in equity being in all cases only concurrent. These inconsistencies have led to anomalous results. For instance, in bankruptcy, if on the application to a county court on a debtor's summons, or on a petition for adjudication, the petitioning creditor's debt be disputed, and put in course of trial,

such trial must be in a superior court of law, if it be a legal debt exceeding 50*l.*; but if the debt be an equitable debt not exceeding 500*l.*, the county court may determine it. Yet when once the debtor has been made bankrupt, the county court, as a local court of bankruptcy, has power to try questions to any amount and of any kind, between any persons interested in the bankrupt's estate. Its jurisdiction is enforceable, not only against parties to the litigation before it and persons who, though not parties, voluntarily come in and submit to it (which are the limits of the jurisdiction of the superior courts), but against all persons claiming adversely; and when once its jurisdiction has properly attached, no other court can prohibit or restrain its exercise.

The present system of appeal from the county courts may be referred to as further illustrating the anomalous working of separate jurisdictions, even when exercised by the same court. At present the appeal in common law cases lies to one of the superior courts of law, and the appellant may select whichever court he prefers. The appeal is limited, unless with the sanction of the judge, to cases where the sum in dispute exceeds 20*l.* In Admiralty suits, the appeal lies to the High Court of Admiralty, and the limit of appeal is fixed at 50*l.*, and no further appeal is allowed, save by permission of the judge. In equity proceedings, the appeal must go to one of the Vice-Chancellors specially appointed to hear appeals from the county courts, and no limit whatever is imposed, and no further appeal is allowed. In bankruptcy cases, the appeal is to the chief judge in bankruptcy. From the chief judge there is an appeal to the Court of Appeal in Chancery; and, by leave of the Court of Appeal, to the House of Lords; and no limit whatever is imposed. And in some of these instances, dependent upon the nature of the jurisdiction, the appeal is limited to questions of law, whereas in other cases, the appeal may be upon the facts as well as the law.

Other inconveniences and inconsistencies are pointed out by the Commissioners, and none can doubt that they call for alteration and correction.

Now comes the question, what are the remedies? Clearly it is too late to return to the state of things existing prior to 1846. The Commissioners suggest the incorporation of the county courts into the supreme or high court of justice. They do it in these words:—

“Assuming, in accordance with our previous recommendations, that there will be effected a consolidation of all the superior courts into a single great court of civil judicature—the supreme or high court of justice—which will contain within itself the elements of all the original jurisdiction now vested in each and all of the courts to be consolidated—we

recommend that the county courts should be annexed to and form constituent parts or branches of the proposed high court of justice. This would at once put an end to many of the anomalies, inequalities, and division of jurisdictions above adverted to, and to the uncertainty, expense, and delay to which litigants are now exposed from courts acting on conflicting rules. All original jurisdiction being centred in, and exercised derivatively from, the high court, the extent and mode of its exercise would simply be a question of distribution. Facilities would be given for the removal, transfer, and proper trial of causes and proceedings, due regard being had to the circumstances of the case, and the wishes of the litigants. It would no longer be necessary to preserve separate forms of procedure; and it would be possible to provide for the decision of common law, equity, admiralty, and bankruptcy demands by means of one uniform, simple procedure, common to all jurisdictions.

"Upon the incorporation of the county courts into the high court of justice, the judges and officers of these courts would necessarily be attached to and become judges and officers of the high court, and would respectively exercise such functions and perform such duties as may be assigned to them by general rules or by special order of the high court."

The Report goes at some length into the existing arrangements of the county courts. Much of this is known to our readers. The conclusion at which the Commissioners arrive is that the existing system is altogether too costly and elaborate.

The Report deals next with the question of *jurisdiction*. To remedy the anomalies in connection with this subject, the Commissioners add—and we must give this portion of their recommendation in full—

"We think that these courts, as constituent parts or branches of the high court of justice, should, subject to the power of transfer hereinafter mentioned, have jurisdiction, unlimited by the amount claimed, whatever be the nature of the case; and that thus, if the parties to the dispute are content that it should be decided in the county court it may be dealt with accordingly. It is true that the existing limits of the jurisdiction of the county courts may be waived by consent, but practically this power is of little use, for it is difficult to induce disputants to agree upon anything.

"We propose that when the amount sought to be recovered exceeds the limit which we shall suggest, the defendant should be entitled, as of right, to transfer the cause into the superior branch of the court. When the defence involves a cross claim above the same limit, the plaintiff should have the like right. There may be cases below the limit which still ought from their nature to be tried in the superior branch of the court.

In every case, upon the application of either party, there should be a power of transfer by leave of a judge of the superior branch of the court, sitting in chambers, upon his being satisfied that the case is a proper one to be so transferred, or that for some special reason it ought to be heard and disposed of by a superior tribunal.

"We think that what is commonly called the exclusive jurisdiction in common law matters should be raised from 20% in contract, and 10% in tort, to the uniform limit of 50%. The information we have received as to the cost of contested actions in the superior courts in claims to this extent, shows that the expense is very large in reference to the amount recovered, and seems to make such a change very desirable.

"We recommend that the existing restriction of the jurisdiction of the county courts to certain kinds of tort should be abolished, and that the jurisdiction of these courts be extended to all actions of tort. These actions really are not more difficult than actions on contract. But whether difficult or not, they will not, as a rule, bear the expense of trial before the superior tribunals. Actions of this description are frequently brought for purposes of extortion and costs. It has been found necessary, in order to suppress such attempts, to enact, that they may be sent, in certain events, to the county courts to be disposed of. It is true that actions for defamation, malicious prosecution, and false imprisonment, sometimes involve difficult and important questions; when they do, if not originally brought in the superior branch of the court, they will doubtless be transferred into it.

"We think that the exclusive jurisdiction in admiralty cases should be fixed at 50%, as we are unable to see any reason why that amount should be a limit in one class of cases and not in another of a similar kind.

"We recommend that all cases in the county courts should be dealt with by one uniform procedure, and that the existing distinctions as to common law, admiralty, and equity cases should be abolished. In our former Report we called attention to the inconvenience which results from these jurisdictions being distinct and separate, although vested in the same judge.

"The proposal we have now made, that the county courts should have jurisdiction, unlimited by amount, will abolish the existing restriction by which they have jurisdiction in equity matters only to a certain amount, and in certain proceedings only, and will extend the jurisdiction in equity of the county court to all matters cognizable by the high court.

"The nature of many causes in equity—such as suits for specific performance, suits for the administration of estates, and for the execution of trusts—is, however, so different to ordinary money demands, recoverable at common law, that we



think it impossible to fix any absolute limit of exclusive jurisdiction by reference to amount. We propose that in cases of this nature the absolute right of removal, applicable to other cases, should be qualified by general rules, or by making the leave of a judge of the superior branch of the court necessary.

"The jurisdiction of the existing courts of equity in matters of injunction is, however, of so important and delicate a nature that there should be a special provision for reserving that jurisdiction, in certain matters, to the superior branch of the court.

"As respects bankruptcy business, we see no reason why litigation between the estate and third parties should not be conducted in the same manner as other contentious business. The present system under which such questions, irrespective of the amount involved, or of their importance, are in the first instance dealt with and decided in the county court, and frequently by the registrar of the court, with the absolute right of either party to prosecute two appeals, as well upon the facts as the law, and, subject to leave being given, a third appeal upon questions of law is, we think, by no means satisfactory. This system is calculated to lead to undue expense and litigation in questions of trifling importance; and, on the other hand, the decision of difficult cases, or cases involving large sums, may be seriously prejudiced by the evidence being taken before a tribunal which is not intended by either party finally to decide the controversy.

"The ordinary administrative business in bankruptcy, and the decision of questions as to right of proof, and other like matters as between the creditors themselves, or as to the conduct of the trustee, should of course be dealt with by a summary proceeding, and should, we think, be regulated by rules of the high court. It seems to be by no means necessary to keep up, even in name, a distinct bankruptcy jurisdiction, but it may be deemed inexpedient at once wholly to abolish the London court. As vacancies occur, the duties of the London registrars could from time to time be transferred to officers of the high court."

*Procedure* is the next subject dealt with. The want of a proper classification of the business constitutes a practical grievance. Causes which are to be contested are mixed up in the same list with causes which are really undefended. Suitors, having causes of importance to try, and witnesses in attendance, are kept waiting, while what is merely routine business is being transacted. The want of a more extensive power of obtaining judgment by default is another ground of serious complaint. At present, until the cause is called on for hearing, the plaintiff generally has no means of knowing whether or not it is to be defended, so that unless the case

comes within certain exceptions, he is compelled to be prepared with proof of his debt, and the going through these formal proofs occupies unnecessarily the time of the court, and keeps other parties and witnesses waiting.

The Commissioners recommend that the procedure shall be of the most simple and summary description, and similar to that now in use in the county courts.

They further recommend that the same power of obtaining judgment by default, by writ specially endorsed, which has since 1857 existed in the superior courts, should be extended to the county courts.

They think that the parties should be relieved from this obligation, and should be at liberty to serve their own process in the manner and according to the practice which prevails in the superior courts. The service should, as in the superior courts of common law, be required to be personal, unless under an order allowing substituted service.

It will be desirable that the execution of the process of both branches of the high court should be committed to the same officer. The effect of this would be to get rid of the necessity for a high bailiff.

The "banking system" of the county courts is a branch of the work which adds enormously to the expense of the courts. In these days of post-office orders, all except those interested in the maintenance of the present system, would probably agree with the Report, that this may well be got rid of.

A still further saving would be made, if the court fees were collected by stamps.

Next follows one of the most important recommendations in the Report:—"With a view of affording time to the judge to give his undivided attention to the more important business, we think it expedient to confer jurisdiction on the registrar to deal with the smaller class of cases."

Obviously, the effect of transferring a very considerable share—would it not be the greater share?—of business to the registrars, would be that the work of the county court judge would be very much diminished, and a concentration of the county courts, with a reduction in the number both of the judges and of the registrars might be effected. The Report suggests this course. It does not enter into details on the subject, but it indicates that certain convenient centres should be selected, at which the judge should ordinarily be found, and in the neighbourhood of which he should reside, and where at frequent short intervals he should sit either in court or in chambers; secondly, that certain other towns should be selected as places at which he should be required to hold courts; and thirdly, that he should further be empowered, and that it should be his duty, to hold a court for the trial of any par-

ticular case at any place within his district, where from the number of witnesses or other cause it should be deemed more convenient to do so. They add:—

“We propose that for each district connected with these central courts, there should be two registrars, and that a registrar should at short intervals visit the towns in the district at which county courts shall be required to be held. We propose that one registrar should be in daily attendance at the central town of the district, and should there sit either in open court or in chambers, as may be required by the nature of the business he may for the time being be called upon to transact. Probably in some central places more than two registrars may be required. We think that the registrars should be empowered to deal with cases in which the plaintiff is entitled to judgment by default; to fix periods for payment of debts by instalments; to hear (with certain exceptions) cases not exceeding 5*l.*, and by consent any matter within the jurisdiction of the court, either party having the power before the hearing, but not by way of appeal, to refer the case to the judge. The judges will thus be relieved from going to the smaller places; whilst all cases involving difficult points of law, or which the parties or the registrar may think sufficiently important to be tried by the judge, will be heard at one of the principal places at which the judge will hold his court.”

In regard to the objection that such a proposed concentration of business would increase the expense by the parties and their witnesses having to travel greater distances, they admit that this may be so in some cases. But, on the other hand, there are at present important matters tried at county courts in small towns where there are no advocates, and the cost of bringing them specially from a distance more than outweighs the expense of taking the parties and witnesses to the place where the advocates exercise their profession. Bearing in mind the vast addition made to the means of communication by railways since the present courts were established, and the greater power of classification and arrangement of causes that will exist if the recommendations are adopted, the Commissioners doubt if the expenses of the parties to such causes will be increased.

The Report recommends that the registrars who are in future to act as judges, shall be paid by salary and not by fees. They may be appointed either from barristers or attorneys. The appointment is to be with the Lord Chancellor.

The Commissioners think that with these changes carried into effect, we may well get rid of all local and inferior courts. They seem to anticipate that this recommendation will meet

with opposition from some of the powerful corporations interested in their maintenance. The existence of small local courts is no doubt objectionable in many ways, but the argument given by the Commissioners that, "if they did not exist, no one would think of establishing them," is surely a dangerous one. Who would now think of making the Bar wear horse-hair, or of having a woolsack, or possibly of establishing a monarchy in England, if such did not exist? and yet we should dispute the applicability of the argument of the Commissioners.

The local courts which they propose to abolish are the Lord Mayor's Court, the Court of Passage at Liverpool, the Salford Hundred Court at Manchester, the Court of Chancery of the County Palatine of Lancaster, the Court of Common Pleas at Lancaster, and the Court of Pleas of the County Palatine of Durham, the Admiralty Court of the Cinque Ports, and the Stannaries Court of the counties of Devon and Cornwall. The respective jurisdictions of these courts will, if the proposals are adopted, be annexed to or become merged in the high court.

The Commissioners think it desirable that the salaries of the judges should not be uniform. They object to the power which the county court judges now possess of appointing deputies to sit for them. They recommend that the power to appoint a deputy for the judge, and also for the registrar, should be vested in the Lord Chancellor. Upon the consolidation of the circuits, and when the changes we have indicated in the duties of the judges and officers of the courts shall in any case take effect, the Commissioners think that the judges presiding over the more important of these courts should receive salaries proportioned to the more important duties they have to perform, and that it would be a fitting encouragement to the judges of these courts, and an inducement to them to aim at excellence in their decisions, if, from time to time, as vacancies occurred, proved ability in the discharge of their judicial duties was rewarded by promotion to the more important courts. They think also, for the same reason, that there should be power of promotion from the office of registrar to the office of judge. The promotion of judge suggested here is an innovation and an unconstitutional one in the sense of being one which violates a well-known principle of the constitution, that a judge shall have nothing to hope for and nothing to fear after his appointment. But for all that we see no valid objection to it.

The following are the conclusions of the Report:—

"The changes we have recommended, if adopted and carried out, will necessarily cause a considerable diminution in the civil business at the assizes.

"In our former Report we referred to the inconvenience and expense to the suitors occasioned by the distribution of a small amount of business among a large number of circuit towns, and we recommended the abolition of the Home Circuit, and that the judicial business of the country should to a considerable extent be concentrated, and should no longer be arranged and distributed according to the accidental division of counties.

"The proposals we have now made give increased force to these recommendations as respects civil business. It is, we think, clear that the great majority of causes tried on the Home Circuit could be disposed of at less expense in London, and there are several counties, for example, Rutland and Westmoreland, where it is manifestly an idle waste of time and money to have assizes. At all events, there can be no necessity to provide for the trial twice in each year of civil business in those counties in which in all probability there will ordinarily be little or no such business, and where, unless under exceptional circumstances, such business as there is can be more conveniently disposed of elsewhere.

"On the other hand, great complaints are with reason made that the present arrangements do not afford sufficient facilities for the prompt trial of important cases at Liverpool and Manchester.

"We recommend that actions to be tried elsewhere than in the metropolis or Liverpool or Manchester should be tried under commissions to be issued from time to time by your Majesty for trial of the causes at any place or places named in such commissions, and that for that purpose the requisite changes be made in the existing law of venue, and in the existing system of circuits.

"Such commissions may be separately issued, or joined with commissions of oyer and terminer and general gaol delivery, or either of them. In those counties and boroughs to which such commissions are issued we recommend that a general sessions of the peace, or an adjournment thereof, for the trial of prisoners, be held at the same time or immediately before or after the holding of the assizes or commissions of oyer and terminer and general gaol delivery. This course would relieve the judge from the trial of the minor class of cases, and would be in accordance with the practice which prevails at the Central Criminal Court, where the more serious cases are alone tried before the judges of the superior courts. It would also very considerably relieve jurors by diminishing the number of their attendances at assizes and sessions.

"As respects Liverpool and Manchester, we recommend that there should be four sittings in each year for the trial of civil causes in the superior branch of the court at Liverpool

and also at Manchester, and that the duration of these sittings should not be limited, nor should it be necessary for the same judge to be in attendance during the whole of each sitting, and that there should be power for two or more judges to sit at the same time, when that course may be deemed more convenient.

“In our former Report we recommended that the present restriction of time for the *Nisi Prius* sittings in London and Middlesex should be abolished, and that those sittings should be held continuously throughout the legal year by as many courts as the amount of business to be disposed of might render necessary. The delay and inconvenience caused by the present restrictions seriously prejudice the suitors in commercial and other cases of importance, and appear to call for prompt redress.

“Other matters yet remain into which, by your Majesty's Commission, we are directed to inquire. We have bestowed much attention upon the mode of distributing and conducting the business, both civil and criminal, at the assizes and quarter sessions, and the Central Criminal Court, upon which we propose to make a subsequent Report. We have further to consider procedure, and also the mode of conducting business in chambers. Believing, however, that it is desirable not to delay our present Report till the evidence on the above-mentioned subject is complete, and fuller deliberation has been had thereon, we humbly present this our Second Report to your Majesty's consideration.”

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## VI.—BEQUESTS FOR SUPERSTITIOUS USES.

By W. F. FINLASON, Editor of the “Charitable Trusts Acts.”

CASES sometimes occur, which throw a broad, clear light backwards upon our history, by showing the operation among us, at this day, of causes which have exercised a mighty influence in past ages, and thus enabling us to observe their nature and their force. Such a case was that which lately came before the Probate Court, and in which a priest had a bequest of a large estate; doubtless to secure the offering of masses for the soul of the donor. Such a case carries us back to those middle ages, which some have called Ages of Faith, and others Ages of Superstition; to the age of chantries, or endowments for masses for the dead; and all the gross abuses satirized in the poetry

of Chaucer, and denounced in the preaching of Wickliffe, and which did more than anything else to bring about the subversion of the ancient religion in this realm. It is startling to find such a revival among us of mediæval practices; and some Protestants finding such a devise upheld, may naturally feel alarmed at the progress of Romanism; and may be supposed to desire some alteration of the law required to prevent such bequests for the future. But an examination of the history of the subject, which is one of great interest, will satisfy any intelligent person that there is no need for new legislation.

By the Roman Catholic doctrine of the mass, it can be applied for the personal benefit of an individual, and that benefit can be obtained by the payment of money. Hence gifts or endowments for the offering of masses for the souls of the donors; and it is obvious that the motive for such gifts and endowments must have been as powerful as it is possible to conceive. The influence of the motive can be traced in the history of the Roman Catholic Church almost from the earliest times. We find the Church at Rome enriched very early, not only by donations, but bequests; stimulated, there can be no doubt, by the influence of this doctrine. An historian of the 4th century represents the Pope as "enriched by the lavish donations of the principal females of the city" (Ammianus, xxvii. 3); and as Dr. Milman states, "the prodigality of the offerings to the Church and to the clergy, those more especially by bequests, was so immoderate that a law was necessary to restrain the profuseness on one hand, the avidity on the other—the law of Valentinian, A.D. 370, addressed to Damascus, Bishop of Rome, and ordered to be read in all the churches of the city (Cod. Theod. xiv. 2, 20); a law which Ambrose and Jerome approved, as demanded by the abuses of the times" (Latin Christianity, vol. i., 91). This edict strictly prohibited ecclesiastics from receiving bequests, and of course it prevented bequests for masses. Thus as early as the 4th century it was found necessary even in Rome, with the full approval of such men as Ambrose and Jerome, and with the tacit assent of the Pope, to pass a law to prohibit ecclesiastics from receiving bequests; and there can be no reasonable doubt that the cause of it was the tendency to the excess of such bequests for masses, and that the object was to prevent such bequests; to do which effectually it was deemed necessary to prohibit bequests to priests at all.

The practice, however, was too profitable, and too deeply rooted in superstition to be repressed, and it appears to have existed ever since in the Roman Catholic Church. Yet, though tacitly allowed, it is remarkable that it has never been expressly upheld, and Roman Catholic historians appear

to have been ashamed of it, as they avoid mentioning it. This is remarkable; for instance, in Dr. Dollenger's "Church History," in which he is silent about it, even when treating fully of the mass. Indeed, no trace can be found of the practice of private masses, except in cases of necessity arising from illness, or other causes. Dollenger, in his History, gives an account of the different species of masses; but describes them all as *public*; and only mentions an indistinct allusion in the seventh century to the possible lawfulness of a private mass, which may have been meant in a case of illness (vol. ii., c. v., s. 13). At the masses, which were public, there were public offerings or oblations, from the faithful generally: first, as in the English Communion Service, there is the offertory, and there is no mention made, in the first or second periods of the History of the Church, of the *purchase* of masses for the benefit of individuals by previous offerings of money (*ibid.*). The names of the donors of their gifts were commemorated in the prayers of the priest (*ibid.*). But the service was public and general, and the offering would not be the cause or occasion of the service.

In the Middle Ages, however, the corrupt practice of purchasing masses for the souls of individuals by money payments became established, and it is remarkable that though the attention of the Church of Rome was drawn to complaints against it many centuries ago, it has never to this hour been distinctly declared to be lawful. In the 14th century, Wickliffe challenged the practice as unlawful, and the Church of Rome, while condemning his propositions, avoided any distinct definition of doctrine on the subject. His propositions were extreme; for he affirmed that all were simoniacal who bound themselves to pray for those who ministered to them in temporal things: "Omnes sunt simoniaci qui se obligant orare pro aliis eis in temporalibus subvenientibus," which would apply wherever a priest, from gratitude for a charitable gift, promised to pray for the donor. This would be absurd, and the Church of Rome was safe in condemning it; but in doing so did not touch the real question, for in such a case the gift would not be with a view to obtain the benefit of the service. The whole question, therefore, was evaded. So at the Council of Trent; though several of the decrees touched upon the subject, and it is evident that the Council were fully aware of the evil, they left the root of it untouched, and altogether avoided the real question, which was, whether the *purchase* of masses was lawful? The Council, indeed, in general terms, directed that the bishops should take care to prevent all practices which tended to avarice or superstition, "the false imitators of true piety." "Episcopi ea omnia prohibere curent ac teneantur quæ nec avaritia vel irreverentia vel



superstitio veræ pretatis falsa imitatrix induxit" (Sess. xxii.); but this was general, and the *practical* part was left to the bishop. The Council, indeed, under the head of superstition, condemned the desire for the celebration of "a certain number of masses," "missarum certum numerum;" which was probably aimed at trentals, and similar practices, and went very far towards a condemnation of the whole system, as its great object was to secure a certain number of masses.

So under the head of avarice, or what tended to avarice, the Council condemned bargains or illiberal exactions for masses as necessarily tainted with simony:—"Mercedum conditiones pacta, et quicquid promesses novis celebrandis datur nec non importunas atque illiberales eleemosynarum exactiones potius quam postulationes atque ejusmodi quæ a simoniaca labe vel certe a turpi quæster non longe absunt omnino prohibeant" (Sess. xxii. cap. ix. can. 9). That is, the Council expressly prohibited the exercise of undue influence to obtain gifts for masses, but it tacitly allowed the clergy to be offered beforehand, and to *accept* and *exact* whatever might be freely offered for the purpose; and as the Roman Catholic faith, as laid down by the Council itself, taught that the mass was of infinite value, and was capable of being offered to the special personal benefit of individual souls, it follows that, in the minds of the faithful, *no* gifts could be excessive in amount, as none could be proportioned to the infinite value of the benefit. There was no limit, therefore, to the amount to be received from this source.

The pecuniary interests involved, however, were too powerful to admit of the reform required being carried out by the Council; and it was left to be carried out by legislation, as it has been in most Roman Catholic countries, and as it was in our own, even while it continued Roman Catholic. In modern times, however, when the Church has become impoverished, she more and more encouraged the practice of gifts and bequests for masses; and in the last century, Pius VI., while cautiously abstaining from any distinct affirmation of its lawfulness, put forth a Bull, couched in general and equivocal terms, which appeared to sanction it. The Bull in terms merely upheld the right of the clergy to receive, as the apostles had done, contributions from those to whom they ministered on spiritual things, which of course no one had ever objected to. Under colour of this, however, the Bull went on, in an indirect and equivocal manner, to declare the lawfulness of *alias* for the celebration of masses or the administration of sacraments, especially for masses for the dead. It did this not by laying down what was the right doctrine and practice on the subject, but—in the course always followed by Rome—by condemning what was deemed wrong.

Thus the Bull following the decrees of Trent, condemned all bargains for reward or illiberal *exactiones* of *alius*, "*Cujus vis generis mercedum conditiones pacta, nec non illiberates eleemosynarum exactiones*," as not far from simony, and then it went on also to condemn the notion that it was an abuse to receive alms for the celebration of masses and the administration of the sacraments, "and generally for whatever stipend or honorarium for prayers for the dead, or any spiritual function, might be offered," according to the received and approved custom of the Church, and the right instituted by the apostles of receiving temporal things from those to whom they ministered in spirituals, which no one had ever doubted. The terms of the Bull were so equivocal that they left everything open.

What had been controverted was the lawfulness of offering priests money to induce them to offer masses for the donor. If this was lawful as to masses, it would be so as to sacraments, and it will be observed the Bull coupled together the offering of masses and the administration of sacraments. The Roman Pontiff, however, would have shrunk from laying down that a man might offer a priest, or that a priest might ask, money to administer a sacrament to him; and in our own or any other Church a clergyman who *asked* it would be suspended. Yet the practice was, and is, that no mass for the dead can be obtained without the *previous* offer of money. This was the practice, and the Bull avoided saying whether it was right or wrong. The practice, however, in consequence of this equivocal Bull, was conceived to be sanctioned, and so it continued, and at the Synod of Westminster, held under Cardinal Wiseman, it was more distinctly recognised, it being laid down that the money received by priests for masses was their *own*, and was not to be considered as the money of the Church. This, which gave the priest a *personal* interest in the payments, was the main mischief of the practice, and it was then distinctly approved by the Synod of the Roman Catholic Church in this country.

The whole history of the middle ages shows how powerful was the influence of this motive—the desire of masses for the souls of the dead; and how efficacious that influence was in favour of the clergy. The Church of England may be said to have been founded through the operation of this influence. Statutes so declare, affirming that in ancient times lands and tithes were bestowed for the foundation of the Church, in order to obtain the benefit of masses for the souls of the donors (Statutes 35 Edw. I. and Hen. V.) Religious houses were especially so founded, and Littleton describes a regular species of tenure established in consequence: tenure in *frankalmoigne*. In the earliest ecclesiastical history, that of Bede, we find the influence

of this motive enhanced by legends as to the potency of masses for the dead, for liberating souls, and even bodies (Bede, *Ecc. Hist.*, b. iv. c. 22). In the earliest English poetry there are constant satirical allusions to the exercise of this influence, and its effect in stimulating a sordid spirit amongst the clergy; thus in the "Visions of Piers Plowman," we find corrupt priests represented as wishing "To have a lycence and a leve at London to dwelle. And syngen there for symonye; for silver is swete" (Prol. 85); that is, to sing masses for the dead for money. Priests were said to be "hired" for the purpose. The poorer classes of men were derided as putting their trust in the annual, biennial, or triennial celebration of masses for their souls ("Visions of Piers Plowman," Pass. VII., 170, 180). While the wealthier classes left money or property to a perpetual celebration of masses for their souls monthly, or, if possible, daily; the endowments for such objects were called chantries, and the priests so endowed, the chantry priests, were in course of time very numerous. These priests became known as a class, and very unfavourable mention is made of them in the Year Books. There are cases in which it was attempted to enforce, by legal process, their obligations upon them to offer the stipulated masses, from which it is to be inferred that they often neglected those obligations. Littleton, however, lays it down that there was no *legal* obligations in such cases. And it is manifest that in the course of ages the number of these endowments would so increase, that, as a priest could only offer one mass a day, the accumulation of obligations would become extremely inconvenient, and ultimately their performance would become practically impossible. On the other hand, their perpetual performance, supposing it practicable, would involve absurdities, if not impieties; for at some period in each case, a period however unknown, the soul of the deceased would be liberated, and the offering of the mass would become unnecessary. It is probable, nay, it is certain, that towards the close of the 15th century, the consciousness of these inconveniences and absurdities had begun to exercise to some degree a reactionary influence upon the mind of the English people, and that this tended powerfully to bring about that decline of faith which resulted in the success of the great movement of the Reformation. Hence, we find the clergy exercising all kinds of undue influence to secure bequests for masses, and it is probable that their rage at the decline of these sources of profit led to the persecutions of the 15th and 16th centuries, which did more to advance the Reformation than any other cause, and led the nation to acquiesce so largely in the measures of Henry VIII. Thus, in the "Paston Letters"

we have an instance of the efforts used by priests who were confessors in families to induce persons to bequeath their property in their favour (ii. 321); and no one can doubt that the motive relied upon for the purpose was the desire for the benefit of their masses. The very fact, however, that priests were then obliged to exercise actual personal influence for the purpose betrays a decline in the faith—or rather, the superstition of that period. We say superstition, and we use that phrase advisedly, because the use of it is perfectly in accordance with Roman Catholic doctrine.

That practice, which was neither more nor less than the *purchase* of masses, continued until the Reformation, and endowments for the purpose of securing the *perpetual* performance of such masses became common. Hence, in "Doctor and Student," a work published in the reign of Henry VIII., it is laid down that if a priest have won (or earned) much money by saying of masses he may give it away, or dispose of it by will; whatever might be the law of the *Church* as to such offerings; and so of a chantry priest (Dial ii. c. 39). It is added, however, that though priests were not *bound* by law to distribute the surplus of such money in charity according to the law of the Church.

That the practice was pregnant with abuse, and had the most pernicious consequences, can be shown upon the authority of one who was a martyr for the Roman Catholic faith and the Papal Supremacy. Sir Thomas More describes, as one of the evils of his time, the great number of low-minded, illiterate, indolent priests, and that this was owing chiefly to this practice is plain; for he says that the canons of the Church which required that no one should be ordained except on a benefice or a patrimony, were evaded, and that so "the order was disgraced by the priests begging and lewd living, as they either lived on trentals (*i.e.*, masses for the dead) or served in secular men's houses," usually in the same way (Sir Thomas More's Dial. f. 103). The same evil was deplored by Cardinal Morton, in a synod held towards the close of the 15th century. (Froude's Hist. Eng. vol. i. p. 96-98). Yet "if there were a statute made in such case of like effect as the law of the Church, it would be right and profitable" (*ibid*). From this it is plain that at the era of the Reformation, the practice of the purchase of masses had become fully established, and perpetual endowments for the purpose were recognised; but that there were serious questions raised as to the *propriety* of such payments and endowments; and it was considered that it would be very salutary that the Church should direct the clergy to apply the surplus of these gifts in charity, and that the law should enforce such

directions. And it is interesting to observe that our law as it stands naturally carries this out.

Henry VIII. died a Roman Catholic, and a firm believer in purgatory and the benefit of masses for the dead; and the six Bloody Articles he enacted at the end of his reign furiously upheld these doctrines. Yet he confiscated the chantries, that is, the endowments for *perpetual* celebration of private masses for the souls of the donors, and the subsequent Act of Edward VI. only followed and carried out this Act of Henry VIII. That Act, therefore, which was the basis of the law against superstitious uses, was passed in Roman Catholic times, and passed, be it observed, by a Roman Catholic legislature, while the Roman Catholic religion remained the established religion of the land. It is not surprising, therefore, that it should have been maintained after the Reformation, although the utility of prayers for the dead was never denied; and this perhaps may be the real meaning of the Article which denounces the "Romish doctrine of purgatory" and pardons, which probably alludes to the old doctrine of the benefit of private masses for the dead, performed for the souls of particular persons who gave or bequeathed money for the purpose. Every mass was in a certain sense for the dead; for it was offered for the living and the dead, *pro vivis et pro defunctis*; but that was for the dead *generally*; the Romish doctrine went much further than that, and its essence was the appropriation, by means of money of a special personal benefit to particular souls. This it was which the Article denounced, and certainly it is not aimed at prayers for the dead generally, and it has been judicially decided in our own time in the Arches Court, that such prayers are *not* prohibited by the Church of England. The doctrine of the illegality of bequests for superstitious uses, however, has been upheld by our law. Even where O'Connell's Act (2 & 3 Will. IV. c. 115) legalized bequests for the support of Roman Catholic worship, that is, for masses generally, the law against superstitious uses was left untouched. And so in all the legislation which has taken place within twenty years upon the subject of charitable trusts, which included bequests for the support of religious worship, but *not* for superstitious uses, and which therefore left them still subject to the penalty of the law. And this led to the mischief of secret trusts, which it was one great object to do away with. Gifts for the support of Roman Catholic *worship* have been legalized ever since O'Connell's Act, yet the doctrine of superstitious uses has continued to be applied in our courts to the present time. It has been applied, however, only to gifts *proved* to have been for those uses; that is, for prayers or masses for the souls of the donors. Hence gifts or bequests

to persons, usually priests, without any express trusts for that object, but only on an implied understanding, or an *understood obligation* to offer the masses. It has long been the doctrine of the Roman Catholic Church, that in the case of a priest there is such an understood obligation, when, without any other reason or object for a gift or bequest, property or money is given or bequeathed to him. That is, if he knows or understands that the donor desires and hopes for the benefit of his masses, and gives money with that hope and desire, he would be bound to offer them for that object. It was a proposition condemned by the Church of Rome, that the giving of money for the offering of masses involves no obligation to offer them. All that is necessary to constitute the obligation is, that the priest, the donee, should know that the donor gives the money with that hope and desire. It is obvious that the effect of the Roman Catholic doctrine is, that the hope and desire must exist in every case, and at all events the slightest previous intimation would suffice to indicate it, and then there is the obligation.

It follows that in every such case, that is, practically, in every case of a gift or bequest to a priest, a stranger in blood, there must be the desire to attain this object, and it must constitute the most powerful influence that can operate on the human mind. It is equally obvious that as it operates in favour of uses the law deems superstitious and illegal, it must be deemed in law undue influence, and must invalidate the gift or bequest:—quite apart from such undue influence as is personal. It is plain that such gifts must be simoniacal in their nature, beyond a mere necessary or reasonable support to the ministering priest. And, for the same reason, it is equally plain that they must be superstitious; that is, founded on a false notion of religion; the notion that a simoniacal act, which is a spiritual crime, can obtain a special spiritual benefit to the soul. Hence, beyond that limit, these gifts are deemed improper, even according to Roman Catholic doctrine, as they are gifts of money for spiritual benefit. At all events by our law they are illegal, and this was quite distinct from the law as to undue influence, which meant the actual exercise of personal influence over the donor to an undue extent.

It is evident that in this respect there is a great distinction between Roman Catholic and Protestant bequests. In Protestant cases, undue influence must be necessarily *personal*, and therefore admits of, and may reasonably refuse, express proof of its actual exercise. It is quite otherwise in the Roman Catholic Church, in which the practice of superstitious uses, denounced in our law as illegal, itself involves and applies in the case of *any* priest. Many years ago a case occurred in our courts, and which is reported (*Middleton*,

v. *Sherbourne*, Y. and Coll.), in which a bequest of an estate to a priest was upheld at law, because, though there could be no doubt that the object was the obtaining of masses for the soul of the testator, the opposition to it was on the ground of the actual personal exercise of undue influence, and this could not be shown. The Roman Catholic relations bitterly complained of it, and the son, who was in effect disinherited, brought the case before the Mortmain Committee. But the law left him no remedy; and other cases which have since occurred appear to have been very similar in character.

There was, however, this great fault in the law on the subject, that any gift or bequest tainted with superstitious uses was confiscated. And as there were hardly any gifts or bequests to Roman Catholic religious purposes not so tainted, this operated, practically, as a confiscation of them all. Hence secret trusts, attended necessarily with great mischiefs. Twenty years ago, when the legislation on the subject of charitable, including religious, trusts was in contemplation, the writer, then a Roman Catholic, felt the hardship of this state of the law, and therefore he concurred most zealously in the opposition made to any legislation which should confirm or recognize such a hard and oppressive law. Thus he joined with Sir G. Bowyer and the late Mr. Bagshawe, Q.C., in opposing the Charitable Trusts Bill of 1852, which would have confirmed and continued that law. And in that year, the late Cardinal Wiseman, in his own name and that of the other Roman Catholic bishops, thanked him for the opposition, and expressed his conviction that to his exertions they mainly owed its defeat (Letter, May 29, 1852). Next year another Charitable Trusts Bill, 1853, was brought forward, which, as to Roman Catholic charities, was not so bad, though it still did not give them due protection, the main grievance being that any bequests tainted with superstitious uses were void *in toto*. The writer on that occasion renewed and continued his opposition to any measure which should confirm or continue this iniquitous law, and Cardinal Wiseman, in the name of the bishops, desired him to watch that and any other measure on such subjects. He, and those with whom he acted, could not succeed in obtaining a fair measure of protection for Roman Catholic charities, but they succeeded in having them exempted from the operation of the Act. The writer edited that Act, and in an introduction, entered into an elaborate history of charitable trusts, especially as to religion and education. Seven years later, the supplemental Act, the Roman Catholic Charities Act of 1860, passed, which did not legalize superstitious uses; but on the other hand, it relieved gifts and bequests tainted with such uses from confiscation, and declared that they should be applicable

to other Roman Catholic religious objects. This the writer considered fair and just, though the Roman Catholic prelates were not satisfied with it, and would be satisfied with nothing short of the legalization of superstitious uses, that is, of bequests for masses for the souls of the donors. Bequests for the support of the mass—that is, for the Roman Catholic divine service—were already legalized by O’Connell’s Act. It was only a question as to bequests for the special benefit of the donor. The many years’ study which the writer had given to the subject had satisfied the writer that they were tainted with simony and superstition, and had exercised the most unhappy influence on the Roman Catholic Church. Their direct effect, it is obvious, was to associate its holiest act of worship with the most sordid motive; and to induce priests to say masses for the sake of money. The money was virtually the price of the masses, and the priests were described as “hired” to say them. The “chantry priests,” as they were called, were of the lowest character, and this is equally apparent from the cases in the Year Books, and from the poetry of Chaucer, and from the experience of Luther. Nothing so tended to disgust our own Wickliffe, and in a later age the great German Reformer, with the Catholic system as the insensibility and want of devotion with which the priests said their masses, and this was mainly owing to the endowments for masses; the recipients of which were bound to offer a certain number of masses, and who said them as a matter of course whether in a fit state for acts of devotion or not. Thus the Roman Catholic religion was brought into contempt, and this was one of the strongest, though not perhaps most prominent, of the moving causes of the Reformation. Taking this view, the writer, then a zealous Roman Catholic, rather shrank from the *legalization* of superstitious uses, believing it would open a door to boundless corruption, and result in a renewal of ancient abuses. And he approved of the legislation which, while securing the property to Roman Catholic religious objects, did not recognise the trusts for superstitious uses. In his edition of the Act of 1860, therefore, he expounded and applied this view, and he had no notion that in so doing he was at all acting contrary to Roman Catholic doctrines, or Roman Catholic interests. As to Roman Catholic doctrines, he closely followed the canons of Trent, and the expositions of St. Alphonsus, and admitted a payment for a mass lawful by the law of the church; so that it was no more than a reasonable retribution and support of the priest, which would be an amount too small to operate as a *motive*, and would, therefore, be free from the danger of simony. As to Roman Catholic interests, he knew, from an application he had himself made,



that there was no intention of appointing a Roman Catholic inspector of charities, and, therefore, no intention of applying the Act adversely to Roman Catholic endowments. He saw nothing, therefore, hostile to Roman Catholic interests, or adverse to Roman Catholic doctrine, in the view he put forward in his book. He founded himself, in fact, upon a proposition of St. Thomas Aquinas—"Sacerdos non accipit pecuniam quasi pretiam consecrationis eucharistiæ, hoc enim est simoniacum, sed quasi stipendium sustentationis" (St. Thomas, ii. 29, 110). From this it logically followed that the gift ought not in amount to exceed a reasonable maintenance, and this was laid down by St. Alphonsus. The writer's views on the subject, in accordance as he conceived with these orthodox authorities, was conveyed in the following note:—

"It is otherwise of gifts for the celebration of divine services for the souls of donors or their family, which would merely be for their personal benefit, and so, even if legal, would not be charitable. The Roman law lays down that, in order to avoid the taint of avarice or charge of simony, they are to be regarded as gifts for the maintenance of the priests, and as such they would be, according to the English law, charitable—the benefit being *general*, not special and personal. And if the donors had so regarded them, the object being permanent, and extending beyond the personal benefit or the life of particular ecclesiastics, the English law would recognise, and could and would enforce such gifts as trusts for the support of priests or the maintenance of divine worship in general, according to the Roman Catholic liturgy, although it is offered for living and the dead; that alone not being by the English law, nor even in the view of the English Church, superstitious. But in the cases referred to, the donors have not so regarded them, and have declared, on the contrary, the object of the gift to be purely special and personal. This the English law deems not charitable; and even if it were, it would create a trust impossible for any human law to enforce, seeing that it is rested on the intention and application of particular services for the benefit of individuals. And the attempt to secure this by gifts for such services, not the services themselves, is deemed superstitious. In this view the Roman law is much more in accord with the English law than is generally supposed; and though upon the view taken in common by both, that these gifts are in substance for the support of priests, they would hardly be prohibited by the Roman Church, they are to the utmost restrained; and they are not otherwise recognised than by rules of moral theology, enforcing, as *against the ecclesiastics accepting them*, their rigid observance, which tends indirectly to limit them, by enhancing the weight of their obligation. The English law, upon the grounds above stated, and not having any means of dealing with the conscience, deeming it dangerous to allow of men's accepting pecuniary endowments upon trusts, their fulfilment of which no one can enforce, not only regards

these gifts as not charitable, but condemns them as contrary to public policy, and, in the legal sense, superstitious; and as these gifts are avowedly not for the benefit of the donees, considers them to fail altogether. It is clear that they are intended as trusts, and not for the mere personal benefit of the donees; and hence, especially as they are usually coupled with bequests for alms to the poor, the Roman law regards them as trusts, taking care that the funds be not applied by clerics or laymen to their own private use. And though in countries where the Roman Catholic Church is established, and the law recognises the right of the Roman Catholic ecclesiastics to receive such gifts, the execution of these spiritual trusts is committed to the prelates of that Church, even there it is impossible that they can enforce them in any other way than by seeing that the funds are placed in proper hands for the purpose of application, either in distribution of alms or maintenance of divine services, or the support of pious and proper priests and ministers of divine worship; nor could they do that without the aid of the civil or secular law, added to which, in this country, the bishops themselves are recipients of such gifts. And in this country, the law, for the reasons above stated, does not allow ecclesiastics to take such gifts, the reasons being all the stronger in that by the canons of the Council of Trent, the Roman Catholic bishops—themselves the chief recipients of such gifts—have power to commute such trusts for the very reason, on which, among others, the English law regards them as contrary to public policy; viz., their inevitable tendency to an accumulation of obligations likely to render performance impracticable, especially when, as is always more or less the object, the obligation imposed is perpetual.” (Pp. 31-33.)

This limitation of the *amount* of the payment or endowment for masses was the more important, and the danger of simony all the greater, because by the canons of the Council of Westminster, held under Cardinal Wiseman; these payments are declared to be the *priests' own private property*. “*Honoraria Missarum ad sacerdotis peculium pertinent*” (Acta et Decretan, c. viii. v. 14). And, on the other hand, the view that for this very reason the amount ought to be limited is in accordance with Roman Catholic theology, for the English Vicars Apostolic, in 1838, declared that five shillings was a reasonable payment, an amount calculated with reference to the *minimum* of a reasonable maintenance.

“*Æquum quidem nobis videtur omnibus perpensis et statuimus quinque solidos prostipendio missæ accipi posse, habita præsentis pretii rerum ut vitam victumque necessarium.*”

This being so, if that amount was reasonable, it followed that *no more* ought to be allowed; and as a priest cannot ordinarily offer more than one mass a day it follows that a reasonable endowment, on even Roman Catholic views, would not exceed about £100 a year,

It is obvious that even assuming, as on Roman Catholic doctrines must be assumed, that such bequests are proper at all, they must be limited to a reasonable support, and the most approved Roman Catholic theologians put the practice of the bequests for masses on that ground, and admit that otherwise there is danger of simony. Thus Bergier says that these payments are to be regarded only as alimentary pensions, or means of subsistence.

There was nothing, therefore, in the writers views adverse to Roman Catholic doctrine, and accordingly the *Weekly Register*, a moderate Roman Catholic paper, reviewed it without any expression of disapproval. And the editor afterwards declared that he had "intrusted the reviewing of the work to a highly qualified ecclesiastic, who would have noticed anything theologically or ecclesiastically objectionable, if anything objectionable there had been."

Nevertheless, the views put forth by the writer on the subject were vehemently denounced in the *Tablet*, the well known organ of Cardinal Wiseman; and the contrary view, that a priest might take as much as he could get, or as much as might be given to him for the offering of masses was boldly avowed and upheld.

"It is a good, honourable, pious, and lawful, and laudable thing to give five shillings or five pounds, or *five hundred pounds*, for saying one mass, or a number of masses, in a year, or in a succession of years, to one priest or to ten priests, or a succession of priests, either for the intention of the donor, or for his soul, or the souls of his family or friends. The payment is a fee; the fee or reward, or honorarium, which is given to any one who does an act for you that he need not do. It is not the price or *value* of the mass; but no one looks upon it as a free gift which leaves to the charity or good nature of the recipient to decide whether or not he will do anything in return for it."

That is, though there was a faint attempt at a quibble as to price and value (as if price need necessarily be value), it was boldly avowed that a priest might take any amount that might be given to him for masses, and that the *masses would be due in return*. A great controversy ensued, in which some eminent ecclesiastics joined in upholding this view; and Dr. Manning, the present highly esteemed primate of the Roman Catholic Church in this country, wrote a letter in the *Register*, in effect maintaining the same view. Dr. Manning, however, was not then in that position, which was at that time occupied by Cardinal Wiseman. The Cardinal took no open or avowed part in the controversy; but the writer was well aware that he had prompted or inspired the article in the *Tablet*; and, therefore, wrote to him to inquire if he would adopt the view

avowed in that article. His Eminence, in his answer, avoided any distinct adoption of it, but did not disavow it, and denounced the writer for the line he had taken in the matter, and substantially, therefore, he upheld the *Tablet* view.

The Cardinal, indeed, with astute prudence, withheld the grounds of his opinion; but Dr. Manning, in his letter in the *Register*, cited the Bull of Pope Pius VI., as showing that it was lawful "to take alms for the celebration of masses or the administration of the Sacraments; and, generally, any stipend or honorarium which may be offered on the occasion of suffrages or services for the dead, or any parochial function."

It is manifest, that if it was meant that the money may be offered beforehand for the celebration of the mass, or for the administration of the sacrament, then it amounts, as there is no limitation whatever, to the sanction of simony; and that, unless it meant that, it was an utter evasion of the whole question in controversy. In either view it was fatal to the writer's faith in Romanism; and he not long afterwards, greatly to his grief, felt compelled to withdraw from the Roman Communion. This is only mentioned as showing his persuasion that substantially such is the system sanctioned in that Church. The application of this to the present question will be manifest. It shows the closest connection between the subjects of undue influence and of superstitious uses. It shows that, by the Roman Catholic religion, people are encouraged and invited, and urged by the strongest possible inducements, to leave as large an amount of property as they can to priests, in order to secure the benefit of these masses. The motive is all the more powerful because it is spiritual selfishness. The object is a personal benefit to the donor, and the effect is a personal benefit to the priest: The priest gets the money, and the donor gets, as he supposes, the benefit of the masses. The moving cause, the motive, the inducement of the bequest, is the benefit of the donor. This, of course, is a motive far more powerful than charity, and likely to lead to bequests of unlimited amount. On the other hand, the recipient of the bounty is bound to offer the masses for the donor, and this object is answered as well by private masses in an empty chapel as by services in which the people share. Hence the priest may live where he pleases, and settle down in a comfortable do-nothing kind of life, just as the chantry priests did of old, and with the like results. This is the system the English law ever since the Reformation has denounced, and which it still denounces. But if such bequests as the one before us are sustained, the law denounces the system in vain. It lives and is maintained in spite of the law, by the most simple, yet effectual means. In the course of the controversy

which arose, the author, while upholding his own views, argued that the tendency of the system he described as superstitious was to revive the abuses of the middle ages, and therefore to do injury to the Church. Undoubtedly, in this argument he could only argue historically and rationally, for he owns that he knew no actual instances of abuse; and though he suggested the possibility of such cases, he had actually heard of none. Indeed, there was a remarkable secrecy observed on the subject of Catholic gifts or bequests, and the secrecy itself excited his suspicions as to the secret influence of the system. Although he had been for years engaged in communications on the subject with the Roman Catholic episcopate, and acted as remembrancer to suggest or inform their minds as to the law, he never had any information from them as to the number or nature of Roman Catholic religious trusts. This secrecy, no doubt, has become habitual under the old confiscating laws; but it has still continued; and the secrecy itself, in his mind, as in the minds of many other Catholics, excited suspicions as to the unhealthy character of the system. It is true that, especially in consequence of the inquiries of the Mortmain Committee, the author had heard, in common with all the world, of bequests to ecclesiastics; and he believes there was one such instance mentioned in the papers as to a bequest to Cardinal Wiseman, whose high accomplishments and long labours on behalf of his Church fully entitled him to the liberality of his flock. But of these cases the author only heard, from public sources of information, chiefly in consequence of those inquiries; and with these exceptions, he knows nothing as to Roman Catholic secret trusts, though he has heard in this way enough to raise an argument. His arguments, however, rested upon the facts of history, and upon the identity of human nature, and the inevitable tendency of similar causes to produce similar results, and of the same system to result the same abuses. In this he was merely maintaining his own views, that is, the views of the legislature and of the law, as to the pernicious influence of a system of bequests to priests for the offering of masses; that is the law which declared them invalid as superstitious; though, at the same time, he maintained, as he had always done, that the bequests should be applied to Roman Catholic religious purposes, and should not be confiscated; and on that basis the law was settled and left.

In the ten years which followed the Roman Catholic Charities Act of 1860, it became abundantly apparent that the tendency of public opinion and the spirit of the age were so adverse to endowments for the perpetuation even of charitable objects, that there was no chance of the Legislature ever repealing the law against bequests for superstitious uses, which

are not charitable. And, on the other hand, the Charitable Trusts Acts, doing away with all confiscation of the property, and requiring its due application to Catholic religious objects, great obstacles were interposed to the maintenance of secret trusts for masses; and indeed, to escape the law, express trusts for such purposes had long been avoided. The idea, therefore, naturally arose, of avoiding all difficulties as to trusts, by the simple expedient of leaving the property directly and absolutely to a priest, with some private intimation to him of the object, which indeed he could very well divine without any such intimation, so that it might, perhaps, safely be omitted; and, indeed, more safely omitted than expressed. The application of all this to the recent case in the Probate Court will be obvious. There a priest claimed, as residuary legatee, estates said to be worth 7000*l.* a year, which were devised to him by an aged lady, to whom he had been confessor. It was proved that the old lady had said that money could not be left for masses, as it was illegal; *but it might be left to a priest, who could be told privately what to do with it.* Nobody can doubt that she had been told this by her confessor, or some priest, who had consulted some Roman Catholic lawyer on the subject. The will was opposed in the Court of Probate; but there it was simply a question whether the will was the testator's own free act; and no one can doubt that it was; because it was in accordance with the teaching of her religion, and the dictates of a judgment founded upon it. At all events, there was no proof that it was not her free act; and Lord Penzance declined to apply the doctrine of the Court of Chancery, that in the case of a devise to a party occupying such a position of confidence and influence, it must be shown how the devise came to be made. In a recent case in Chancery, *Turner v. Collins*, the Lord Chancellor laid down, in accordance with all the cases, that in such a case "the Court must be satisfied *as to how the intention was produced.*" And no one can question that, in the case before us, the devise had for its real object the offering of masses for the donor's soul. Lord Penzance said, the case "was one in which there was wide room for suspicion;" that is, it is to be supposed, suspicion as to the real object of the devise. As to actual, personal undue influence, there not only seems to have been no evidence of it, but also an absolute absence of such influence. The priest denied all knowledge of the devise; and no doubt truly; and there is in such cases no necessity for personal influence, so that it would be absurd to attempt to exercise it. In the Court of Chancery, however, the priest could be examined upon oath, as to whether he did not consider that there was a moral obligation upon him to offer masses for the soul of the donor; and if the Court were satisfied from all the

evidence, that the donor must have desired and intended it, and that the priest must have known that she had so desired and intended, though not a word was said to him about it, then there would be either a secret trust for superstitious uses, which would defeat the bequest, or there would be evidence of such influence as might well be deemed undue, even although there was no personal and actual influence exercised by the priest. However, in the Court of Probate, that question was not entered into, and the will was upheld, leaving the question for ultimate determination in the Court of Chancery, otherwise the case would be utterly defeated, simply by reason of bequests to priests. The object is of course understood, or can be intimated by a word; and the obligation is created. The priest receives the estate and the endowment, and with it he contracts the obligation to offer masses for the donor. Thus the object is effectually attained, and the law against superstitious uses is defeated. The law remains in deed, but it is made a dead letter, is evaded, and defeated. It is possible, however, that even in Chancery any attempt to set aside such evidence might fail. And if so, it would be difficult to devise a law which should defeat such bequests. A positive law which should prohibit priests from taking such bequests would be inconsistent, unless it prohibited them from taking the ordinary payments for masses for the dead; and such a law is not at present likely to be passed. The practice is now so deeply rooted that it is part of the Roman Catholic religion. Moreover, the necessity for any such prohibitions appears to be less now than ever. The character of the Roman Catholic clergy themselves has vastly improved in this country; they are, as a body, pious, charitable, and hard-working; and if they become possessed of bequests, would no doubt generally apply them for the maintenance of religion and charity. It is more with reference to the possible ultimate results of the system that it is objectionable, than with reference to its present operation. And with reference to the future, the mischief, as it increases, will be realized in the Roman Catholic Church itself; degrading, by degrees, the character of its clergy; rendering them, as it did in former times, sordid, mean, and indolent. Powerful as is the influence of the Roman Catholic Church, it is met in these days by an influence infinitely more powerful—the influence arising from the advancing intelligence of the human race. We are not therefore disturbed by the apparent impunity of bequests for superstitious uses. The very phrase itself suggests the true view of the subject, for if indeed they are superstitious, then they cannot probably long continue to any great extent in the present age. Isolated instances may occur, but in these no great mischief will be done, and speak-

ing generally, this is an age in which superstitious influences daily decline more and more, and the Church which subsists upon them cannot maintain its hold upon the human mind. As soon as it is made apparent that it has subsisted and does still subsist upon them, men of intelligence will do as the writer did, feel certain that it cannot be divine in its sanctions, and will even, though with reluctance and with long, regretful, lingering regard, bid it farewell. It is in the force of human intelligence, and not in persecuting, confiscating laws, that the true antidote is to be found to superstition; and its fruits, "superstitious uses" and "undue influence."

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## LEGAL GOSSIP.

We have given a summary elsewhere of the recommendations of the Judicature Commission. Here, however, we wish to call attention to one fact of special interest to the Bar. Since the passing of the County Court Act of 1867, the writs issued out of the superior courts of law have considerably diminished. In that year the number was 127,702. In 1868 it fell to 83,174, being a decrease of 44,528, or nearly one-third. This decrease has been continued. The writs issued in 1869 were 81,778; in 1870, they were 72,660. In other words, there has been a very large decrease of business to the Bar, notwithstanding the general prosperity of the country. What is the lesson of these facts, so far as our profession and its interests are concerned? Is it not that it is of vital importance that the county courts should be remodelled, either in the form suggested by the Report, or in some other way, so as to give the Bar a fair chance as against the solicitor. Of course, we are speaking here mainly with a view to the interests of the profession, and know well enough that we are open to the retort that the profession exists for the public, and not the public for the profession. But inasmuch as it is of some importance that a Bar should exist, the interests of the public and of the profession coincide. Lately, everything has gone into the hands of the solicitor, and unless the recommendations of the Commissioners, or something like them, be carried into effect, and so cause the formation of local bars, or unless the two branches of the profession are amalgamated, the Bar seems doomed to extinction.

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The case of *MacDonnell v. Kempe*, tried at Guildford during the last assizes, has called public attention to the scruples



entertained by the High Church clergy with respect to celebrating the marriage of a divorced woman. It is understood that these scruples are founded on St. Matthew xix. 9, where it is said, "Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery : and whoso marrieth her which is put away doth commit adultery." It is supposed that the latter clause absolutely prohibits the remarriage of a woman who has been divorced. Looking at the matter in a legal point of view, it may be fairly argued that this is not a correct interpretation, and that the exception introduced into the first proposition must be imported into the second. There can be no doubt that under the first, a husband who divorces his wife for fornication is permitted to marry again. If he puts away his wife for any other cause, it is not a dissolution of the marriage, and therefore if he marries another he is guilty of adultery. But when the marriage is dissolved, as it may be for the cause mentioned, which is clearly implied in the exception, he is not prohibited from marrying another. Now it is obvious that the second proposition is entirely *in pari materiâ* with the first, and depends on precisely the same reasons. It is intended, without doubt, as the mere converse, or rather counterpart, of it, and the same exception is therefore necessarily implied. When a woman is divorced for fornication the marriage is dissolved. But the marriage cannot be dissolved as to one party and not as to the other. Unless the wife who is divorced is prohibited in express terms from marrying in any case, it must be clearly taken that when the marriage is dissolved as to the husband, and he is free to marry another, she is also free to marry another ; or with reference to the case put in the text, a third party may marry her as he may any other woman. The exception introduced into the first proposition shows the principle on which both it and the second are founded. The wide effect of an exception of this nature is familiar to lawyers. Neither of the parallel passages in St. Mark and St. Luke contains the exception in either of the propositions ; and the second proposition in St. Mark gives a converse, or counterpart, differently put, viz., that of the wife putting away her husband. But unless it can be shown that the exception in the passage in St. Matthew is an interpolation, due effect must be given to it, and it cannot be limited to the first proposition upon any principle of interpretation which goes beyond the mere letter.

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The publicans are endeavouring to get up an agitation against the new Licensing Act. The average publican's notion of an agitation includes broken heads and windows, and howling every opponent down. They have been trying this method of agitation for some time. In Exeter, as in most

cathedral cities, they seem to have unusual influence, and they exerted it there some weeks back, to pelt the bishop, and to break up a meeting. Since the passing of the Act, they have renewed their rioting, and the example has been followed in Birmingham and in other places. Now, while we are not desirous of having the Permissive Bill, and while we are ready to admit that the teetotallers often talk great nonsense, it is time to tell the publicans that we are not going to allow them to dictate to society what the law shall be. It is as well that they should know that the majority of decent people in the country regard them as following a trade which, if not of dubious morality, is in a larger number of instances than any other legally recognised trade, dubious in its surroundings; that there has been for some time a suspicion that they require to understand that though a number of us have protested against the proposals of a portion of the community to close their houses altogether on Sunday, and to place unnecessary obstructions in the way of obtaining liquor, this was done out of regard to public convenience, and not out of regard to the publicans; that so far as the publicans are concerned, nobody entertains respect for them as a class, or regards them (with, of course, many exceptions) otherwise than as a necessary nuisance; and that now, if they attempt to over-rule the Act of the Legislature, they must be taught obedience to the law.\* The day for altering a law by breaking a few heads has gone by; and if the publicans think to benefit themselves by intimidating society, they will find themselves committing an error that will recoil on their own heads. Liberal or Conservative, we should all unite to oust a Government weak enough to allow the new law to be set at defiance by a combination of publicans.

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There are often some funny things done in coroners' courts. Except the small courts of appeal, constituted of members of boards of guardians, it is probably true that the coroners' courts are the most arbitrary in the kingdom. The coroners seem too often in possession of a morbid fear that every one present is engaged in a conspiracy to diminish their authority, and, like all persons in such a state of mind, often go to the extreme in the execution of their authority. The office of coroner is, in fact, evidently fast falling into disrepute, and yet in days long past it was held in so high estimation that "none in shires could have it under the degree of knight." Now, however, the unfortunate possessor of this formerly most honourable appointment seems hardly to have sufficient dignity to impress even his own officers with his authority. Take, for example, a case recently reported:—A few days ago, in Mr. Richards's court, the jury having

been duly sworn to inquire, &c., after viewing the body, proceeded with the coroner to the mortuary. Upon their return, Mr. Richards said—"One gentleman of the jury has not viewed the body, and I must ask him to go at once and do so." The Juryman—"I strongly object to do so." Coroner—"You have been regularly sworn in, sir, and I must insist upon your going." Juryman—"I cannot go. I decidedly object." Coroner—"Then I shall commit you to Newgate for contempt of court. Take my advice and go." Subsequently the juryman went with Pounceby, the officer; but in a minute or two the latter returned, saying, "The bodies are locked up and cannot be seen." Eventually, however, the bodies were seen, when the following dialogue took place:—Coroner (to Pounceby)—"Summon that gentleman on the next two inquests." Pounceby—"I can't do that." Coroner—"But I order you to do so." Pounceby—"Then I shan't." Coroner—"You are exceedingly impertinent, and will be reported." Pounceby—"All right; I don't care." On the one hand, Mr. Pounceby could hardly show his contempt for the coroner more distinctly than he did, and, on the other, one cannot but admire the *naïve* way in which the coroner directed his subordinate to punish the offending juryman by directing him "to summon that gentleman on the next two inquests." The bystanders at this remarkable scene must have gone away deeply impressed with the majesty of the law; they must have felt the extreme propriety of the stern sentence of the coroner on the troublesome juryman, whose delicate, although natural qualms, had raised an objection to the viewing a disagreeable corpse in the disgusting dead-house, in which, as a rule, the parochial authorities think fit to deposit the last shreds of "the human form divine." They must have been terrified at the reckless audacity of the officer who bearded the lion in his den, with the heroic words "I shan't." And when they read in the next day's paper of a coroner's officer, who also carried on the lucrative business of undertaker, and recommended himself, with the sanction of a coroner, to the burial of his own "cases," when it was supposed the relatives could pay, the admirers of these courts must have become speechless with greater admiration. Seriously, is it not time, we would ask, to revise these coroners' courts? Is it well that the coroner should be *elected*, most frequently by the most ignorant of the electors, that he should perhaps encumber his position by the cost of his election expenses? Is it dignified that his court should be held in the tap-room of a public-house; that the witnesses, and even the jury, should be occasionally assisted in their solemn inquiry by frequent recourse to exhilarating beverages? and is it absolutely necessary to continue the barbarous

system of viewing the miserable remains of mortality in the obscene and reeking atmosphere of a dead-house? We care not to sicken our readers by any further inquiry, and the worst we wish the staunchest upholder of the present system is, that he may be summoned on a jury *super visum corporis*.

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Among the "slaughtered innocents" of the late session, the Building Societies Bill was one which deserved a better fate. It was first introduced to the House in 1870, and the three sessions in which it has been under discussion, have given ample opportunity for perfecting its details. The general purposes of the Bill of 1870, were discussed at the time in the *LAW MAGAZINE AND LAW REVIEW* (Vol. XXIX. p. 323). Its principal object was to consolidate the law of benefit building societies, a measure the necessity of which has long been apparent; for the present Building Societies Act of 1836 (6 & 7 Will. IV. c. 32), consists not only of its own clauses, but of all such of certain ancient and long-repealed Friendly Societies Acts (10 Geo. IV. c. 56; 4 & 5 Will. IV. c. 40), as may be held to apply to the societies in question. To substitute for the perplexing uncertainty which this causes, one definite enactment would alone be a valuable improvement; but more than this is necessary to relieve benefit building societies from the embarrassments in which they have been involved. First, the power to borrow must be granted, defined, and limited; and the directors and managers of these societies relieved from the heavy responsibility many of them have incurred in this respect. Second, provision must be made for the realization of the properties of these societies in the event of winding-up, by a method less ruinously costly than the compulsory process of the Court of Chancery. Third, the scheme of legislation must be adapted to the present state of the law with regard to friendly societies, and to those more enlightened modern views which tend to simplify the incorporation of societies, and to sweep away the cumbrous machinery of trusteeship. All these objects were proposed by the Building Societies Bill of the session just closed, and the great magnitude of the interests affected gave some hope that they might have been attained. The Government, however, interposed a suggestion for bringing these societies under the Joint-Stock Companies Act, but the Royal Commission on Building Societies reported against it. They were disposed to recommend the establishment of some more stringent check upon ill-advised schemes and inequitable proceedings than is now available, or than the Bill contemplated; and between these widely-divergent views, the Bill fell through. While future legislation becomes matter of discussion from first principles, it is to be hoped that the next

session will not pass without some measure to remedy the pressing defects of the past, and place these societies in a position to profit by any future measure for their regulation that the wisdom of Parliament may devise. Few persons are aware of the extent of the transactions of these societies, or of the amount of real good which has been effected through their instrumentality. The amount annually distributed by them in the form of advances for building, may be measured by tens of millions of pounds, and the number of persons who owe their independence as houseowners to these societies, by hundreds of thousands. While the benefit building societies established under 27 Will. IV. c. 32, have failed to receive the protection they require; all the privileges they seek have been given to societies with precisely the same object, and with much wider scope of operation, under the Industrial and Provident Societies Act of 1871. We believe that already a great number of societies have been incorporated under this Act, and these societies possess power to buy and sell land, to borrow money, and to act as corporate bodies, and have all the privileges of the Industrial and Provident Societies Acts. As this movement develops, it will become more and more evident that the same privileges must be granted to benefit building societies.

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The writer of "A Plea for a New Print of Bracton," in our last number, accidentally omitted, from the list of MSS. of Bracton in England, one in the Middle Temple library. Through the courtesy of the librarian he has been able to see this MS., which tells its own story thus:—A transcriber of the fourteenth century began his transcript of Bracton with the pious invocation, "*Assis principio sancta Maria meo.*" In course of transcription the pages containing the second and part of the third tracts of the fourth book were passed over. Another person noted the defect of the transcript on its margin, and prefixed a title, a preface, and a table of contents. The title implies its own date to be earlier than the accession of Henry IV., and its own author to be an officer of the Exchequer. The preface is the same as the preface to Glanville. Its occurrence as a preface to Bracton is, so far as the writer knows, unique, and raises suspicion that some transcribers of both treatises used a "common form" of preface. The table of contents notes the defect in the text, and differs somewhat from the printed table. Subsequently its paragraphs were numbered, and the corresponding numbers were written on the margin of the text. On the book are written, besides, some old legal forms, and two names—"Gilbertus Anwyll," and (in a much later hand) "Johes Trystram, possessor." The MS. is clearly written and in good

preservation, and would be a valuable authority for the text of a "new print."

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The work of the extension of Lincoln's Inn Library, although seriously interfered with by the strikes in the building trade, has progressed considerably; the external roof is completed, and the building is weather-tight; nearly all the materials for completing the interior are on the ground, and only await the settlement of the disputes between the masters and operatives, to be formed into appropriate and faithfully executed extensions of the fittings and decorations of one of the most handsome and conveniently designed libraries in the kingdom. Now that the exterior approaches nearer completion, we see no reason to alter the opinion we formerly expressed,\* that "the mode of extension was correctly conceived, and was being ably carried out." We observe that the noble royal arms, designed and executed by Willement, have been removed from the window opposite the library door; and we have been informed that all the windows on the northern side of the library, now so richly furnished with circular quarries, with amber fillets running round the stone mullions, and with well-executed arms of members of the Bench, are to be removed, and to be replaced with plain cathedral glass; we have serious misgivings as to the effect of this alteration on the present fine appearance of the room. The object of the alteration is to give more light; that will be fully effected, but it is by no means clear that more light would be required when the extension is brought into use. The extension will form nearly half the entire length of the library; and being provided with windows on both sides, and on both floors, will be abundantly lighted from the north, east, and south, and will certainly have great effect in giving more light to the original part of the room. When the effective and beautiful windows on the north, before noticed, are removed, and replaced by the plain cathedral glass, there will be a powerful glare of white light through windows devoid of character; the grand *coup d'œil* that at present exists will be utterly destroyed for the purpose of providing additional light that, we believe, will not be required.

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The Bench of the Hon. Society of Lincoln's Inn has resolved to rebuild the Old Buildings; an appropriate and well-considered plan and style of architecture have been adopted. The new "Old Buildings" will be built in divisions, and the first division on unoccupied ground, thereby avoiding the displacement of tenants before the new chambers are ready to

\* *Law Magazine and Review*, May, 1872, p. 350.

receive them. In the plan adopted, special arrangements have been made to render each suite of chambers complete and adapted to the requirements of the practising counsel. The ground is already enclosed for the first division of the building, and the work will proceed forthwith. The occupiers of the present inconvenient chambers in Old Buildings will have reason to thank the Bench when the new chambers are finished.

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Sir Roundell Palmer has given the sum of 10*l*. to Professor Cutler, to award as a prize, next winter, for law, to the best student in that branch of the evening classes, at King's College, London. The course for the prize involves attendance at two classes on two evenings in the week, and giving in an essay upon a legal topic. It is not generally known that King's College offers a law diploma to students who attend certain courses for two sessions, and pass certain examinations. This diploma was recently awarded to Mr. J. Goode, student of Lincoln's Inn.

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The arrangements for the forthcoming Social Science Congress, at Plymouth, are so far complete that we are enabled to announce the names of the whole of the presidents. The Attorney-General, Sir J. D. Coleridge, will preside over that of Jurisprudence and Amendment of the Law, and will deliver his address on the second morning of the meeting; Mr. G. W. Hastings, Barrister-at-Law, and Chairman of the Worcester School Board, will take the Education Department; Dr. Acland, F.R.S., Regius Professor of Medicine, Oxford, that of Health; and the Earl of Lichfield, that of Economy; while Lord Napier and Ettrick, formerly Ambassador at St. Petersburg and at Washington, and subsequently Governor of Madras, since which he has been made a Peer of the realm, will be President of the whole Congress, and will deliver his address at the opening meeting, on the 11th of September. The following are the special questions to be discussed:—Municipal Law Section.—(1.) Is it desirable that defendants in criminal proceedings, and their wives or husbands, should be competent or compellable to give evidence in their own behalf, and, if so, in what cases? (2.) Can a Court of International Arbitration be formed with a view to avoid a war, and, if so, in what way? (3.) Ought railway companies and other carriers of passengers be liable to an unlimited extent for the acts of their servants? Repression of Crime Section.—(1.) Is it desirable to adopt the principle of cumulative punishment? (2.) What ought to be the primary aim of punishment—to deter, or to reform? Is it desirable that in-

dustrial day schools should be established? Education Department.—(1.) How far does recent legislation render new regulations necessary for the training of teachers in elementary schools? (2.) Why are the results of our present elementary schools so unsatisfactory? (3.) What public provision ought to be made for the secondary education of girls? Health Department.—(1.) What are the principles on which a comprehensive measure for the improvement of the sanitary laws should be based? (2.) What steps should be taken to guard against sewage poisoning? (3.) What means can be adopted to prevent the pollution of rivers? Economy and Trade Department.—(1.) How far ought taxation to be direct or indirect? (2.) What principles ought to regulate local taxation and administration? (3.) How may the condition of the agricultural labourer be improved?

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The Commons session, which has just now closed, had 240 public Bills before it. Of this number, 116 became law, viz., 90 which were introduced into the House of Commons, and 26 which were introduced into the House of Lords. The remaining 124 had the following fate:—109, introduced into the House of Commons, were not passed by that House; 8, brought from the Lords, were not passed by the Commons; 6, passed by the Commons, were not passed by the Lords; and 1, passed by both Houses, was laid aside by the Commons on consideration of the Lords' amendments. Of the 116 Bills which received the Royal Assent, 87 were Government Bills and 29 were not. Of the 124 Bills which came before the House of Commons, but did not become law, 33 were Government Bills and 91 were not. With two exceptions, these 33 Government Bills are described in the list as withdrawn, the order for proceeding with them being discharged. The exceptions are the Thames Embankment Bill, the motion for going into committee (in the House of Commons) being negatived, and the Municipal Corporations (Wards) Bill, which was passed by the Commons, but in the Lords the second reading was put off for six months.

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#### IRELAND.

The Right Hon. John Richards, P.C., late a Baron of the Exchequer, died on the 14th ult., in the 82nd year of his age. Mr. Richards was the second son of John Nunn Richards, Esq., of Hermitage, county Wexford, and was born in the year 1790. He was educated at Trinity College, Dublin, and called to the Irish Bar in 1811. He was subsequently appointed one of the judges of the Supreme Court at Madras.



He resigned this office in 1835, and was appointed Solicitor-General for Ireland. The next year he became Attorney-General in succession to Sir Michael O'Loughlen, and in 1837 was appointed a Baron of the Exchequer, which position he held until 1859, when he retired, and was succeeded by Baron Hughes. In 1849 he was appointed Chief Commissioner under the Irish Incumbered Estates Act, and upon him devolved the principal labour of bringing that most important measure into operation. Mr. Richards was twice married, first, in 1812, to Catherine, second daughter of the late Henry Goone Molony, Esq.; and secondly, in 1832, to Christina, only daughter of the late Christopher James O'Brien, Esq.

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An Act passed last session provides for the appointment of Commissioners of Affidavits for the county of the city and for the county of Dublin. It would seem, from the wording of the Act, that the appointment of each Commissioner must be a joint one for both city and county. Following the precedent of the English Act, the statute requires that the persons appointed should be attorneys of one of the superior courts of common law, and residing and practising within ten miles of the four courts. The appointments are to be made by the Queen's Bench. Under a comparatively recent statute that court exercises the exclusive power of appointing commissioners for all the law courts. The same Act gives power to the Queen's Bench to appoint Commissioners in the Channel Islands. The English courts have for some time possessed this power. The *Irish Law Times* says: "We have heard of cases in which great inconvenience has arisen from the want of any person in these islands with authority to take affidavits for the Irish courts. The new statute remedies this defect. It seems to place the Irish courts, with reference to the power of appointing commissioners for taking affidavits, in the same position in all respects as the English courts. The only difference will be that created by a previous statute. In Ireland the Queen's Bench nominates one set of commissioners to act for all the courts. In England each court nominates its own commissioners for itself. The Act remedies a small defect, and in doing so accomplishes a small but useful reform."

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The *Irish Law Times* says: "The public will remember the general lamentation which followed the death of Colonel Brewster, son of our ex-Lord Chancellor. Colonel Brewster commanded the Inns of Court Rifle Volunteers. He died in the prime of life, universally regretted. His regiment subscribed a very considerable sum of money to erect memorial gates at the south end of the gardens of Lincoln's Inn Hall.

They consist of a large central gate and two smaller side ones; the fabric is light and elegant, and the screen work represents memorial flowers. On the top of the central gate are the colonel's arms, with his name and the date of his death, and on each of the other gates is the monogram of the Inns of Court Volunteers. They were designed in Belgium. We are glad to learn that the memory of a distinguished Irishman is held in such esteem."

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Baron Hughes, who was the third Baron of the Irish Exchequer, and who died at his residence in Monkstown, county Dublin, on the 22nd ult., in the sixtieth year of his age, was a son of the late James Hughes, Esq., solicitor, of Dublin, by Margaret, daughter of Trevor Morton, Esq., and was born in Dublin, in the year 1812. He was educated at Trinity College, Dublin, and was called to the Irish Bar in Michaelmas Term, 1834. He was appointed a Queen's Counsel in 1844, and was for many years a Bencher of King's Inn, Dublin. He was appointed a Commissioner of Lunacy in Ireland in 1846, a Commissioner of the Board of Bequests in 1853, Commissioner of Endowed Schools in 1854, and third Baron of the Court of Exchequer in Ireland in 1859, was an unsuccessful candidate in the Liberal interest for the representation of county Cavan in April, 1835, but was returned unopposed as member for the county of Longford in May of the following year. He held the Solicitor-Generalship for Ireland from October, 1850, till December, 1852, and he again held the same post for a short time in 1858. The late judge, who was highly respected, was the author of "Practice of the Court of Chancery in Ireland." He was a magistrate for the counties of Cavan and Longford, and married, in 1835, Sarah Augusta, daughter of Francis L'Estrange, Esq., captain in the 3rd Regiment of Buffs.

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## BOOK NOTICES.

[\* \* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

**Forms and Precedents in Conveyancing.** By W. W. Barry, of Lincoln's Inn, Barrister-at-Law. London: Simpkin, Marshall, & Co. 1872.

THIS collection of forms and precedents is likely to prove extremely useful. The author has prefixed an introduction of forty-four pages to the general contents of the work, and has also from time to time interspersed in the main body of the volume, as the occasion demanded, foot-notes of a valuable character, explanatory of the forms. In pursuing this method he has merely followed the example of other compilers, notably of Mr. Blythwood, Mr. Jarman, and Mr. Davidson; and has acted in accordance with his own maxims as stated in the introduction, that notwithstanding the numerous collections of precedents before the profession, without a thorough acquaintance with the principles on which they are founded, no experience in practice, however extensive, will render a man a safe and secure conveyancer; for forms and rules of practice, unless united with sound principles, are but like the flowers of a child's garden—planted without their roots.

The author's views regarding *recitals* are peculiarly sound. In making recitals, there are, he says, "two things to attend to. First, the making recitals sufficiently explanatory of the present transaction taken by itself, as that any one who reads the draft without any other papers may be able to collect all the facts which are necessary to the complete understanding of the transaction. Secondly, the consideration that the draftsman is preparing one of a series of instruments which are to constitute the future abstract of title; and therefore it is necessary to put upon record, by way of recital, all intermediate facts and circumstances since the last deed which are necessary to the derivation of the title, so that in proceeding from deed to deed on the abstract, one may, with the aid of the recitals, have a complete chronological history of the title." And again, "It is always better to recite deeds and facts as substantive recitals, rather than as recitals in another deed, or as recitals within recitals, as in such latter case they are termed."

The execution of the work is reasonably fair. Barry on Conveyances will not of course compare with Davidson, or even with

Prideaux; but we think it will compare with Hayes, and this is no small honour to attribute to it. So far as we have been able to look into the forms and precedents, they are both accurate and useful, of a most various and exhaustive character, and wonderfully disembarassed of irrelevant matters.

The Statutes. Revised Edition. Vol. III. (11 Geo. III. to 41 Geo. III., 1770-1800). London: Eyre and Spottiswoode. 1872.

THIS volume (being the 3rd) of the revised edition of the Statutes covers a period of thirty years. The volume is somewhat smaller in bulk than the earlier volumes, but the year 1800 was too important an epoch in legislation not to be made the ending of one volume and the beginning of another; and this appears to have been in fact the motive and object of the revisers.

The work is generally conducted on the same plan as the other volumes, but with this difference, that certain unrepealed Acts (*e.g.* certain Acts relating to the constitution of the East India Company prior to 1858) are here omitted altogether, as being virtually, though not actually, repealed, the editor stating, as his justification for the omission, that a complete revision, with a view to an extensive repeal, of these Statutes has been undertaken by the East India Executive, and a Bill for the purpose is shortly to be submitted by them to the English Parliament. The volume is also preceded by a chronological table of the Statutes for the period comprised in the volume. This table is of the most useful sort, combining, as it does, the utility of a table of contents with that of an index, and showing, as it does, the Statutes which are respectively existing or repealed by the Statute Law Revision Act, 1870, or otherwise. The execution of the present volume is quite on a par with the execution of the other and earlier volumes.

The Indian Criminal Codes. Fourth Edition. By Fendal Currie, City Magistrate of Lucknow, and Student of Lincoln's Inn. John Flack & Co. 1872.

THIS very useful work appears in the guise of a fourth edition, which was rendered necessary by the enactment, this year, of a new code of criminal procedure for India. This code and the penal code, with the additions made by the Penal Code Amendment Act, given section by section, form the staple portion of the work, but to almost every section a note is appended. Now these notes are, according to the preface, based on the principle of giving "(1) the definitions of the terms used in the sections; (2) rulings of English courts bearing on the subject; (3) reasons given by the Law Commissioners and framers of the code as to the intention of the section; (4) the provisions of any special or local laws bearing on the subject; and, finally (5), the judge-made law on the point under comment." When we state that the author has fully carried out this principle, and has referred to more than 750 cases, and to over thirty text-books and other authorities, we shall have done enough to demonstrate the utility of his work to the magistrate as well as to the legal practitioner. One little fault we have to find. Why add fifty-eight pages

to a thick volume in order to give the rules of the English Inns of Court as to calls to the Bar, and the rules for the admission of pleaders in India?

*Le Droit Civil Canadien, suivant l'Ordre établi par les Codes.* By Gonzalve Doutre, B.C.L., and Edmond Lareau, LL.B. Montreal: Alphonse Doutre & Co.

WE have received the first twelve numbers of the above work. It promises to be of a most comprehensive and even exhaustive character. The work itself is preceded by a general history of Canadian law. When we state that this has already reached 648 pages, and has only got down to the year 1772, our readers will have some idea of the completeness which is aimed at. The work is written in French, but the official documents are given in English. Many of the latter are of very great interest and importance, not only to Canadians but to Englishmen, and especially as bearing on constitutional questions. The work is one which ought to be in all our great libraries. We shall give a detailed account of it when we have the whole of the history before us.

*Life Insurance in 1872; being a Summary and Analysis of the Accounts of the Life Insurance Companies of Great Britain and Ireland, as now for the first time exhibited by the Returns deposited with the Board of Trade in pursuance of the Life Assurance Companies Act, 1870.* By T. B. Sprague, M.A., Vice-President of the Institute of Actuaries. Part I. London: Charles & Edwin Layton, Fleet Street. 1872.

THIS is the first instalment of a very useful and instructive little work, on a subject which just now is becoming one of special importance. In conformity with the Act of 1870, commonly called *Mr. Cave's Act*, all life insurance companies are required to report annually to the Board of Trade, in addition to other information, particulars as to receipts and expenditure, with assets and liabilities. These returns are printed in this little volume, and they enable any one to draw comparisons in a variety of ways, and to work out theoretically problems of great public utility. Formerly great secrecy prevailed, particularly among the older companies, which led, in many instances, to disastrous results to policyholders and shareholders. Mr. Sprague points out the evil effects of that secret system, and goes on to show the results of the Act of 1844, which led to the immediate establishment of a number of new offices competing ruinously with each other, and almost as quickly dissolving or transferring their business to other more prosperous companies for the time being, some of which in their turn bore a similar fate, and in their wreck laid bare a system little short of downright fraud, and conducted by gentlemen whose integrity and honour were above suspicion. In dealing with these facts the author goes fully into the subject of amalgamation, and as he proceeds points out the special nature of life assurance, and the benefits accorded it by recent legislation. The advantages of publicity

will be felt by the companies as well as the shareholders in various ways, inasmuch as public confidence will be increased, and by that means the companies indirectly benefited. After commenting in various ways on the present state of life assurance, our author gives a summary of statistics, and suggests, as an amendment to Mr. Cave's Act, that companies should be required to furnish direct information as to the total sums assured and the number of policies issued.

As we said before, the tables will be very useful as throwing some light upon the financial position of the companies, and we have to thank Mr. Sprague for laying them before the public in the way he has done. We shall look forward with interest for the appearance of the second part, in which the question in all probability will be fully worked out.

## FINAL EXAMINATION.

*Trinity Term, 1872.*

At the examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the Examiners recommended the following gentlemen, under the age of twenty-six, as being entitled to honorary distinction:—Ernest Augustus Smith, James Loye, Henry Lewis Arnold, Samuel Jeffery McKee, Tobias Harry Tilly, William Webb, and Charles Frederick Deacon.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Smith, the prize of the Honourable Society of Clifford's Inn, and, as a further mark of distinction, a prize of the Incorporated Law Society. To Mr. Loye, Mr. Arnold, M. McKee, Mr. Tilly, Mr. Webb, and Mr. Deacon, prizes of the Incorporated Law Society.

The Examiners have also certified that the following candidates, under the age of twenty-six, whose names are placed in alphabetical order, passed examinations which entitle them to commendation:—John William Archibald Calkin, Mark Davis, George Garratt, Henry Hughes, Gwilym Christor James, John Reginald Symonds. The Council have accordingly awarded them certificates of merit.

The Examiners have further announced to the following candidates, whose names are placed in alphabetical order, that their answers to the questions at the examination were highly satisfactory, and would have entitled them to honorary distinction, if they had not been above the age of twenty-six:—William Richard Francis, Thomas Augustus Goodman, Frank Slater Pilditch, Samuel Robinson.

The number of candidates examined in this Term was 220; of these 188 passed, and 32 were postponed.

## APPOINTMENTS.

The Right Hon. Hugh C. Eardley Childers, M.P., has been appointed Chancellor to the Duchy of Lancaster; the Right Hon. George Young, Q.C., M.P., Member of the Privy Council; Mr. Montague Bere, County Court Judge; Mr. T. K. Kingdon, Q.C., Recorder of Bristol; Mr. R. R. Torrens, M.P. for the borough of Cambridge, a Knight Commander of the Order of St. Michael and George, in recognition of his colonial services; Mr. J. P. Benjamin, a Patent of Precedence. Mr. Richard Harrington, County Court Judge, has been transferred to a new Circuit; Mr. F. E. Rogers has been appointed Recorder of Wells; Messrs. J. B. Sargeant and E. Bullock, George Browne, R. H. Collins, T. W. Saunders, Revising Barristers; Mr. Robert Ransom, solicitor, of Sudbury, has been elected Town Clerk of that borough; Mr. J. Newton Edwards, Treasurer of the Liberty of St. Albans; Mr. James Batting, solicitor, Clerk to the Commissioners of Taxes for a division of Bucks; Mr. W. C. Bousefield, Coroner for Newcastle-on-Tyne; Mr. John Lambe, Coroner for Hereford; and Mr. William Holt, Coroner for Great Yarmouth.

## OBITUARY.

*July.*

- 7th. HASLAM, Prosper, Esq., Solicitor, aged 69.
- 22nd. ATKINSON, J. Glenton, Esq., Solicitor, aged 59.
- 23rd. JACKSON, John, Esq., Solicitor.
- 28th. RUTHERFORD, George, Esq., Solicitor, aged 83.
- 30th. STEDMAN, R. Frost, Esq., Solicitor, aged 59.
- 31st. SYMES, J. Cole, Esq., Solicitor, aged 88.

*August.*

- 3rd. BLOXAM, Henry, Esq., Solicitor, aged 73.
- 4th. LADE, T. Newman, Esq., Solicitor, aged 40.
- 8th. BULL, Henry W., Esq., Solicitor, aged 80.
- 8th. GROVER, J. Logan, Esq., Solicitor, aged 74.
- 8th. DRAPER, Edward, Esq., Solicitor, aged 43.
- 8th. GREENE, Thomas, Esq., Barrister-at-Law, aged 79.
- 11th. JOHNSON, William, Esq., Solicitor and Coroner.
- 18th. MILLS, J. Hillam, Esq., Barrister-at-Law, aged 27.
- 20th. DOBINSON, J. George, Esq., Solicitor, aged 65.

THE  
LAW MAGAZINE AND REVIEW.

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No. IX.—OCTOBER, 1872.

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I.—THE PERSONAL CHARACTER OF OBLIGATIONS IN ENGLISH LAW.

III. CONTRACTS WITH UNCERTAIN PERSONS.

WE have already considered one branch of the exceptions to the general rule that the effects of a contract are confined to the contracting parties: those exceptional cases, namely, where the immediate effect is to impose contractual relations upon third persons ascertained at the time. We now turn to the other main class of departures from the rule, namely, those cases in which the parties are not completely ascertained at the time of making the contract. Of these uncertain contracts there are two divisions.

I. A contract with any person indefinitely who shall satisfy a certain condition or answer a certain description.

The condition or description may or may not be capable of being actually satisfied by more than one person: for instance, I may promise a reward to the first person who shall do a specified act, or work to every one who shall come to my workshop and apply for it at such and such times.\* Are such contracts allowed by the law of England? Generally speaking, they are not: and the ground on which the law refuses to admit a contractual relation between the certain promisor and the uncertain promisee is expressed by saying that there is no privity between them: the reason is in fact the same as that which, as we have already seen, prohibits the actual contracting parties from conferring rights on a stranger.†

\* The case of different persons satisfying the same condition successively for the time being will be considered apart.

† Cp. Savigny, *Obligationenrecht*, sec. 61 (ii. 88).



As is the case with many general rules of English law, this one has become clear and intelligible not so much by any formal enunciation as incidentally in the course of fixing the limits of the exceptions from time to time made or attempted to be made to its application. We proceed therefore to these exceptions.

#### A. Sales by auction.

The case of an ordinary sale by auction might at first sight be deemed an exception;\* for it might be said that the vendor makes a contract with the unascertained person who will be the highest bidder. But this is not so, for every bidding is a mere offer, and there is no contract until some bid is completely accepted by the fall of the hammer:† then indeed there is a complete contract with the actual purchaser, and this is with a certain person, and not in any way anomalous.

When the sale is *without reserve*, however, the case is altered, for then a peculiar incident comes in, thus explained in the Court of Exchequer Chamber:‡

“We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition [‘without reserve’] from the case of the loser of property offering a reward, or that of a railway company publishing a time table stating the times when and the places to which the trains run. Upon the same principle it seems to us that the highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so; and that this contract is made with the highest *bonâ fide* bidder; and, in case of a breach of it, that he has a right of action against the auctioneer.”

This state of things accordingly constitutes a real exception.

B. We now come to the cases where a general offer or undertaking is made by public announcements. It is quite settled that a reward offered by advertisement may be sued for *ex contractu* (in assumpsit) by the person who has performed the condition required. It is difficult to say that this is not a distinct exception to the general rule; yet it is not impossible to liken the transaction to the ordinary sale by auction, and refer the complete contract only to the time when the performance of the condition is completed.

The first positive general statement we have as to these

\* And has been by continental authorities: Savigny, *l. l.*

† *Payne v. Cave*, 3 T.R. 148.

‡ *Warlow v. Harrison*, 1 E. & E. 316, per Martin and Watson, BB., and Byles, J.

cases was made by Parke, J., in *Williams v. Carwardine*.\* “There was a contract with any person who performed the condition mentioned in the advertisement.” This was followed without dispute for a considerable time, until Lord Campbell observed in *Gerhard v. Bates*:† “These cases, though not now to be questioned, are somewhat anomalous.” Not very long afterwards an analogous but not exactly similar case arose which made it necessary again to discuss the principle. This was *Denton v. Great Northern Railway Company*.‡ The action was founded on the announcement in the company’s time tables that a particular train ran which had in fact ceased to run: there was a count in assumpsit, and another in tort for false representation: it was held by a majority of the court that the action lay on a contract, and unanimously that it lay for false representation. Lord Campbell said:

“If the company promised to give tickets for a train, running at a particular hour to a particular place, to any one who would come to the station and tender the price of the ticket,§ it is a good contract with any one who so comes. . . . Is it not within the principle of those cases in which it has been held that an action lies on a contract to pay a reward? There the promise is to the public at large, exactly as it is here; it is in effect the same as if made to each individual conditionally; and on an individual fulfilling the condition, it is an absolute contract with him and he may sue.”||

This language seems to treat the announcement as a conditional contract rather than as an open offer. However, Mr. Leake (whose statements of principles always deserve attention) prefers to say in the case of a reward that the publication is an offer to any one who is able to give the information asked, and that the acceptance of it by giving such information creates a valid contract.¶ This is ingenious, and perhaps ingenuity is well spent in trying to reduce what seems a substantial exception from an important principle to a merely apparent one. The question is not very likely ever to become practical. But what would happen if, after some one had procured the information and was on the point of furnishing it to the advertiser and claiming the reward, but before he had made any actual communication, the advertiser were to withdraw the offer? Or if the plaintiff

\* 4 B. & A. 621.

† 2 E. & B. 476.

‡ 5 E. & B. 860.

§ It does not appear in the case whether the plaintiff had or had not made any distinct demand for a ticket. Of course if he had taken one there would have been a new and complete contract at once.

|| Cp. *Re Agra and Masterman’s Bank*, L.R. 2 Ch. 397, judgment of Cairns, L.J.

¶ Leake on Contracts, 13.

in *Denton v. Great Northern Railway Company* had, on arriving at the station, found on the walls of the company's building a new and correct time table that moment printed and put up? One may say with some confidence that an action would lie for false representation:\* but since an offer may be retracted at any time before acceptance, the existence of any cause of action *ex contractu* would in such a case depend precisely on this nice and rather speculative question, whether the transaction is really a general offer followed by a definite acceptance, or is to be looked on in the more anomalous light of a contract entered into with an unascertained person. Now in *Denton v. Great Northern Railway Company* it does not appear that the plaintiff had done anything which amounted to a positive acceptance. He seems to have ascertained somehow (not necessarily from the company's agents) that the train he expected to meet did not exist, and then to have gone away without any formal tender or demand; at all events it does not seem to have been thought material how this was. It seems, therefore, almost impossible to say that there was not a real contract from the beginning with any one who substantially fulfilled the condition of being in readiness to take a ticket for that particular train: and if so, the same principle would cover the cases just now supposed, and we have a real and not merely apparent exception to the general rule that the parties must be certain.

It may be questioned perhaps whether this is altogether a desirable result. For Mr. Leake's view not only has the advantage of being more elegant and symmetrical in theory, but it provides a definite test for unforeseen cases, and therefore one would like to think it is that which the courts really act upon: whereas the view which seems to prevail in the judgments just now discussed tends to create a somewhat ill-defined class of exceptions; obviously capable of an amount of extension to which it is not very easy to assign any limits except such as may happen to be ascertained by unsuccessful experiments. One such experiment was tried in *Gerhard v. Bates*.\* The ground of the action was a guaranty given in general terms to the public by a promoter and managing director of a company that a certain dividend at least should be paid to the bearers of 12,000 "appropriated" shares. There were counts in assumpsit and in tort. The count in tort was held good, the "wrong and loss being clearly concatenated as cause and

\* The count in tort was held clearly good in the actual case of the time table: and although it has never been used in the case of a reward, the count in assumpsit having always been sufficient, there seems little doubt, from what was said in *Gerhard v. Bates*, that it would be supported if necessary.

† 2 E. & B. 476.

effect," but the count in assumpsit was held bad for want of privity and of consideration, some doubts being expressed, as already mentioned, as to the character of the cases allowing actions for advertised rewards.

We come now to the second division of what we have called uncertain contracts, namely :

II. A contract of which the benefit or burden attaches to any person who for the time being satisfies a certain condition, or possesses a certain attribute which may continue to subsist in a succession of different persons.

Such a condition or attribute may consist in—

A. Deriving title to the obligation immediately or mediately by transfer from the original contractee. Assignment of a debt is the type of this class. The statement of the general rule as opposed to this kind of exception is the familiar maxim of our law that a chose in action is not assignable,\* or as it has been more accurately expressed by judicial authority,† "a chose in action cannot be transferred so as to enable the transferee to sue at law."

B. Standing in a particular relation (ownership, possession, or real right) to a certain object: and this either simply, or in connexion with a derivation of the substantive right from the person in whom such right and the contractual right were originally united: Type, covenants running with land.

C. Combination of the two kinds of conditions, actual or by fiction of law (*i.e.* when the right to the benefit of the obligation is presumed from the possession of the object): Type, negotiable instruments.

The principal classes of these exceptional cases which actually occur will now be shortly reviewed in the order indicated by the above classification.

A. Equitable assignment of things in action generally.‡ The transfer of a debt or of the benefit of any other contractual obligation is generally enforced by courts of equity, and is to some extent recognised by courts of common law. But it would be a mistake to conclude that the principle on which equity acts is the unqualified contradiction of the common law maxim. Contractual rights, though not unfrequently spoken of in courts of equity as property and the subjects of owner-

\* I have attempted to show by historical evidence (in the *Law Magazine and Review* for August last) that the current way of treating this rule as a special interference on grounds of public policy with the supposed natural freedom of commerce rests on no solid authority, and that it is a normal consequence in England as elsewhere of the principles from which is derived the whole of the law of obligations.

† Maule, J., in *Tempest v. Kilner*, 2 C.B. 300, 308.

‡ Authorities collected in 2 W. & T., L.C. 706 *sqq.*; Lewin on Tr. 496; Leake on Contr. 601.

ship, are far from being treated unreservedly as such.\* The true principle was stated very clearly by Lord Hardwicke:† “An assignment [of a chose in action] always operates by way of agreement or contract; amounting in the consideration of this court to this, that one agrees with another to transfer or make good that right or interest; which is made good here by way of agreement.” This is obviously a very different thing from the transfer of ownership or a real right. The personal character of the obligatory relation, though modified, is by no means wholly lost. Hence the very important limitation, that the transaction is not complete without notice to the debtor.

“In assignments of choses in action, notice to the legal holder has always been deemed necessary.”‡ This is indeed put on the ground of such notice being analogous to delivery in the case of an object capable of delivery: “the act of giving the trustee [or debtor] notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go.”§ But this cannot well be, for though the debt be evidenced by a security capable of manual delivery, such delivery makes no difference to the necessity of notice.|| One might almost say that the transaction is, in substance, a novation in which the assent of the debtor is supplied by fiction of law.¶ The consequent doctrine of priority by notice (*Dearle v. Hall*) shows very clearly that the analogy to a transfer of real ownership is only superficial and must not be pressed.

Another aspect of the limiting rule is commonly expressed in the form: “the owner of an equity by assignment is bound by all the equities affecting it”\*\*—a rule which, though not inflexible,†† is of considerable importance in this view. Some

\* The fundamental difference between the cession of an obligation and alienation of property in the strict sense is explained by Savigny, *Obligationenrecht*, sec. 62 (ii. 95).

† *Wright v. Wright*, 1 Ves. Sr. 411.

‡ Sir Thos. Plumer, M.R., in *Dearle v. Hall*, 3 Russ. 28; *Stocks v. Dobson*, 4 D.M.G. 15, 16. In Scotland, “the assignee or cessionary can sue in his own name,” but “intimation to the common debtor is absolutely necessary to complete the assignation of debts.” Paterson, *Comp. of Eng. and Sc. Law*, p. 171. (Cp. Potier, *Contr. de Vente*, s. 554, *sqq.*)

§ In *Loveridge v. Cooper*, 3 Russ. 58.

|| Judgment of Parker, C.B., in *Ryall v. Rowles*, 1 Ves. Sr. 367; 2 Wh. & T., L.C. 696, where a serious misprint, “or notice” for “on notice,” has crept in (line 2).

¶ The assent of the other contracting party may be rendered necessary even in equity by the nature of the contract. *Stevens v. Benning*, 1 K. & J. 168.

\*\* *Lewin*, 496.

†† See per Cairns, L.J. *Re Agra and Masterman's Bank*, L.R. 2 Ch. 397.

of the cases which are brought under this head are nothing else than instances of the much wider rule, that no man can transfer a more extensive interest or a better right than he has himself.\* But the rule is also used when it is really intended to apply the principle that the personal relation of debtor and creditor continues, and that the debtor may safely act on it until it is terminated by notice. After notice the debtor's position with regard to the purchaser, in case of further assignment, is exactly the same as it was at first with regard to the original creditor.†

It may be considered, therefore, that this head of exceptions is really less extensive and less opposed to the principles of the common law than might appear at first sight.‡

## 2. Transferable shares in partnerships and companies.§

A large partnership or unincorporated company with transferable shares might be thought to present a very strong instance indeed of a contract between uncertain persons; for it may be said that there is a floating obligation, consisting of all the rights and duties incidental to the contract of partnership, between all the members for the time being; and as any member may *ex hypothesi* substitute his nominee for himself, the parties to the contract are in the highest degree uncertain. It seems strange that this line of objection was not more distinctly taken|| while the position of such a company at common law was still in dispute. Perhaps the confused and panic-stricken way of looking at such undertakings which was embodied in the Bubble Act, and prevailed in many cases decided while it was in force, and the consequent admixture of

\* *E.g. Clack v. Holland*, 19 B. 262, expressly put on this ground by the M.R.

† See per Knight Bruce, L.J., *Stocks v. Dobson*, 4 D.M.G. 17.

‡ There are also statutory exceptions, which, however, are of no great importance in considering the general principle. By modern statutes (collected in "Leake on Contracts," 614), certain bonds taken in judicial proceedings, in the names of public officers, have been made assignable to the persons really interested. The assignability is limited and confined to a specific purpose, and moreover these provisions, being in truth only a machinery for securing obedience to judicial process, have in themselves little or no analogy to the assignment of private contracts. But a real exception has been made in the case of life policies (30 & 31 Vict. c. 144). The new statutory right conferred on the assignee is, however, subject to the same limitations which determined the equitable right he formerly had, notice to the debtor (the Assurance Company) being required to perfect the assignee's right, and the priority of assignees as between themselves being determined by priority of notice.

§ "Lindley on Partnership," i. 189-197, 698.

|| There is a suggestion of it in Abbott, C.J.'s judgment in *Josephs v. Pebrer*, 3 B. & C. 639, 643: "It was quite uncertain what person would thereafter, as holder of the certificate, become partner in the concern."

extraneous motives, made it impossible to consider the question calmly as one of legal principle.

However, by this time "the legality at common law of such companies may be considered finally established;" and Mr. Lindley's analysis\* shows that they really involve no repugnance to the general rules governing contracts. The reasoning should be studied as a whole with its context; but the critical point is this:

"It is not illegal for partners, however numerous, to agree once for all that any partner who is willing to retire shall be at liberty so to do, and to introduce in his place any person selected by himself."

And "Those who form such partnerships and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions."

This, if a somewhat subtle conclusion, yet is arrived at by steps which one must admit to be legitimate, and commands assent; though one may hazard a guess that in the beginning of the century it would scarcely have been tolerated.

In *Rex v. Webb*, 14 East, 406, where a partnership of this sort was held not to be unlawful, the transferable character of the shares was made out to a certain extent only. The company was for the purpose of supplying Birmingham with bread and flour: the holding of shares was virtually restricted to persons in the neighbourhood, and every new shareholder was required to enter into new covenants with the partners for the time being or a trustee for them, and to buy of the partnership certain weekly portions of the bread and flour to be manufactured by them: moreover no one could purchase more than twenty shares.† And some stress was laid on the circumstance that the object of the undertaking was not "to raise stock *for the purposes of transfer*, nor to make such a stock the subject of commercial speculation or adventure."

It may be presumed that at the present day the power of creating transferable shares in a partnership is at all events limited by the rule (to be considered afterwards in its place) that new kinds of negotiable instruments cannot be invented at pleasure.

And if the common law does not positively disallow partnerships thus constituted, it certainly gives them no active encouragement; for it seems certain that considerable difficulties stand in the way of getting any effective remedy for the protection of the rights arising out of such an arrangement. The partners cannot even as between themselves concentrate

\* At p. 196 of his work.

† See the judgment, p. 415.

their rights in a representative \* for the purpose of compelling individual shareholders to perform their duties to the partnership; and conversely, it appears very doubtful what would be the proper legal course (if any) for an individual shareholder to obtain payment of his dividends or interest.†

However, the practical interest of these questions has been much diminished by the Companies Acts. It may perhaps fairly be said that the free powers of transfer given by those Acts are not so much innovations as consolidations of the common law.

It is worth while to point out the fact that "shares in companies governed by modern statutes are not mere choses in action"‡ as indicating the general tendency and results of the modern treatment of the subject.

The Companies Act, 1867 (ss. 27-36), provides for the issue of share warrants payable to bearer for fully paid-up shares or stock; but the attempt to create a special class of shares transferable by mere delivery in the original constitution of a company has been pronounced to be repugnant to the spirit, at least, of the Companies Acts.§

FREDERICK POLLOCK.

(*To be continued.*)

## II.—MAINE ON ANCIENT LAW.

THE book of Mr. Maine upon Ancient Law is a volume of distinction both for manner and matter. It is much for an English lawyer to lift his eyes from the earthy present, and to revert them to the real past, if not yet range them to the rational future. No doubt the manner suffers variously from this retrospective survey, which exhibits nature in the inverse order and epochal colours of the writer's position. For, vainly would he refer us to archaic documents or early witnesses, of which his purview, language, the public must be definitively the expositors. To escape the vicious circle, he must find a fulcrum in the future, which is the only true interpreter of

\* *Hybart v. Parker*, 4 C.B. N.S. 209.

† *Lindley*, ii. 889; *Lyon v. Haynes*, 5 M. & Gr. 504.

‡ *Lindley*, i. 663; Cp. *Ex parte Union Bank of Manchester*, L.R. 12 Eq. 354.

§ *Re General Company for the Promotion of Land Credit*, L.R. 5 Ch. 363, 377; s. c. nom. *Princess of Reuss v. Bos*, L.R. 5 H.L. 176, 203.



past and present, through the means called system. System of some sort, in advancing to the real in science.

Accordingly Mr. Maine does not pretend to write a treatise, as he honestly declares, of even the Roman law, though this is his main subject. He merely faggots our national unity of a *bund* or bundle of essays, unconnected with each other, and often incongruous within themselves—though writ in this case, not, as frequently, by even different “hands” or authors. He merely gives them the name “chapters,” though heads of *what*, he does not indicate. The very sentences maintain a unity of incoherence with the general structure; and the terms, at least when technical, are commonly inaccurate. But be it recollected that the writer deals with foreign laws, and evidently piques himself on academic perspicuity.

The *decousu* would be also quite of course in an English law book. It would be so in even the literature, if we listen to our old friend Guizot, who described it as devoid of this *partie intellectuelle*. But what is singular in Mr. Maine is, that with all these drawbacks, and as further aggravated by the inverse disorder of his contemplation, his book has something so superior to the trivial tenor of our legal writers—is so fraught with conscience, culture, and even a measure of conception—as to make it a phenomenon in Anglo-American law literature. Add to which, that the topics accumulated for discussion are most of them of really cardinal importance in jurisprudence. They might seem to the superficial a collection of curiosities, a book-trade traffic in the old clothes of society, advanced to law. But even so, they would not have been useless, nor out of place. The fact however is that Mr. Maine is neither quack nor smatterer; nor even the ordinary flatterer of his kindred or his country. His habitual term for the Gothic ancestry is the “barbarians,” if not sometimes savages; and he regards their feudal system (but this erroneously) as a monstrous mischief. Nor does he conceal his disdain for the routine of his professional brethren. These are distinctions to be added to the other merits of this thoughtful writer.

But partly for these reasons perhaps, among certain others, the reception of the book by the English public seems likewise singular. Though now before them for some score of years perhaps, it has thus far attained but one reissue. The legal press have scarcely noticed it at all with any gravity; though possibly for want of language to talk *about* things so outlandish. Nor do the publishers seem to have taken to *exploitation* of the startling author. Yet there are reasons to believe that he has made a deep impression. The work, it seems, is become a class-book with the students at law; with whom however the author is a pluralist professor. It appears also to have inspired some recent flights into foreign law, or at least

flutterings; such as the rival translations of Gaius. For Mr. Maine's curiosities are taken largely from these archaic Institutes. It may be mentioned that the Government have also decked his name with *Sir*, though I respect him far too gravely to repeat the feudal incongruity. In short, both public and profession seem to stand in awe of his erudition.

A situation of this nature is of complex peril at the present juncture to Legal education, Law reform, and the general interest. But for the same reasons it may auspiciously be turned to serve them. The sounder portions of the book, already familiar to the profession, may be made a conspicuous pedestal to the exposure of the graver errors, and even for crowning both those parts with some supplemental hints of system. For this is what is really needed at the same time to avert the mischiefs, and to evolve the merits, of the book with the English public. As the counterpart to their own genius of analysis and mere particulars, some gleams of theory are their prime requisite for seizing truth as for sifting error. But Mr. Maine does but pile an antique chaos upon their own for them.

To reduce both to any order within the limits of an article, the comments must of course be cursory, and so combined as to support each other. But to prevent the appearance of thus selecting for mere effect, the alleged errors will be taken quite in order from all the essays; grouping also around them the minor samples when rendered evident. The writer hopes by this economy to give fair colour to his reprehensions, and cast the challenge for further proof upon Mr. Maine himself or others. He will however think it further proper to give the public meanwhile his name. No doubt, with Englishmen an Irish signature would count for little upon change. But they will possibly not slight it as a pledge of honesty or honour.

1. Already in the modest Preface, there occurs an error of prime importance. Mr. Maine assumes that Jurisprudence universally has but one type, and that the Roman may be taken for that "typical system." But, not merely jurisprudence, which is the vastest of organisms, but even the simplest of animal systems cannot move, or live perhaps, without three elements; and these contrasted with each other by contrariety, and by opposition—that is to say, by direct, and oblique antagonism. Thus the type must be not either of these alone, nor even all together, but the *predominance* of each successively in the development of the system.

Nor was the notion on the part of Mr. Maine an inadvertence; for he afterwards repeats it analytically in the very subject. He describes the Roman Family, House, and Tribe or rather *gens*, as "a system of concentric circles which have

gradually expanded from the *same point*." His thoughts were probably at the other extremity of the creation, or upon the nebular phantasm or hypothesis of La Place; to which even mere material or mechanical laws could not give consistency. It would be shrewder to have looked at home, and followed "Darwin upon Species," which makes creation easy by committing types and laws to accident. But the fact is, that the House community is the direct contrary of the Family, and arose on a decentric and distant foundation; while the Tribe, as the name itself imports, is the *tertium quid*, opposed to both of them by society to reunite them in a higher system.

Conformably, the Roman polity, which from the outset showed this large development, so far from offering its complex type, as our author thinks, in the primitive form, represented the very manhood of the general progress of society. It was the first-fruits of what Mr. Maine himself calls the "progressive races." The prerogative of these races was to have evolved a *third* term, or more strictly to have acceded to its dominance as type; and thus escaped the vicious circle which bars even still the anterior world. To the vantage ground of this vast pedestal of races and of ages it was, in fact, that the Roman race owed their unprecedentedly great history. And so the germs of their institutions would be best explored through those anterior regions, where they remain still predominant or more exposed to direct inspection; and from which they had accumulated to the rude synthesis of the Romans, throughout a progress no less real, and but more latent, in the lower systems. For, otherwise how should the higher have ever come to be developed?

The mere prospect of trying to impart such an idea to the actual world, might well frighten a writer with even a folio's space before him. But my adventure requires this basis, and the feat seems feasible in a few paragraphs.

Let us conceive the social march, thus far, divided into three compartments, and named in order the Asiatic, the African and European; and then the type of each respectively to be the Family, the House, the Gens. This will be upon the largest scale or the most general expression. Descending therefore to the species in each of those vast cycles, we should find the same three elements evolved in their historic forms, and with the due proportionalities to both their order and progression. Commencing therefore with the Chinese empire and its appurtenances of transition, as composing the granitic basis of the universal edifice, it should offer, as its social type, the Family form, as it does even still; while the two ulterior germs, though in secular strife with it, are kept subordinate. For example, all the children of the husband by his concu-

bines, are adopted by the wife proper and share his substance upon equal terms; no doubt to prevent the shoals of outcasts so often wielded against the empire.

The next in order of the social germs, which is the House community, was by these failures forced to pass off into space and find distant settlements, around which gathered all the refugees and vagrants from the Family empire. This was really the offal origin of the wild medley of hordes, made Houses, who supplanted one another with their robber empires throughout central Asia; and may be described by the names of their two extremities as Assyro-Persian. They were notoriously, in every detail, the direct contrary of the Chinese people; the contrary alike in their history and in their destiny.

Above those two extreme empires, and thus between them socially, could under favour of their conflict next emerge the supreme germ, and react on both obliquely, though as yet but feebly, towards conciliation. This rudimental rise of the Tribe or Gens into social dominance, is marked accordingly in the Hindoo empire with its rude Caste *classification*, and its government by *intellect*, though in the primary and priestly stage. It was thus also that its destined mediation between the extremes, took the form called the Bhuddist religion, which was diffused throughout all Asia, and of which we thus encounter the rationale for the first time.

Turning over to Africa by due *generic* contrariety, the social march must needs present the House community as the general model, and have reopened itself successively into three similar but counter systems. The first of these was the Egyptian empire, with the Family fathers become formal, spiritual. The next was the Semitic colonies, where the robber Houses became pirate Counters. The third, which supervened on both of the races, Semitic and Egyptian, and is well known to have combined the fragments of their lore and culture to some system, was accordingly the Greek empire of art, philosophy and strict civiltude. For even the territory of Greece in its islands and peninsula, with perhaps even its *Hellenic* people, were effectually African. The Attic Achæans were of a wholly different race, and gave to Greece its synthetic element, as the Brahmans did to India.

It was on both of these vast developments of the Family and the House *genera*, that the Romans came at length to construct their social edifice, under guidance of the Gentile element as the type of the supreme cycle. *Condere Romanam gentem*, as it was worded by their learned poet. The Romans could of course embrace the cycle but in the lowest or Family section, and by a sort of combination of the Chinese fathers and the Egyptian priesthood. Not—as it must be quite needless to remark to the rudest reader—that there could be any personal

or national consciousness of those proceedings; they being merely, as in inert nature, the operations of social progress, through the medium of the supreme organization known as races.

The Teutonic race or peoples, who succeeded to the Roman, reproduced the Household extremes, Asiatic and African, by compounding their merely military and merely mercantile excesses into a sort of mixture, through the Gentile notion in its personal form; which medley is no other than the famous Feudal system. And in fine the two remaining species of the extreme orders of development, and shown to be successively the Hindoo and the Greek systems, must be the elements for combination allotted to the Celtic race, where the Gens matured into the Clan, as the State and Empire do into the Nation.

This rude *mappe-monde* of the whole domain of social history and Jurisprudence will enable us to note with brevity the truths and errors of Mr. Maine.

2. The foremost of his essays is entitled "On Ancient Codes." His use of the word code is, in the first place, very loose. He applies it to the Roman law alike at all its stages; quite the same to the Twelve Tables as to Justinian's *Corpus Juris*. To the Tables he also gives the name of "institutions." But this must imply vagueness upon some or all of those subjects. The Tables were simply Laws, or to use Warburton's phrase, Legation; a compilation prescriptive, civil, and in the case perhaps constitutional; thus having nothing of jurisprudence, and so not of codes, not to say institutions. There was however the excuse that the term code had been appropriated to precisely the prescriptive portion by the *Corpus Juris Civilis*. But then our author should not give it also to the whole collection without notice, in addressing a public not very familiar with the premises, and an age when the name Code embraces the Digest also, and even the Institutes.

But the great question of this so-called chapter is, as to which of those Laws is primary? Mr. Maine, with all his countrymen and many other, thinks it was the Case-law; and that mankind must have been judging before they yet had laws to judge by! He calls quite properly to witness Homer, as was done for ages in the Courts of Greece. The great poet, he assures us, knew but two names for Law; to wit, *Themistes* and *Dikè*, and yet gave both to the judicial form of it. This profusion amid penury would scarce befit the great economist as well of language as of fiction, *qui nihil moliret ineptè*. Mr. Maine seems however fully certain in the premises. "The divine agent," says he, "suggesting judicial decisions to kings

or to gods, was *Themis*." "Then the *Themistes*," he proceeds, "must be distinctly understood to be, not laws, but judgments." And to make assurance doubly sure, he cites Mr. Grote. "Zeus or the king on earth," says the historian, "is not a law-maker, but a judge." He is provided with *Themistes*, comments our author: but "consistently with their emanation from above, they can be but separate and isolated judgments."

Now this point of consistency, in the first place, does not seem obvious. It would appear more consonant with emanation from a divine mind to be united at least in principle, than sent in packages as from a tea-shop. Then if Zeus did but hawk the judgments, was he not less a judge than sheriff? All rejudgment even in England, is *from*, not *by*, the "court below." But let us pass from heathen to Christian doctrine, where we can be stricter. Was the Son, the *second* person in order of the Holy Trinity, not sent down from heaven by the Father, as a *judge*; and sent to judge according to the laws or statutes of the Father; not merely to retail His judgments, or why implore the Son as "Saviour"? Was it statute laws or was it judgments that the same omniscient Father delivered quite directly to His prophet Moses, for His Chosen People? The statutes, then, were antecedent in theology, as in necessity.

But who moreover, after Mr. Maine's assurances to the contrary, would suppose that this was also just the case of the heathen Zeus; and that Homer's *Themistes* mean quite literally, statute laws? The example most relied on by our author himself may vouch for it. This case is the description of the Cyclops in the *Odyssey*: "They have," sings the poet, "neither assemblies for deliberation nor *Themistes*—οὐκ ἔμυστρος." Now by this last word is palpably meant, not judgments, but statute laws, as the appropriate issue from deliberative bodies. The poet further proceeds: *ἑμίστρεται ἑχαστος παίδων*, &c. That is, "each father *legislates* for his children and wives," &c. Could Homer possibly have meant, that the Cyclops father *judged* them or for them; which would be only what the ordinary fathers did the world over?

If he could, he must at all events have said it in different terms. The very etymology crowns, as usual, the confirmation. The word *Themistes* is palpably from *τιθεω*, to enact or posit. The Latin version *ponere* is likewise technical for legislation. Besides *θημα* in *Themistes*, there is *ισταω*, to set up or constitute; so that the word means, to a hair, statute laws—*themata statuere*! And so with *Themis*, who had her name from (not gave it to) the same source, she was the goddess or generative principle of *Law*, not "Justice." Moreover, justice too is not all special to case-law, but is of all these laws the common object, and so of the statute law by generic

primacy. *Per contra*, the *Dikè*, so far from being a mere *alias*, is just the name which Homer gave exclusively to judgments; which Mr. Maine would mistake easily, as he describes the name, naïvely, "to fluctuate between a judgment and a custom or usage"! In fine, if we pass down to the Greek forum of schoolboy history, we find the high officials of the case or judgment law styled *Dicasts*; while the revisers of the statute laws are, on the other hand, named *Nomo-THETISTS*! So that our learned Prælector (*vulgo* "Reader") of the Inns of Court, and Professor of the University of Classic Cambridge to boot, would seem as little at home in Homer's language and mythology, as he is in the genesis of general Jurisprudence.

Why, practically also, in Mr. Maine's own Roman "type," the Legislation was so plainly primary as to usurp upon all the rest. This phenomenon he had the merit of observing in itself quite tolerably, when remarking that the Roman law had scarce any "Judges" in the English sense. But again, he notwithstanding gives the name to even the jurisprudents, whom the Romans deemed a sort of law-makers—*conditores legum*. The very prætors were conceived as legislators, with the difference that their laws were annual. The edicts are styled *annuæ leges*, by the good authority of Cicero.

The reason too of all this is as profoundly plain as possible. The Roman purview moved in all things from the general towards the particular. Thus the jurisprudents, from the various sorts of statute law, evolved the particular or more proximately popular contents, by *deduction*; and then the prætors controlled both sources by a comparison of their joint results. And in this the prætor was no more absolute, as Mr. Maine and others fancy, than the syllogizer is in drawing conclusions from the premises imposed upon him. With the Teutons and their judges and lawmakers, it is the contrary. Instead of jurisprudents to evolve more special laws from general, they have the method, perhaps more lucrative if not so logical, of "Private bills." The Judges too, like even the parliaments, commencing with the private facts, are forced to ascend *analytically* back by groping for the rule of law. They are thus in a perpetual struggle against the current of the natural order; and so, when baffled or weary, are obliged to turn off to either bank, and tell the savages of this strange region, who crowd to wonder at the wiggèd explorers, that the object of the swimmer was just to bring them some beads of justice.

It was in this way that the author also could descry nothing beyond the case-law. With his chin to the splurged water, he could see, like the poet's pilot, and thus proclaim but *pontus*

*undique et undique pontus.* His Roman "type" no doubt appeared to be a sort of obstruction. But when he passed that over to the higher seas or days of Homer, he could (*en vrais Anglais*) extend his real type of the Common law back, we saw, to "archaic" Greece, and up to Jove upon Mount Olympus.

It might be asked then how the English law has ever found a jural footing? The answer would be, that it was supplied by nature in her regular way. This way is in fact the mutual service of the leading races, as their social function. The Gothic peoples, like the Romans, cannot see or work in opposite courses—which to expect from men, is just the mother absurdity of our times. The earlier race prepared the principles, the mainly statutory basis; the other people supply the personal counterpart of facts and details, which are equally requisite and more important perhaps for the moment. Whatever basis the English law has yet attained is thus duly Roman, whether Civil or Canonical, with later splicings from the French. Left to itself, our Jurisprudence must still have ranked with the Turkish system and its hierarchy of Cadis, with the Grand Ulema for Lord Chancellor. Perhaps below it, as the Turks have their *Themistes* in the Coran; unless indeed our ethnic sympathies had led us likewise to the Bible.

Of the queer ways in which this national purview comes to mislead even the writers, Mr. Maine suggests another example on this occasion. It is known that Jeremy Bentham has analysed all law—which was with him to say the statutory form mainly—into the "elements of command, obligation and sanction." Mr. Maine bows to Bentham with his *élève* Mr. Austin, but submits that the command must be somehow proper to the case-law. Thus the personalistic view which misleads Bentham to make it general, enables Mr. Maine to recall him to the national order, and to vindicate the command for the case-law of personality. It is a sample of the way in which the English jurisprudence makes its crab-wise progress towards truth and justice, upon the crutches of counter errors.

The truth however of the matter mentioned would appear to be briefly this. The "sanction"—which by Bentham was understood of mere punishment—is brought in action but exceptionally, and so could be no element: to make it such, would be beside to give the law an element of evil. The "obligation" seems still less so, being an abstract result of the law. And as to the command, the lawmaker can neither need nor use it. His subject matters are generalities and apply mainly to things insensible; and these he regulates but by request, or by "rogation" as the Romans phrased it. The judge alone commands, as he has to enforce punishment. He may tell the convict, as his personal and proper subject, "to go and be



hanged." Nor does humanity or judicial dignity seem to gain largely by the lengthier formula, which tells him that he must be taken from the presence of the court and be hanged *by the neck until he is dead*. For here we have that English draughtsmanship which is another trait of the same purview, and "provides shrewdly against a hanging by the legs or by the arms, or by the hair, which might be cut, while the man could still run off alive.

Our lawmakers go most of them to Paris and its public places, and might learn the expression of their business from the simplest notices. *On ne passe pas—On n'entre pas—On ne porte pas le manteau—On ne sort pas par ici*. And if you persist ignorantly, as the writer once did, you are met (as there) by even the rudest soldier, with a gracious smile, and a: *c'est impossible, Monsieur!* Thus it is sheer impossibility that opposes you, and not the soldier; as in the notices, the law itself does not breathe of command, but rather civilly informs you of the universal custom.

In England you are met for instance by the blunt burgher with: "Stick no bills"; and which yet leaves you to evade it by sticking other adhesive nuisances. A policeman "on duty" will meet you with: "*You must go back*"; and leaves your feelings to reflect if the costumed "rough" has not insulted you. If you ascend among the polished people and read the notices on the park gates: "The visitors" (but of course no others) "are requested"; or are "respectfully requested"; or "particularly requested not"—to do what? "to damage the plants or the grounds"! or sometimes are "particularly requested to take notice" to that effect. Even here the observer can see the legislative and the general genius of these two great peoples.

The author, still in the same chapter, pursues unconsciously his Gothic type, of judgment before law to judge by or meat after mustard, into what he calls the passage of the Themistes down from kings to oligarchs; with the difference that they got here amassed into a secret knowledge. His conception of the mechanism of social movements is of the crudest; but the jural advance now referred to is a specially curious sample. He says: "We have in fact arrived at the epoch of Customary law. Customs or *observances* now exist as a substantive aggregate, and are assumed to be precisely known to the Aristocratic order." Can the writer have really known what he was saying, or what a custom means? A custom to lie in observances, or to be hoarded with an oligarchy! Why custom, by its very essence, pervades the whole of its community, as well the ruled as the rulers, and is quite involuntary in its rise and regimen. Thence it is a sort of law so comparatively tardy, that it was virtually unknown in the great Roman system; as well attested by even the name in its

unworn length of half a dozen syllables. The length is also a sure sign of the complexity of the notion. This notion was moreover alien to the Roman race, as to the Law; with whom the *mos* was the equivalent—quid valent *leges sine Moribus*. So the Gothic part in turn was the *usus* or usage; and custom only supervened, to bring as usual those extremes to order.

Thus a custom with an oligarchy is a contradiction almost in terms. On the other hand the usage is perfectly in place and order; and this is doubtless what he meant, as he mistakes them for quite the same. The Feudal system was indeed his "substantive aggregate" of usages, secreted with the oligarchies and doled to serfs by their "kept" judges. Even England to this day has never had one genuine custom; the Common law, so far as native, being a mass of mere usages. For as the *mos* regarded *conduct*, so the usage came to manage *business*; while the Custom advances up to governmental or social interests.

It seems accordingly to be the part of the Celts in this line of march; their social clannishness quite obviously adapting them for its formation. Thus the Romans caught their only trace of it in the religious ceremonies of the *Gens*. The modern French are the only people perhaps in all history who had a whole jurisprudence of this Custom law, their *Droit coutumier*. And how, by the way, did they prove its rules in litigation? or was it by their feudal oligarchy, as our author fancies? No, but chiefly by the lowest multitude, or as the law phrase was, *par tourb*! They did not want the witnesses to be qualified in mind or morals, because the rules to be attested were a second nature and a common reason.

The ancient Law of the Spanish also was of this customary character, but has been long dissolved into their modern codes or systems; as with the French, the *Droit coutumier* has been into the Code Napoleon. The Brehon law of the Irish was a customary law throughout, of which a remnant may be still seen in the so-called Tenant-right of free Ulster: a right which Mr. Maine should note, has been revived and is maintained, not alone without, but even *against*, an oligarchy and an alien government. And the mode in which this English government can comprehend even still the Custom law, was shown the other day, in its offer to this tenant-right, of the superior sanction of a "Parliamentary title." As well might Parliament pretend to sanction the Laws of Nature or Morality.

III. Though the title of Mr. Maine for his second chapter be *Legal Fictions*, the subject is but one of the three organic agencies which are therein considered as the levers of jural

progress. The two others, which are Equity and Legislation, would thus by implication be a sort of Fictions also. For this is the succession, likewise, on which the writer insists with emphasis. "The historical order," says he, "is that in which I have placed them," viz., Legal Fictions, Equity, and Legislation. And at all events, the series is not unworthy of the terms.

It has however some connexion with Mr. Maine's real jural type, which is, we saw, not the "Roman system," but the Teutonic anarchy. For the article of Fictions corresponds to the judge or case Law. And if this concert was not formally discerned by the author, it must have been because his notions upon either subject are not very thorough. All he can tell us of the Fictions, is that he chose to accept the term in a more extended sense than does the English law, or even the Roman. But how much *more* extended he does not say precisely; and less precisely still does he describe the Roman or the English doctrines. These he seems to commix not alone with one another, but both of them again, with forms and formulas and even presumptions.

Fiction, he tells us, "in the old Roman law is a term of pleading, a false averment by the plaintiff which the defendant was not allowed to traverse." Did the writer not allude to the *Presumptio juris et de jure*, which alone could protect the falsehood, and could do it but as jural *fact*? Moreover he should remember that the "old Roman law" had small concern with this refined pleading, and that this little was for the prætor; who predetermined the issue both for the parties and the judge—much like the French *juge d'instruction*, who is so laughed at by our profound newspapers. The author's instance of a Roman Fiction is accordingly not very grave: it is, "that the plaintiff was a Roman citizen when in truth he was a foreigner." But the question here would relate to a personal *quality* or status, not at all to a Fiction, which imports a supposititious *effect*. "The object of these Fictions," our expositor proceeds, "was of *course* to give jurisdiction, and they therefore strongly resembled the allegations of the writs of the English Queen's Bench and Exchequer, &c., that the defendant was in custody of the King's Marshal, or that the plaintiff was the King's debtor and could not pay through that default," &c. The sequence, in the first place, does not appear much "of course"; and were it otherwise, the English usages must seem odd proof of the Roman Fictions.

A foreigner could not at Rome object, as such, to the jurisdiction. Then, in England, it was not status that affected the jurisdiction, but the *fictitious* allegations of being in the Marshal's custody, or in the King's debt, which could likewise be but through a *fact* of contract. These samples on the

English side, where Mr. Maine was at home, were really Fictions, though debased into judicial "tricks of trade." But the only thing "of course" to connect them with Roman law, is the fact that our author was in a custody still closer than that of Marshal or even King, to wit the purview of the Gothic race. He was constrained by this duress to reflect our English Feudalism, which was throughout a scheme of Fiction, back on Roman Republicanism; quite as he had before endowed the Greek Olympus with the Common law.

For seriously, the Roman law had no Fictions proper at all, but merely forms for articulating or distinguishing its generalities; and which were not the Law itself, but the means or marks for knowing it. This Law consisted, on the contrary, of *Themistes*, statutes, and at lowest presumptions. The Fictions are *assumptions* made of those fundamentals, in default of them. They were employed at all by the Roman law or lawyers, not in lawmaking or pleading, but in argument and oratory, with the view of reconciling the Law and Case, or of refuting either. For either of those positions might be subverted by an avowed fiction, from which there could be drawn a consequent that harmonized with the other. Thus the Fictions with the Romans were levers, not of law, but argument; and even as such subsided into the district of judication.

The only exigency for them which they met with in their jural progress, was when, upon advancing to the confines of the *jus gentium*, they felt the want of some means of bridging their intercourse with other peoples. Of this there are some famous instances, which strangely escaped Mr. Maine. One of them is the "Postliminy," which is still decanted by public-law writers, though it is to be feared, with scant comprehension of its real significance. It *feigned* that the Roman citizen, made captive in a just war, and carried consequently into slavery, remained at home and in his legal rights, in the event of his returning by escape or ransom from the enemy. And in the case of his dying in slavery, there was another of these quasi-Fictions, no less famous with the Romans, by the title of the *Lex Cornelia*, to the effect, that the death took place at the moment of capture, and therefore when the prisoner had still been free and in his full rights. But even these could not be Fictions proper, as indeed the Romans called them positive laws, and they are treated in the very *Institutes*, among the States or qualities of Personality. The Romans exercised in fact their lawmaking jurisdiction to its normal fulness, upon the person and the civil rights of the captive deceased or returned; and could have none when or while he was absent from their territory. But in the English Fictions proper referred to by Mr. Maine, it was a shopkeeping rivalry of false advertisements within the Law.

The multitude of profound questions, International and Civil, which were involved in these Roman cases, would astonish even legal readers; and would do more to show how Law has wrought out its own development than Mr. Maine, with his three levers, has succeeded in exhibiting. One from many may be noted, as of public interest at this moment. Were those laws International, as has been assumed by posterity? or were they Civil regulations confined to the Republic? The latter would appear to be the Roman impression, although they gave the *postliminium* the epithet *fictitious*. For this applied but to the *supposed* presence during absence of the prisoner, and not at all to the Law, which saved his rights despite the absence. In case the captive died in slavery, and therefore could not make a Roman will, the Law which similarly saved his rights from the outset, was called *suspensive*. But both proceeded upon positive facts—to wit, the death or the return—and these were all that could be duly dealt with by the local jurisdiction.

But how then has Postliminy been passed for cardinally International? It would be curious to hear the pundits of this supreme law essay to answer. The institution implied no shade of Roman treatment with the enemy; affected none but the individual captives and their laws or country. It did not even take account of the usage of ransom, which had already grown up among the Greeks by the name of *lutron*; and which the English of our own time interpret queerly by the name of "*loot*." The only possible connection with the enemy in the transaction could be, if the captive returned upon an errand from them, or with a promise or intention of going back to captivity. It was the memorable case of Regulus in the Carthaginian wars. But did Regulus return, or did the Romans let him, in obedience to a Law of Nations, or to some other obligation? He returned in the first place, because he *swore* to the Carthaginians that he would do so in the event of not succeeding in their errand; and the oath was a bond of Natural or religious law, not International. And in the next place, he returned because he came with that *intention*, and that the Roman law could not detain a freeman against his will. The case could not attain the Law of Nations even by its *Fecial* rudiments, as Regulus could be no legate of either the Romans or the Carthaginians.

Thus there absolutely was no ground for a proper law of Internationality. What was the colour then that has imposed those Roman statutes on the higher law? There was doubtless first the fact, that they were conterminous to each other. The Civil Law was put to strain to extend aid to its citizens, in certain casualties beyond its power or means of direct remedy, and which it thence had to await from the

hands of accident or nature. But the Law of Nations is essentially of a *remedial* character. Another character of this great Law is, that it proceeds from the *future*, or a *posteriori* like conclusions in the syllogism; and not from the actual or from the past, as is the course respectively of the Civil law and the Natural. But the return and the death of the Roman captives were future events; and so were easily mistaken for devolving to the *jus gentium*. The answer still would be, however, that both the events were *contingent*; and that this modal belongs logically to the Civil law, and not the International. This supreme Law must always be at the lowest based on rational justice; and thus must range beyond the region of contingency and accident.

The British reader of the foregoing paragraphs is perhaps thinking of the Washington Treaty, and of its three famous Rules or Fictions of Neutrality. Also, of the cognate matter of the Foreign Enlistment Act, and of the limit between Legislation generally and the Law of Nations. The discussion will perhaps furnish him some fresh hints upon these home questions, and which, as still *sub judice*, the writer does not wish to prosecute. We return then to Mr. Maine's remaining levers for jural progress.

The Legislation, which he ranged the last, was the Roman part, we showed, and therefore foremost. The suppositions which the Roman lawyers employed to verify or disprove the Law, came with the Teutons, in default of the Law, to take its place of principal. They are the supplement to the Case law, which make the base and bulk of our English system. This might be familiarly indicated by the logical image of a chaos of minor premises decapitated of their majors, and thus leaving the judges to imagine them at pleasure. For in fact all judicature in itself is *hypothetical*; that is *Fictitious*; and requires to have the *thesis* premised to base and regulate the *hypo*-thesis. It is the import of the *Pro*-position, both in logic and etymology.

But Mr. Maine contends, we said, that all jurisprudence must have begun with these *sub* theses, and not with super; or even that the super or simple theses were also judgments. In this he was, we showed, inspired, and thus excused by the national genius. The *Themistes* of the primitive Greeks came, in the turn of the Gothic race, to be sent down first to the Feudal Kings, in the form called their divine right; after passed to the oligarchies who supplanted them in the government, and who in England gave the monopoly the popular facing called Representation. In the progress of the race, this mystic repertory of the statute law ascended or descended, with the German metaphysician, into what has been described as the "depths of the moral consciousness."

And in the American democrat, it is the "sovereignty of the people." But throughout, the sovereign had to keep judges to dispense the hoard for him, by Fictions.

Strangely different from these plain consequences of his own real type and teaching, is Mr. Maine's conception of the theory too of the English Fictions. "There can be no doubt," says he, "of the general truth that it is unworthy of us [English] to effect an admittedly beneficent object by so rude a device as a legal fiction." Thus it was and is optional with the English to dispense with them, and they must have devised them in mere sport of fancy! The English thus to set themselves to contrive abstract figments, if they did not serve among themselves the ends of truth and reason! England, the classic land of facts, common sense, statistics! Will not Mr. Maine consider that to each and all of these high distinctions—which by their nature never round themselves to *rationality* in thought or discourse, and therefore not to full *reality*—the cure and complement are Fictions: known too as etiquette in even diplomacy, and "understandings" in negotiation.

The head of Equity, which jural history with Mr. Maine had ranked the second, or between the Legal fictions and the Legislation, comes plainly after them. By Equity he understands "any body of *rules*, existing by the side of the *original* civil law, founded on distinct principles, and claiming to *supersede* the civil law in virtue of a sanctity inherent in those principles." No doubt, and indeed inevitably, it is our home English Equity. But still it may be mended by a few touches of modification.

Instead then of a body of "rules," we should read *reasons*; for this is the distinction of Equity from case and statute law. Again, "existing," not by the side of the civil law, but behind or after it; and reacting upon both the judgment and the statute law to solve their conflicts. "Claiming" therefore to support them both in the harmony of right and reason, and not "supersede the civil law, original" or otherwise. But, as the author notes quite well, based on other and peculiar "principles"; and "superior," though, not for his mystic sanctity, but for profane reason. With these amendments, Mr. Maine will have said more of correct equity than all the Chancellors that have succeeded to the Woolsack since Bacon.

IV. The title of the third chapter is "The Law of Nature and Equity"; thus repeating the latter subject, and in still crosser combination. The things are doubly incongruous, or at once in rank and series. The Law of Nature is properly primordial in the social order; and Equity, as has just been

noted, is the final term of the *Civil* system! But perhaps Mr. Maine would take the chaos by the two extremities, as being the only portions that present him any character. All creatures of vital, and even of physical nature, from the sporocyst back to the comet, first take shape by a head and tail. And the adage makes the absence of both a synonym with nonsense.

Let us however hear him. Equity, or as the author sums up the theme descriptively, "a set of legal (jural) principles, entitled by their intrinsic superiority to supersede the older law, very early obtained currency both in the Roman state and in England." But at all events, not earlier than the older Law itself, but later; nor entitled to "supersede" it, since it fails to do so to this day, and on the contrary is itself reabsorbed into it at this moment in the same England; nor is it obvious how a title of "intrinsic superiority" could have been fathomed early in either Rome or England, and more especially as we are still left in quest of it in both those Laws. Nor, such as the impression was, did the Romans base it upon "distinct principles." Nor, still less, did the English, who merely borrowed the Roman results, and masked them with the Gothic negative of all principle, the Personal conscience! *Conscientia viri boni* was, and is perhaps, their ground of Equity. Mr. Maine might have at least remembered Selden's heavy and homely image, as to the standard of English Equity in the shoes of the Lord Chancellors.

The author does remark accordingly, that what the English called Equity, was a farrago of odds and ends imported from the Roman law, and as well in its canonical extension as the Civil form, and finally reduced to a grimace of unity by the Personal or ethnic sympathy with Wolff, Puffendorf, and even Grotius; who had themselves, on their part, absorbed into this jural maelstrom of the "moral and personal consciousness"—i.e. selfishness—the Natural Law. And this is probably the clew to the copulation of our author's title.

It was therefore of necessity that he should also misconceive the proper character of what occasionally was called Equity in the Roman system. This he tells us was no other than the famous *jus gentium*, "which the Edict of the prætor was," says he, "supposed to have worked into Roman jurisprudence." "Its Ordinances," he goes on to explain, or rather to confound, "are said to be dictated by Natural Equity as well as by natural reason." Now this was with the Romans a distinction without a difference. The Natural Equity would describe *reason* in its stage of the Law of Nature, and the Natural reason does but express the same thing in terms. The Reason was the Roman *differentia* of the *Æquitas*, and as distinguished from the Natural law, which was simply just—



*æquale*. It was the *state* or relation (*etas*) as opposed to the mere *quality*; and thus providing an ulterior and independent ground for Equity. And the crowning proof is added by the Greek term, which is *ἐπι-εἰκία*, or as if *super-æquale*; and not *ἰσότης*, which means mere equality. But assuredly Mr. Maine must be too absorbed in his legal studies to breathe a little of the atmosphere of Hellenism that no doubt envelopes him.

The worst of the matter is that the Legal studies do not seem the better for it. Indeed he has not yet collected from the primer called the Institutes the difference they point out plainly between the *Jus naturæ* and the *jus gentium*. The Natural law they compose of attributes possessed in *severalty* by all animals—*quod natura omnia animalia docuit*. But the expression should be *social* animals, as the examples adduced confirm; and which was thought perhaps to be supplied by the term *docuit*, as it implies *habit*. The *jus gentium* is defined to quite the opposite; by the same *Institutes*, as *quod omni humano generi commune est*. Besides this express limitation to the human kind or species, the *commune* might apply to this kind as set off into communities; that is, to species of society, instead of individuals, as with Natural law. It should be owned however that the lawyers, both Roman and modern, rather interpret it to mean: *what was practised similarly by different nations*. But even so, they overlook what amounts to the true construction, that the practices are here a product of *nations* or communities, although of course exhibited in common by their personal members; and must thus rank as social species, not the animal attributes of Natural law. And such is the grotesque confusion still pervading these great subjects!

It should be noted, moreover, that with the Roman writers, the descriptions of the *jus gentium* retained a tincture of the Stoic philosophy. This doctrine, as the final summary not merely of the Greek culture, but also virtually of the earlier world, was the vicious circle of a mundane Unity; or socially a vast republic composed alike of gods and men, with an endless train of dualisms, representing the social cycles, which I called African and Asiatic, and which left no outlet for the law of progress. The third or medial term, which gave egress to this supreme course was merely surmised by Aristotle in his ethical and logical writings (as by the doctrines respectively of the "Golden Mean" and the Syllogism); and which formed, by the way, the secret of his fame with thinking posterity. But to work down the idea into *society* was then impossible, in even its most superficial stratum of religion. It is precisely why even the inspired and "chosen people" could conceive no heaven beyond the earth, and no Trinity in

the Deity; but revolved within the domain of the House, and the Lord, of Israel.

The Romans, as the next society on the stadium of social progress, and prepared by all anterior history to take, in Plato's fine conception, from the hand of exhausted Greece, the torch of civilization, were enabled to give some speciality or articulation to the vague notion of the Stoics and their republic of Natural reason. Having obtained through their vast conquests an agglomeration of various races, whom they saw to be in *morals* and *usages* irreconcilable, they seized them by the higher practices they had in common with Rome herself, and to which the local residue must needs be subject, within each community. For that which obtained the consent of all, must be the highest expression of each local body, while yet developed from that body by an independent organism. This organism was the social germ which we said distinguished the *jus gentium*; which the Romans were prepared for through the accession of their *Gentile* element; and which they then pursued ideally into a heaven of the *future*, a trinity of the Godhead, and the Christian system generally,—which accordingly is the noble basis of the veritable Law of Nations.

But the Prætor had to do with earth, the Roman State, and its Civil law, to which he had to divert downwards the Rational doctrine of the *jus gentium*. This he could do but by the same reasoning which would apply to the subject states, had they each of them a prætor to give some system to their civil usages. He merely turned it to the organic or rational control (and not absurdly the supplantation) of both the Civil and the Natural laws; and irrespective of the authority of the "allied" states whom he despised, and knew to be themselves unconscious of any such conception. Well, here was in turn the true genesis of Roman Equity.

The novel result may be quaintly tested by a previous innovation, upon the notions which make Postliminy a central portion by the *jus gentium*. What was it that constrained the Prætor to originate this institution; and afterwards, the Legislature to enact the Cornelian supplement? Why the spectacle, in the first case, of the captive citizens who returned, and were left in indigence or in dependence on the heirs succeeding to their goods and family; and in the second case, the counter spectacle of the heirs or family themselves, left in the like destitution, if the prisoner died in slavery, through his unfitness to make a testament of any force with the Civil law. The conflict thus entailed by the Civil law with the law of Nature was so glaring, we are told, as to shock the Roman people, and so to suggest the Prætorian middle term which was thence called Equity. Not at all of course the *jus gentium*, which knew elsewhere of no such practices; and

less, if possible, the Legal Fictions of Mr. Maine, before excluded.

Prepared a little by this slight exposition, the reader may now estimate the views which Mr. Maine still echoes upon these cardinal subjects. He says: "The *jus naturale* or Law of Nature is *simply* the *jus gentium* or Law of Nations seen in the light of a peculiar theory." But even the "simple theoretic" light he does not show us. He thinks it "unfortunate" that the great Ulpian even tried to make any distinction between them! Gaius, who countenanced the modern huddle, was "a much higher authority." And the passages from the Institutes—above exhibited and explained—"leave no doubt that the expressions (*i.e.* *jus naturæ* and *jus gentium*) were practically convertible!" The reader is requested to revert to those descriptions, showing the one Law to *extend* to all animals indiscriminately, and to man at their head but in the measure of *individuals*; and the other Law to *comprehend* the men alone and as composing *nations*! The difference, our author repeats, "was entirely historical, and no distinction in essence could ever be established between them."

There remains to be here added but that the English Chancellor, who is the analogue of the Prætor, though in the usual way of contrariety, moves, or reasons or divines, not from above or a higher law; but on the contrary, from below—from the special facts and the personal conscience, and which thus sways him, by the national bias, into the dominant Common law. He is accordingly, in his turn, amassing Rules, Reports, nay Precedents; which would be jural monstrosities in a system of genuine Equity. Bacon, with his usual grandiloquence in Law as in other things, began his functions with the Prætorian prelude of some hundred rules, not one of which adverts to anything above the routine of the *Chancellerie*. But Bacon knew his countrymen as well at least as he knew their law.

In Equity he saw before him but a chaos or else a void; whereas the Prætor proceeded on a scheme of laws, if not rational principles. The Roman Chancellor discharged the judicial business of Administration; the English Chancellor directs the judicature as an engine of Political government. The Prætor was a lawmaker, as all things public were at Rome; and even down to the private Pater, who could produce law by his *ut legassit*; and the supreme official did but make modifying or medial laws, to resolve by reason any conflict rising between the Civil law and the Natural. The English Prætor is a mere judge, and like all things English a politician; indeed a species of "family solicitor" to the State. The former was the noble leader—*præ-itor*—on the route of progress. The latter is a legal "tinsman" of political expedencies, a

mender of casualties—whence doubtless his name of *Chancellor*.\*

On commencing I expected to despatch the work in a single article, but now observe that we have yet reached but the fourth of its ten chapters. Another paper will be therefore needed to do full justice to the book and public. The matter is the richest possible, however scandalous the treatment—less however by the fault of Mr. Maine than of his German “sources.” And having laid down in the present sketch a sort of basis and scale of principles, I may henceforth go directly, without excuses or explanations, to seize the errors of detail, and haul them up for execution.

J. O'CONNELL.

### III.—ON UNIFORMITY OF DESCENT.

ONE of the most familiar words to the student of Roman law is *elegantia*. It conveys the notion of order, method, uniformity, simplicity. The idea is much more in accordance with the spirit of our common law than our equity. It looks rather to the general rule than to the particular instance, and in this respect is not without great advantage. General rules or orders laid down by authority should be few in number, but those few rigid and unbending. Every general rule must sometimes work harshly. If, however, the rule be in some instances not adhered to, other instances of a somewhat similar character afterwards arising, doubts suggest themselves whether the rule will be enforced or relaxed. Now, nothing is worse than doubt and uncertainty. A certain wrong is better than an uncertain right. Besides, if one person is to have a *privilegium* or special right, a wrong will result to another who would be entitled were the general rule not interfered with. In the abstract, all jurists must agree that in every branch of a municipal system of law uniformity is to be desired.

Applying what has been said to the subject of the present paper, why, we ask, should various customs of descent prevail side by side in England? Why should freehold land in Kent devolve upon all the sons, and in other counties upon the

\* Seriously, this is just the province of English equity, if we believe Coke, who assigns its subjects to be Trusts, Frauds, and Accidents.

eldest alone? Why should the youngest son take copyhold held of one manor, and the eldest that held of another? It is not our object to discuss the larger question, whether or no, land should in case of intestacy be made saleable by the administrator, and the proceeds divisible as personalty. We merely suggest that no such distinction as our own prevailed in the Roman law, and that when intestacy does occur it is almost invariably the result of carelessness, and rarely happens in the case of a property of any magnitude. Whatever the rule, primogeniture might still exist as a custom. Indeed, it now in the vast majority of instances depends on settlement instead of intestacy. But leaving these matters out of consideration, and assuming that land will always as now go to the heir, it must be desirable to have one table of descent, and one only.

The following two extracts, from Williams on Real Property, are very suggestive of difficulties under the present system:—Speaking of gavelkind in Kent, the author says, “in which county all estates of inheritance in land are presumed to be holden by this tenure until the contrary is shown.” “The descent of an estate in fee-simple, in copyholds, is governed by the custom of descent which may happen to prevail in the manor.” Gavelkind prevails over a large county, and therefore its customs are perfectly well established and generally understood. There is, however, this most serious evil: a considerable number of disgavelling Acts have been passed, chiefly in the reign of Henry VIII. There were no tithe or ordnance maps at that time, and had there been they would have now become decidedly musty. The only allusion to the lands disgavelled is by the names of the then owners. Now many estates have been retained in the same families ever since. This, to begin with, is not easy to prove. But suppose one of those estates to be now put up for sale, how can one know that the boundaries of the estate are the same now as, say, in the time of Henry VIII.? An outlying farm may have been added, and that farm be sold in hundreds of building plots. Intestacy, except in the case of mortgage trust estates, does not often occur, but it may, and the title be involved in doubt for years.

The difficulty then in Kent is not in any uncertainty of a rule, but in knowing which of two inconsistent rules is applicable to a given case. That in copyholds is of a different kind. Manors are all comparatively and most actually small. The difficulty there is in telling how far a custom extends. Thus there may be instances on the rolls of a descent to a younger son, but if that is all one can find, it will not oust an elder brother from his common law right as against a younger. As an antiquarian pursuit it may be and is very interesting to trace the heir to a copyhold, but it is often

very unsatisfactory in practice. The rolls are not always well kept, and with, as is sometimes the case, very few holdings it may be most difficult to discover instances in point. We once heard of a steward asked to search the rolls of a little manor and make an affidavit as to the custom. He pondered over them for days, and then said with a groan, "Why half of them are in Latin!"

The confusion we have alluded to might be obviated by a short Act of a few lines. Such Act should simply declare that in the case of an owner of freehold lands in Kent, or copyholders anywhere dying intestate after the passing of the Act, the ordinary rules of descent should apply. Most legal changes, however beneficial, cause for a time doubt and uncertainty. Not so the one we suggest. Indeed, quite the reverse.

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#### IV.—FORENSIC ELOQUENCE.

**I**T is a common observation that, with some few exceptions, the members of the English Bar do not exhibit much oratorical power, and that in our courts of law the quality of eloquence is conspicuous chiefly by its absence. There is certainly some ground for the remark, although such a state of things is at first sight somewhat surprising, when we consider what high rewards are offered in this country for excellence in public speaking, particularly in the profession of the law. The phenomenon, however, is easily explainable.

In the first place, the extent of the supposed deficiency in forensic eloquence is often much exaggerated in consequence of the erroneous ideas which are frequently entertained upon the subject of public speaking. The term eloquence is often restricted and confined in its popular acceptance to emotional speaking of an affecting or exciting character. The orator is commonly expected to abound in vehement declamation, fierce invective, and stirring appeals to the passions, and to illustrate his discourse by energetic tones and action. It is these things which go to make up the popular notion of oratory; and if we are to take this view of the matter, it must be admitted that the charge of a great want of eloquence at the English Bar is very well founded. But if we regard the subject in a more reasonable light, it is plain that these things which in the common view are the indispensable characteristics of oratory, are really only particular manifestations of it.

They are no doubt its most showy and outwardly effective branches, but there are many other kinds of eloquence, which no less deserve the name, and which are frequently far more conducive to the objects of the orator. A man may properly be called eloquent if he possesses the art or power of convincing or persuading others, by means of skilful and appropriate speech, characterised by a certain energy or beauty both in the composition itself and in its delivery. Hence we may fairly give the name of eloquence to luminous and cogent argumentation, to persuasive reasoning calmly urged, to clear and expressive narration or description, and to many other modes of speech which appear to be addressed rather to the intellect than to the feelings. These quieter kinds of address frequently require the greatest skill in their use, and are often far more effectual instruments for producing conviction or persuasion than the more ostentatious varieties of eloquence which popularly usurp the name. Even a mere statement of facts is susceptible of great felicity of expression, and may be endowed with considerable persuasive or convincing power. It was said of Lord Mansfield that "his statement of the facts of a case was worth the argument of any other man." The reason was that, without at all distorting or misrepresenting the facts, he stated them in such well-chosen and expressive language, and arranged them in such an ingenious sequence, that the conclusion at which he wished his hearers to arrive, suggested itself to them as it were spontaneously, and with all the greater force, because not directly urged by the advocate. In the same way the calm and temperate style, which is essential to a merely argumentative discourse, may often be applied with great effect to the process of persuasion. It is a well-known rule of rhetoric that although, if the design of the orator is to *convince* the judgment of his audience by argument, he need never be afraid of professing his intention; yet, if he wishes to *persuade* his hearers by working upon their emotions, he must be careful to conceal his object; if he is too energetic and over-eager in attempting to arouse the passions of his audience, he defeats his object by displaying it. In this process, therefore, the maxim "*artis est celare artem*" has an especial application, and the orator will often find it expedient to seem to follow while he really leads, and to express himself with less force and pathos than the occasion would naturally appear to warrant.

No doubt there are occasions when declamation and impassioned energy have great effect. But it must be remembered that the object of the advocate is to convince or persuade his hearers, and that the topics which he chooses, and the style and language which he employs, ought always to be subservient to that end. He must, therefore, above

all things, study to be appropriate to the occasion, and to suit his style of address to the circumstances of the case, and the nature and disposition of his audience. Now, the great majority of the cases in which the members of our Bar are employed depend either upon questions of law, or upon ordinary matters of fact, which call only for calm discussion and plain business-like treatment at the hands of the advocate, and afford no scope whatever for declamation or invective, or for flowers of speech and flights of imagination. Nearly all Chancery business is of this character, as also the greater part of the business at Nisi Prius. The same remark applies to the business before parliamentary committees, to nearly all arguments *in banc*, and to the generality of criminal prosecutions. In all cases of this kind, any attempt to indulge in imaginative or inflammatory eloquence would be manifestly inappropriate, and would impede, instead of furthering, the speaker's object. It would be absurd, for instance, and not eloquent, to employ declamation or imagery in an ordinary action on an account stated or for goods sold and delivered, or to appeal to the passions of a Vice-Chancellor on a question of costs. The true orator, therefore, in these commonplace cases, will take care to avoid any rhetorical parade, and will evince his skill chiefly by a good choice and arrangement of his arguments and topics of persuasion, and by a clear and temperate style of language and delivery. This is a sort of eloquence, which without much natural genius may be attained by quick observation and long practice, and is not by any means uncommon at the Bar.

No doubt a considerable portion of the business of the Bar is of a different character, and appears to give "ample room and verge enough" for the development of some of the more ambitious and ornamental branches of the art of rhetoric. Not a few, for instance, of the causes tried at Nisi Prius are of this description, as involving either circumstances of general importance and public interest, or matters of great consequence to the welfare or character of particular clients. The criminal courts, also, often supply cases which admit of a high degree of eloquence. This is seldom the case with prosecutions, to which a dispassionate and unpretentious style is more appropriate, but it frequently happens that defences of prisoners and of other persons accused of crimes give great opportunities for the exercise of rhetorical powers—

Quæ sit enim culti facundia sensimus oris  
Civica pro trepidis cum tulit arma reis.

All these are cases in which the nature of the subject appears to admit, and indeed to invite, a lofty or powerful and impassioned style of speaking. Yet it must be admitted that



even in cases of this kind great displays of eloquence are far from frequent, and the style generally adopted in them differs from the level and commonplace mode of speech which we have been considering chiefly by the addition of a certain amount of indignant or pathetic energy and emphasis.

But even in cases of this kind, where the nature of the subject admits of an elevated style, there are several circumstances which combine to restrain the eloquence of the advocate within somewhat narrow limits. In the first place, he must keep tolerably closely to the point, and not diverge into irrelevant topics. If this rule had prevailed in ancient times, it would have nipped in the bud half the eloquence of the Greek and the Roman orators; and even in more recent times, it is well known that Erskine owed much of his success to his famous but irrelevant attack upon Lord Sandwich, in Captain Baillie's case. But the rule of the courts in excluding irrelevant matters is now enforced with some strictness, and of itself imposes a considerable check upon the orator. One important result of this rule is that the domain of the passions, in which the most splendid triumphs of eloquence have been achieved, is partially at least closed to the forensic orator. The power of biasing men's judgment by working upon their feelings is certainly the most striking, if not the most intrinsically meritorious, branch of the art of rhetoric, and is said by Quintilian to be by far the highest manifestation of oratorical power. But its application to forensic disputes is greatly checked by the rule against irrelevancy, as the issue there to be decided is not a point of policy or expediency, but the truth or untruth of particular propositions of fact or of law. This is a matter to be determined by the reason, and therefore an appeal to the emotions is usually quite beside the question. The advocate may occasionally appeal to the moral sentiments of his hearers, but it is plain that such feelings as terror, pity, or hope, or desire of gain, are, properly speaking, quite irrelevant to forensic contentions, and although they are often introduced into them, it is usually done covertly or incidentally. The advocate, moreover, is obliged to be very cautious how he attempts to excite even those emotions or sentiments to which he is allowed to have recourse, since, as we have before mentioned, a direct attempt to excite them would probably defeat its own object. Another check upon the eloquence of our advocates is to be found in the nature and character of the tribunals before which they practise. Where the tribunal consists simply of a judge or of several judges, rhetorical ornaments or declamatory amplification are manifestly out of place, as they would never strengthen a weak argument, and would only enfeeble a strong one. But where the tribunal is constituted of a judge and a

jury in the ordinary manner, a more animated and emotional mode of address is frequently appropriate and effective. Juries are usually composed of persons not habituated to sift the statements or reasonings of an advocate, and their feelings and prejudices have often no inconsiderable share in determining their judgment. They naturally desire that there should be as little dulness as possible in the proceedings, and, therefore, a dry and jejune style is very distasteful to them; hence, what is addressed to them always makes a better impression, if it is urged with a certain amount of feeling and of rhetorical force and expression. At the same time, a jury is usually composed of business-like persons, anxious to arrive at a right conclusion, and somewhat impatient of anything which appears to divert attention from the matter in hand. They are, therefore, on most occasions suspicious of any show of eloquence, and very apt to regard it as a mere cloak and cover for a weak case; and the trial is presided over by a judge vigilant to repress irrelevancy, and to expose rhetorical artifices. Accordingly, in addressing a jury, the advocate, while avoiding a meagre and prosy style, must generally be careful to abstain from any far-fetched ornaments or ambitious efforts of oratory, which may betray his art, and so detract from the force of what he says. Indignation or pathos should only be employed in exceptional cases which fully warrant them, and in general a rational, but lively and energetic, style is found the most suitable for an address to a jury.

These considerations show that the mere infrequency of great displays of oratory at the Bar is of itself no argument to prove any deficiency of oratorical power, and that the unimpassioned and argumentative species of eloquence, which is the most common among our advocates, is in the majority of cases the most proper and effectual. There is no doubt, however, that in the times of Erskine and his immediate successors at the Bar, a loftier and more passionate and ambitious kind of eloquence was occasionally employed by the leading forensic orators, and was rewarded by the most distinguished success. In this style of eloquence none of our present legal orators appear comparable to Erskine or Brougham, or to several of their eminent contemporaries, and hence an opinion has sometimes been expressed that the Bar has declined in powers of oratory since their times. But it must be remembered that they were men of rare natural talents, who delivered their great orations under exceptional circumstances, highly favourable to loftiness and fervour of thought and of expression. Their greatest forensic speeches were made in political or *quasi*-political trials, which took place in times of extreme political excitement, and attracted universal public interest. Such an opportunity as was afforded to Lord

Brougham by the trial of Queen Caroline has never been surpassed or equalled in the case of any other advocate, and the highest efforts on the part of the orator were not more than appropriate to the greatness of the occasion. And many of Erskine's most celebrated speeches were made in the course of great Government prosecutions for treason, or libel or sedition, at a time when the limits of the law on these subjects had not been firmly settled, and the doubtfulness of the law combined with the peculiar nature of the cases, and the heat of political feeling, to produce a high degree of public excitement, and to make the trials matters of national importance. It was natural, therefore, that the advocate who felt that so much depended upon his exertions, and that they attracted so much public attention, should put forth all his efforts, and employ all the resources of rhetoric in order to ensure success. Such opportunities for high and stirring eloquence have hardly ever presented themselves to the advocate in recent times, and the absence or scarcity of this more imposing kind of eloquence, which is the result of public difficulties and dissensions, can hardly be considered a subject for regret. It is true that some of these great orators, and particularly Lord Erskine, did manifest great powers of elevated or affecting oratory on many occasions which had nothing to do with politics, and evoked a much less amount of public feeling. These, however, were usually cases of an exceptionally interesting or affecting character, and we must consider that the eloquence of these great advocates is now chiefly judged of by their published speeches, which are comparatively few in number, and were no doubt selected and preserved simply because they were the highest achievements of their authors on great public occasions, or their most brilliant and striking efforts in private trials, which gave great scope for oratorical effect. Lord Brougham's forensic speeches, for instance, form only a small portion of his published works, while the published speeches of Lord Erskine, as is remarked in the preface to the last edition of them, "do not fill up the pleadings of *three weeks*, out of a life of nearly *thirty years*' incessant occupation in all our courts of justice throughout the kingdom." It is possible, therefore, that the superiority of these great orators to the forensic speakers of the present day may be somewhat less considerable than it is often supposed to be. And the comparison of the two periods appears to show that, although in the former period there were a few eminent legal orators, whose eloquence was of a higher character than any now heard at the Bar, the average oratorical merit of the Bar in general was not greater at that period than it is at present. It would seem that the style then generally adopted was of a rather more declamatory and *ad captandum* character than that

now used, because juries, and sometimes even judges, were then more apt to be influenced by their wishes and prejudices than they are in these times. The present style, however, being usually addressed to persons of more education and intelligence, has more of logical sequence and cogency, and is characterized by better taste, so that on the whole it appears to deserve the preference.

It must be admitted that if we compare the speeches now delivered at the Bar with the productions of the Greek and the Roman orators, we find that the ancient orators greatly surpassed the modern in force and beauty of expression and delivery, in bold but chaste ornamentation, and in rhetorical fervour and energy. In all these respects Lord Brougham, in his *Dissertation on the Eloquence of the Ancients*, ascribes to them, with some justice, an "immeasurable superiority," which he attributes in part to the different state of circumstances in which they were placed. Public speaking was a matter of much more importance in ancient times than it is at present; for it was then the chief means of advancing or retarding public measures, and almost the only means of giving to the speaker's ideas upon any subject such a publicity as is now easily obtainable by means of the press. And the character of the audience in those times was highly favourable to oratorical displays, as it was greatly influenced by passion and sentiment, while highly appreciative of all kinds of rhetorical beauty. Hence there was every incentive to the orator to take pains to attain proficiency in his art, and to elaborate and beautify his speeches to the utmost. And accordingly, it is well known that the ancient orators not only went through a long course of preparatory training to fit themselves for a public career, but also expended a great amount of labour upon their individual efforts. Those speeches of theirs which have come down to us were nearly always fully written out before they were spoken, and in many instances were never spoken at all, as in the case of Cicero's oration for Milo, and his second Philippic. Quintilian certainly mentions that Cicero on ordinary occasions did not write out his speeches, but merely thought over his subjects, and noted down the chief points of the case and the heads of his intended discourse. The speeches, however, which he made from notes in this manner are of course not among those now extant, as it is only the written orations which have been preserved. The elaboration natural to written speeches was evidently one of the main causes of the finish and polish which are observable in the style of the ancient orations. Hence it is hardly fair to compare them with modern forensic speeches, which are seldom, if ever, written out before they are spoken; and it must be allowed that the ancient orators,

notwithstanding their numerous excellences, had many great defects. Their reasoning was apt to be vague and inconclusive, and they appealed too manifestly to prejudice and passion. Lord Brougham says:—

“It is impossible to deny that the ancient orators fall nearly as far short of the modern in the substance of their orations as they surpass them in their composition. Not only were their views far less enlarged, which was the necessary consequence of their more confined knowledge, but they gave much less information to their audience in point of fact, and they applied themselves less strenuously to argument.”

Their great fault of irrelevancy has been already mentioned. Of this the celebrated oration on the Crown is a glaring instance, and many of Cicero's forensic speeches are strongly marked by the same defect. Discourses so loosely addressed to the question would have very little weight with a modern audience, especially in a court of justice; and the ancient orations, although admirable models of style, and no doubt appropriate to the audiences to which they were addressed, would have been found wholly unsuitable to the purposes of modern advocacy, for which our present mode of speech is practically much better adapted.

The eloquence of the Bar has often been unduly depreciated by the habit of comparing it with the eloquence of political speakers. But this sort of comparison is very unfair to the barrister, as the political speaker, such as a member of Parliament, is in a much more favourable position for the development of rhetorical powers. Unlike the advocate, he can usually select his own subjects, and his own time for speaking; and the subjects of his discourse, unlike the majority of those treated by the advocate, are usually matters of public interest and importance, which offer abundant scope for the higher kinds of eloquence. The audience, too, of a parliamentary speaker is more dignified and refined, and also more numerous than that usually addressed by the barrister, while it is much influenced by feeling and by party spirit, and frequently encourages the orator by its applause. The political speaker has also fewer restrictions on the range of his discourse than the advocate; and as the matters he discourses are usually questions of expediency or propriety, it often happens that he may legitimately appeal to the wishes and feelings of his hearers, and express himself with considerable warmth. Parliamentary debate, therefore, offers much greater opportunities for an elevated and impressive kind of eloquence than are presented by advocacy, and it is obvious that the speaker who harangues a public meeting has in many respects even greater advantages than the par-

liamentary orator. There is one circumstance, however, which might be thought to favour eloquence at the Bar, and to discourage it in political assemblies. The subject of the advocate is generally quite new to his hearers, and being of a personal and practical character, is naturally interesting to them. It is their duty, moreover, to listen carefully to what he says, in order to arrive at a just conclusion. His audience, therefore, is a very attentive one. The subject of the political speaker, on the other hand, is usually some general question, the nature and bearing of which are well known to his audience, and which they have already heard or seen discussed. Accordingly they have usually made up their minds about it beforehand, and are apt to be inattentive to a fresh speech on the same subject. But these circumstances operate in a manner different from that which might have been anticipated. The advocate knows that he will be listened to by his audience, however poorly and inelegantly he addresses them, and the knowledge of this fact has a natural tendency to make him less solicitous about his style and diction than he otherwise would be, and to direct his attention rather to the matter and substance of his remarks, than to the manner in which he enunciates them. The politician, on the other hand, is obliged to exert himself in order to obtain the attention of his audience, and naturally does his best to make up for the comparative triteness and generality of his subjects, by cultivating a good style and delivery, so as to express what he has to say in the most effective manner. The political speaker, therefore, besides having much greater opportunities for the display of eloquence than the advocate, has also more urgent motives for acquiring and employing a rhetorical style. It is not surprising that under these circumstances great parliamentary and political speakers should preponderate both in numbers and in eminence over forensic orators. This has nearly always been the case in this country, and it is confessedly so at present. There are very few who have any pretensions to be called great orators at the Bar, while speakers of the first class are tolerably plentiful in Parliament. It is true that there are instances of eminent persons who have to a certain extent combined both descriptions of excellence, but the observation that "great advocates seldom succeed in Parliament" appears on the whole to be well founded. The qualities and experience which lead to distinction at the Bar are so different from those which are required for the purposes of parliamentary eloquence, that success in the one style of oratory is generally found to be no real criterion of capacity for success in the other. This fact confirms the view that the two styles are altogether distinct, and that proficiency in them must be judged by different standards of excellence.

We have shown that the deficiency in our forensic eloquence is by no means so great as has often been supposed by persons who have had erroneous notions of oratory, or who have been guided by fallacious comparisons. But it cannot be denied that such a deficiency does to some extent exist, and that, after making all allowances for the difficulties and restrictions of legal oratory in these times, there is room for a greater degree of it than is actually exhibited by the English Bar. There are certainly many members of the profession who in ordinary and common-place cases employ with great efficiency and skill the sort of eloquence which is appropriate to the circumstances. But even in this class of business the style and manner of most barristers might be considerably improved; and in those less ordinary cases which admit of a more elevated and energetic kind of eloquence, there are very few members of the profession who manifest in any high degree of excellence the vigour and felicity of ideas, the power and copiousness of language, and the force and expressiveness of delivery which would be appropriate to the occasion and conducive to success. Of course, this state of things may be partly accounted for by the rarity of the combination of the natural and acquired qualities essential to the orator. But the real explanation is to be found in the fact that the power of speaking is generally regarded by the profession as a matter of merely secondary consideration, upon which it is not necessary to bestow much labour or attention.

We have already mentioned several circumstances in English advocacy which tend to discourage the employment of rhetorical powers, and consequently to diminish both the motives and the opportunities for their cultivation. And it is clear that oratorical proficiency, however desirable; is not in itself the quality most essential to the advocate. Accurate knowledge of the law, and skill in its application, tact and sagacity in conducting cases, and ability in examining and cross-examining witnesses, are qualities which are usually much more important to the English barrister, and will often enable him to attain distinguished success without the aid of eloquence. On the other hand, if he is destitute of these qualities, the most brilliant oratory will avail him little. It is natural, therefore, that the acquisition of these more essential qualities should be the chief object of professional study, and that comparatively little attention should be given to the cultivation of rhetorical proficiency. Every one can see that legal knowledge and skill in legal practice can only be attained by industry and study; but it appears to most persons of ordinary education a comparatively easy matter to express their ideas in intelligible and tolerably appropriate language, and to

deliver their remarks with proper emphasis. Accordingly, our advocates hardly ever go through any preliminary course of study or training for an oratorical career, except, indeed, so far as an occasional attendance at debating societies may constitute such training; and they acquire their power of speaking almost entirely by the practice afforded by professional business. Now, actual practice in speaking is certainly the most important part of the education of an orator; but in order to produce its full effect, it should be preceded and accompanied by some study of the art of speaking. Not that a formal rhetorical training is necessary, because the rules of rhetoric are of too obvious and general a character to be of any very great practical utility; but any one who wishes to become a good speaker should systematically study the speeches of the best orators, ancient and modern, should form habits of rhetorical criticism and observation, and should accustom himself to original composition, especially in writing, besides forming his style by diligent perusal of the best authors. There is no doubt, however, that careful and well-directed practice in speaking, where great pains are taken to make each individual effort as perfect as possible, is of itself an effectual means of gaining oratorical power, and that many successful speakers have attained their proficiency in this manner. But the practice in speaking which our barristers obtain in their professional employment is not usually of so improving a kind. The pressure of business, and the short time usually allowed for preparation, together with the frequent necessity for speaking on facts as they arise, tend to prevent much care or preparation being bestowed upon individual speeches, and to give them something of an *extempore* character, especially so far as style is concerned. Accordingly, the mind of the barrister is usually much more occupied with the matter and substance of his speech than with its form; and speakers under such circumstances are apt, when they have once attained a certain amount of fluency and perspicuity of language which is practically sufficient for ordinary purposes, to give themselves no further trouble to improve their style or manner of delivery. The kind of practice, therefore, which is afforded by actual business at the Bar is not very favourable to the development of oratorical power, even in ordinary cases; and as suitable occasions for the employment of the more elevated and impressive kinds of eloquence are comparatively infrequent, our barristers have not usually much opportunity of learning them by actual practice. There is all the more reason, therefore, why professional practice in speaking should be aided and supplemented by general study of the subject, and improved, as far as possible, by care and attention in each particular case. It is certain that, although there is much less deficiency



in forensic eloquence among us than has sometimes been supposed, a greater degree of eloquence would be appropriate and conducive to success at the English Bar than is usually exhibited there. And though it is said with some truth that the acquirement of transcendent powers of eloquence by any individual advocate is really injurious to the State, because his superior ability gives the client who happens to retain him an undue advantage over his adversary, there is no doubt that a general increase of oratorical proficiency among the members of the profession would, on the whole, facilitate the administration of justice, and promote the public advantage.

## V.—THE LAND LAW OF ENGLAND AND AMERICA.

By W. FINLASON, Editor of Reeves's "History of the English Law," and Author of "A Treatise on the Tenure of Land."

*A Letter to A. H. Brown, Esq., M.P., on the Settlement of Land, and the System of Land Transfer in the United States.*  
By THATCHER ADAMS, Esq., of New York.

ATTENTION has been lately a good deal directed to the difference between the law of England and America as to land\*—we mean, as to the ownership, the descent, and the disposition of land. The law of landlord and tenant is a distinct subject. The comparison of the law of England and America on the subject is of much interest, more especially as the law of America has been in a great degree assimilated to our ancient English law, from which our own had apparently departed. For this reason it becomes of importance, in instituting such a comparison, to consider the history of our law, and to trace the causes of the change which in the course of ages it may have undergone. We shall then be better qualified to appreciate the American restitution of it. Such an inquiry is properly historical, for otherwise we may fall into the error of assuming hastily that the law in different countries, or in the same country at different periods, ought to be the same, forgetting the great differences that may exist in the circumstances of different ages or countries. The avoidance of this fallacy is one of the chief uses of legal

\* *Transactions* of the Social Science Congress, 1872.

history, the study of which is therefore wisely made an essential part of legal education. It is impossible to understand any branch of law, more especially this, without reference to its history. It is important also to separate the study of the *history* of the law from considerations as to its policy, that is, the study of what it has actually been or is, from speculations as to what it ought to be. The study of its history may throw great light upon its proper policy, and at every stage of the history it is necessary to show what the policy was; but the two branches of study are distinct, and to pursue faithfully the *historical* part of the inquiry, it is desirable to abstain altogether from the *speculative*. In the present paper, therefore, no opinion will be expressed as to what our law *ought* to be, and attention will be directed entirely to the inquiry what it has been, and is, and *how it came* to be what it is.

And this inquiry is the more necessary and useful, because there is no subject on which there are more false traditions, or more erroneous notions; and none more illustrates Lord Bacon's observations as to the importance of the legal part of history, on a right understanding of which all our ideas as to law and legislation must necessarily a good deal depend, upon this subject. For instance, the universal idea probably is, that the American law is novel and new-fangled, whereas it is only a restitution of an ancient law. On the other hand, it may appear that exaggerated and erroneous ideas are entertained as to the actual operation of our law, from want of attention to counteracting causes, which materially modify its effect, and perhaps practically bring it much nearer to the American than we are apt to imagine.

The very idea of property in land arose, there can be no doubt, out of considerations of practical utility. Originally, as Sir S. Henry Maine has shown in his most interesting works, all land in the northern nations was held, in common, by "village communities." It was found that under such system land was really of no value: men did not care to cultivate what was not their own; and so, for the sake of industry, there arose necessarily the idea of property. This idea was no doubt established here by the Romans, and adopted by the Saxons, who, barbarous as they were, soon had sense enough to see that land without cultivation was of no use or value; and hence, instead of exterminating the inhabitants, they rather, as Bede says, made them serfs and tributaries. Similar considerations soon gave rise to free tenancy; for it was found that men did not work in earnest in the cultivation of land in which they had no interest, and so we see, in the Saxon laws and institutions, both property and tenancy in land.

The writer's view on the law as to the tenancy of land,

and the relation of landlord and tenant, he has already explained in his work on the subject, which he begs to say was founded on the ancient law of *England*, originally based upon the equitable principle just alluded to, that men ought to have an interest in the land coextensive with the labour and the capital they invest in it; a principle in later times too much departed from in our general law, although still to a great extent embodied and preserved in *custom*. But for the present he has only to deal with the law as to the ownership and alienation of land. As to this, the ancient usage of holding land in common could be still traced in the Saxon "folc land," i.e., land held by the people at large on a general customary tenure, the basis of our common law; and under which the land descended from father to son, according to the old Saxon adage:

"The father to the bough;  
The son to the plough."

This custom is alluded to in the "Mirror of Justice" as that under which the land in this country was generally held at the time of the Conquest; and it was the basis of our common law. Under this custom, however, though land was descendible, it was not alienable, or disposable by will; the occupants being considered as only *tenants*, though having a *descendible* tenancy. This species of tenancy still exists, in the northern parts of the country, in those customary tenancies which can be traced back in our history to Saxon times, and which descend from father to son.

By degrees, another and more absolute form of property arose, created by deed, and hence called "boc-land," or book-land—the ancient Saxon deed being in the form of a book or scroll—and in which the deed described and declared the nature of the property created according to the nature of the transaction, whether a gift or free grant, as in cases of marriage, or by way of *purchase* for a price or value; and as to this species of property, there was the power of alienation, except so far as it was precluded by the express terms of the deed, as it often was in cases of gift on marriage.

There was in such cases a restriction in the power of alienation. A man might deal as he pleased with land he himself acquired by purchase, but not with land derived by gift. The same principle is still recognised in our law; and if an estate has come from the wife's family, then on the failure of issue it goes to her heirs; while, if the estate came from the side of the husband, it goes in such cases to his heirs. This principle is as old as the law of Alfred.

By the laws of Alfred, if a man had land which his kindred had left him, then he must not give it away from his kindred,

if there was writing which witnessed that it was forbidden by those who gave it to him ("Laws of Alfred," c. 41), that is, forbidden to alienate it entirely from the kindred or family. The land did not, as a general rule, go to the eldest son.

There is no doubt that under the ancient English law the land went to the family generally. Land was not *divided*, but by a recurrence to the primitive system of community of ownership, the family lived on the land in common. This is manifest from the laws of Canute, who declared that where a man died intestate, there his widow and children should continue to live ("Laws of Canute," c. 73). The law allowed alienation by will, but provided a course of descent in the absence of a will, which was such as natural affection and reason would dictate, namely, to the nearest kinsmen (*ibid.* c. 74), that is, to all of them in the same degree—to all the children living: and holding in common.

This course of descent became at last, by general custom, established as to all land, and became the basis of the common law rule of descent. It would be an error to imagine that all land was *divided*: even in wills, of which a great many are extant, it would be difficult to find any instances of the *same* estate being *divided*; though different estates are left to different children and other kinsmen; and according to the spirit of the ancient law, it should seem that in the absence of a will they would continue respectively to hold those on which they resided.

No mention is ever made of more specific description of heirs than the "kith" or "kindred" of the person taking the estate. He and his kindred were to have it: that is, at his death, in the absence of a will, all his children continued to hold it, supposing they all resided on it; or if they resided on different estates, it should seem that each continued to hold that on which he resided, to descend in like manner to his "kindred," that is, his *nearest* kindred, all in the same grade holding equally. This, it will be observed, was quite different from the absolute *partibility* of *all* the lands of an intestate among all his children, which is supposed to have become the general law of England, and has been revived in America. *That*, no doubt, was qualified under the older law. In ancient times, land was in the hands of a few owners, and would go rather by *manors* than by *acres*. But in general, lands *were* disposed of by will; and different estates were disposed of to different persons; while the personalty, also, was separately disposed of.

The law then became very much what it is now, except as to descent of all the lands to the eldest son, which, as a general rule of law, was unknown until after the Conquest. It was indeed usual to consider land held by the Crown as descen-

dible to the eldest son; for obvious reasons, he being heir to the Crown: and hence Alfred, in his will, carefully distinguishes between lands so held, and lands his own private property, which he disposed of as he pleased. And as a system of military service by degrees arose, as it probably did, anterior to the Conquest, the descent to male heirs gradually became usual in lands held on such service. But it was not until long after the Conquest that the usage of descent to the eldest son became general; and the more ancient usage of descent to all the sons still survives in the custom of gavelkind. Still there were the *germs* of primogeniture in Saxon times, and gavelkind itself was an approach to it; for under that custom the land was divided among all the *sons*, not all the *children*; so that in this respect the more ancient custom had been already departed from, and an approach made to the preference of the eldest son. So there were the germs of a system of *entail*; for as already shown, land, given on marriage, to a man and his kindred, could not go out of the *family*. Still it went generally to *all* the kindred, that is, the nearest kindred at each grade of descent; and it was not until after the common law or general custom had established a course of descent to the eldest son that this became also the rule of descent in entails. It is material to observe that entails after all only followed out the general rule of the common law: founded upon general usage.

And it is remarkable what tenacity there has been in the adherence of our law to its original principles. Thus the principle of the ancient Saxon law, that land given for a family ought not to go out of the family, was adhered to by the Legislature when they remodelled our law of real property in the last reign. Title is to be traced to the last purchaser, that is, the party who last acquired the land, otherwise than by descent; and land goes on failure of issue to the heir *ex parte paternâ*, or *ex parte maternâ*, according as it came from the family of the father or mother; and land, in the absence of alienation, descends to the eldest son and his issue, preferring at each stage of descent the eldest, as strictly as if the land was entailed. On the other hand, land settled cannot, *while it remains settled*, be alienated from the issue, and in that respect also the land law is substantially what it was before the feudal system. For a man could not then disinherit his heirs, at all events as to *family land*, or land given for the family. (Glanville, lib. viii). Not only did it go to them in the absence of a will, but the owner could not make a will to deprive them of it. This law originally prevailed as to personalty, as well as to realty, and, long after the Conquest, still continued the custom of particular districts, the custom of the reasonable part, as it is called; but in this country, except as

to *settled lands*, this law by degrees disappeared: except as to personalty in intestacy.

Under the feudal system the descent of land to the eldest son became firmly established as to lands held on military service, though as to other lands the old mode of descent to all the sons still, and for a long period, prevailed, and to this day continues to exist. And it is probable that the influence of the feudal system strongly tended to the general prevalence of primogeniture, though, perhaps, not for reasons arising entirely out of feudality. The eldest son would be, no doubt, most likely to be of age, and best able, by experience and knowledge of the world, to manage the estate. On the other hand, the influence of the ancient system, of a family holding the property in common, would lead the eldest son to allow the rest of the family to reside upon the estate, and as they grew up and married would lead him to consider himself morally bound to make some provision for them. And in old books, like the "*Paston Letters*," there are abundant proofs that this was in point of fact the case.

It is most important in every period of history to notice the counteracting causes which often greatly modify the actual operation of a law. And it is probable that even under the feudal system the influence of early traditions was for ages so powerful that practically the position of a family was very much the same as before, under the ancient law, and that the whole family, in one way or another, shared in the benefit of the estate, although it was not actually divided among them.

It is to be observed, however, that the feudal system tended to a more strict limitation of land than merely to make it descendible in the first instance to the eldest son; for the whole fee-simple descended and went to his issue, who might be daughters, whereas he might have brothers able to render military service. Hence the tendency of the feudal system was to favour descent to *male heirs*; to secure which no doubt was one reason for entails.

Again; it is most important to observe that under the feudal system the right of disposing of land by *will* disappeared, and was not restored until the sixteenth century. The result of this was that a man could not dispose of his land at the close of his life, when he knew the character of his children and the position of his family; nor could he dispose of land by disposition to take effect at his death; and thus he could only dispose of land by present disposition, taking present and immediate effect, divesting himself of his property, and then, for the most part, only with licence from his feudal lord. The consequence was that there was very little alienation of land at all, except, under the influence of superstition, to

religious houses, for the sakes of their masses and prayers to liberate the donors' souls out of purgatory (*see* preamble to statutes of Henry V. as to religious houses). Against those alienations the statutes of mortmain provided, and there were rarely any other; for as land in those ages was *everything*, a man was very little likely to deprive himself of it, even if he was allowed to do so.

On the other hand, in those turbulent times men were constantly killing each other, and the doctrine of forfeiture for treason gave the sovereign, for the time being, the strongest motives to have men of large possessions attainted for treason, in order to acquire their lands. The consequence of forfeiture of a fee-simple estate, was that the heirs lost it, while it often happened that through the frequent slaughters which took place in battle, there was a failure of "heirs male," the most common form of entail; the consequence of which was that the land went back to the heirs of the original owner, the donor. The consideration of these causes will help us to understand the true scope of the statute *De Donis*, which has been much misunderstood. It has been supposed that it was the origin of estates tail, and that its object was to secure the land to the issue; and it has also been supposed that this being its object, the judges at once allowed it to be evaded by a process of barring the entail. When it is borne in mind that in ancient times the judges were always consulted as to the passing of statutes, and that the statutes were drawn by them, the absurdity of this view will be apparent. And the truth is, as will be seen, that estates were *not* allowed to be barred, without an ample equivalent being secured to the issue in tail. Entails existed long before the statute, and the statute was not necessary to preserve them, for men rarely alienated their lands, even when allowed, and were little likely to alienate them away from their issue, if they had any. The statute itself indicates that entails already existed, and as practically there would be no alienation, there was no necessity for a statute to prevent *alienation* away from the *issue*. But the statute was required to prevent alienations, which were sometimes resorted to to prevent the land going back to the heirs of the donor on *failure* of the issue, and also to preserve the land from forfeiture for treason.

Men going into war would, to provide for the chance of death in battle, before issue was born, alienate their land to a near relative, thus depriving the heirs of the donor of their reversionary right; and, on the other hand, the heirs of men engaged in treason against the reigning sovereign, and the heirs of the donor, were equally deprived of the land, by the law of forfeiture. What was required, therefore, was a law which should protect the heir of the donor from alienation, and

the heirs of the owner from forfeiture. And both objects were attained by the statute *De Donis*. By this statute, if the donee died without issue, or on failure of issue, the land must go back to the donor or his heirs; and, on the other hand, in case of issue, each tenant in tail having only a right for his life, and the next issue having a statutory right emanating from the gift of the donor, the tenant's treason did not involve forfeiture by the issue. It was declared, indeed, that the tenant could not alienate, but this meant not from the *issue*, for no man ever dreamed of such alienation, but alienation in the event of *failure* of issue. As the liability to forfeiture was correlative to the power of alienation, for a man could *forfeit* all he had, and *not more* than he had, and as, under the statute he had no power of alienation; so in case of forfeiture he only forfeited his *own* estate, not that of his issue. This is distinctly stated by Littleton, and such were the real objects of the celebrated statute *De Donis*; and though in a sense the statute secured entails, it was only in the sense of securing the issue against forfeiture, and securing the reversionary right of the lord in case of failure of issue.

The power of alienation away from the issue was allowed, after the statute as before, in the only cases in which it was at all likely that in those times it ever would be exercised, namely, in cases where, for the sake of convenience, it was desired to alter the arrangements of land in a family, and to exchange one estate for another. One of the many false traditions in our legal history is that estates tail could not be alienated, and another is that they were first allowed to be alienated by means of feigned and collusive recoveries, defrauding the issue in tail. It is difficult to say which error is the greater or the more absurd. Estates tail were always allowed to be alienated from the issue, *when an equivalent was provided*, but not otherwise; and there were more ways than one in which the equivalent could be provided. There were two modes of alienation, but both provided the issue with an *equivalent*. In the one, the issue took an estate from the ancestor who alienated. In the other, by recovery, he took it from the party who recovered. It was a well settled principle of law that an alienation with warranty, by a party interested in the entailed estate, descending upon the issue in tail, might bar the issue. Littleton puts many cases of such alienations, and traces the doctrine back to the time of Edward I., the very time when the statute *De Donis* passed. But then the warranty was only a bar to the issue in tail, either when he had an estate by descent from the party warranting, or when the warranty otherwise bound the entailed estate. So as to alienation by recovery, the common notion that the issue could first be barred by false and feigned recoveries, first introduced



in the reign of Edward IV., is not only utterly erroneous, but is the reverse of the real truth. Recoveries, by which the issue could be barred, were real recoveries in real actions, and these could always have taken place; feigned recoveries, if ever valid, were introduced in a later age, and their validity was always doubted. In a real recovery against the tenant in tail, he would be barred (Year Book, 3 Hen. VI. 55). But this meant a real recovery, either adverse to the entail, or providing an equivalent to the issue. If the recovery was a false and feigned title, then, on the death of the tenant in tail, the issue in tail could falsify the recovery; that is, get rid of it in an action of formedon (7 Hen. IV. 17, 28 Ass. 32, 52). Hence the usage to vouch the donor or his heir,—as a kind of protector of the settlement, and so make him a party to the proceeding; and if he was satisfied by a recovery in value, as it was called, then the recovery against the tenant in tail would bar the entail; and thus while the object of the settlement was attained, the alienation of the land was allowed, which is exactly the effect of our present law.

It has generally been supposed, and is one of the numerous false traditions in the law arising from an erroneous statement of Lord Coke, carelessly followed by all later writers down to Blackstone, that the mode of barring estates tail by recoveries was first introduced in Taltarum's case, in the reign of Edward IV., whereas the Year Books show that the practice had existed for ages; and in the very case itself (cited by successive writers without being read) this plainly appears. That case turned upon a *new point*, as to the effect of a recovery after an alienation, and it was considered that the proper course in such case was, to institute the proceeding against the alienee, and then for him to "vouch" the tenant in tail, and he the donor or his heir (12 Edward IV. 14). About the same period, also, a statute provided that on attainder all estates, including estates tail should be forfeited by the issue. And at this time we find, from "Doctor and Student," that such estates were sometimes barred by feigned discoveries *without* value; contrary to the ancient law, though their *validity* was, it appears, doubted. Another error is in supposing that the statute of Hen. VII. as to fines was intended to facilitate the alienation of estates tail. Lord Bacon had no such idea, and the fact is otherwise. In the latter part of the reign of Hen. VIII., nearly half a century after the statute of Fines, it was still a question whether it *applied* to estates tail at all; and a statute was then passed to provide expressly for their alienation by fine.

At that time, however, other causes had intervened which made their maintenance of less importance, and that was the reacquisition of the power of alienation by will; first by

means of uses, and ultimately by statute. This was the great cause which in this country tended to modify and qualify the operation of the law either as to primogeniture or to entails. A man could, if land was not entailed, alter the disposition of his land, when his eldest son was not fitted for the management of an estate; and the *knowledge* of this tended to diminish entails; at all events, after the feudal system disappeared, as it did at the era of the Commonwealth. It was formally abolished by statute at the Restoration; and it was then that the modern system of settlements was introduced, in which, even where estates are entailed, they can be modified by a power of appointment by will. With the power of disposing of land by will the owner could, after making necessary provision on the marriage of any of his children, reserve the final and complete disposition of his property until the close of his life, when he was aware of the position of his family, and could then distribute his property, real and personal, as might appear most convenient. In the rare case of the intestacy of a person of any property, the law no doubt upheld the right of primogeniture as to the land, but of equal division as to the personalty. But then there is this to be remembered, that division is not ordinarily any injury to personalty, whereas it may be ruin to a real estate. The division of the family estate would involve the destruction of the family, or at least of its position, unless the estate were very large, and the family very small. Nor does it appear that it was ever the general practice in this country to divide estates, at all events *residential* estates, though different estates were often left to different children; and in cases of intestacy the property in *that* way may have been divided.

But it is doubtful whether the division of estates was ever the general law, or that if it existed as a legal right it ever took full effect. It was one thing to distribute a man's estates among his children, or to vest the estate, if there is only one, on all of them, and quite a different thing to cut up the same estate among all of them. There is no trace of such a system ever having been general. In ancient times the family lived and occupied in common, or different members had different estates; in feudal times there was great difficulty in any alienation at all; when the feudal system disappeared, the tendency of the modern system of settlements was rather to restore the ancient system of the *distribution of estates*, than the absolute partibility of land. And the increase in personal property led more and more to an adjustment between real and personal property in the provision for a family; younger sons and daughters being provided for out of personalty, or by charges upon the real estate, which was left as far as possible entire to the eldest son. Undoubtedly, there often was a

tendency to the accumulation of land in the same line, but the prevention of this it is important to observe would not require the absolute partibility of land. The spirit of our ancient law was, it was conceived, rather the distribution of estates than the division of land. And no doubt our old lawyers have always taken pride in the *number* of our freehold landowners. Thus, in the middle of the fifteenth century, Fortescue dilates proudly on this theme. "The country," he says, "is so filled and replenished with landed men, that therein so small a thorpe (or village) cannot be found wherein dwelleth not a knight, or esquire, or such a freeholder as is called a franklin, enriched with great possessions. And also other freeholders, and many yeomen able for their richhoods to make a jury. For there be," he adds, "in the land, divers yeomen which be able to spend by the year a hundred pounds"—an enormous sum in those days, equal at least to 2000*l.* a year now. These were mere yeomen; "wherefore the juries are there often made of knights, esquires, and others, whose possessions in the whole amount yearly to above the sum of 500 marks."—*De Laudibus Legum*, c. 29.

Now, here it is to be observed that on the one hand the freeholders are described as *numerous*, and on the other hand as *very wealthy*. There may have been some exaggeration, but the description is not that of a country in which land was unduly accumulated or unduly divided. Yet the feudal system was still at its height, though it should be borne in mind that it did not apply to land not held by military service, and that it was only as to land so held that the system of entails prevailed. But it is to be borne in mind, again, that as to *all* land the law of primogeniture applied—except in Kent, and some other particular districts—and that there was at that time in general no power of altering the devolution of land by will, yet by means of a judicious distribution of their estates in their lifetime, the result was such a state of things as Fortescue describes, and which appears to have prevailed, as Mr. Froude describes it, in the next century, in the middle of the reign of Henry VIII. (*Hist. of England*, vol. i., c. 1). Certainly, therefore, it does not appear that the law of primogeniture, even coupled with the feudal system and a system of entails, had led on the whole to any undue accumulation of land. With the power of alienation by will it was still less likely to have that result. For if a man had more estates than one, he could distribute them, and if he had one, he could charge it for the benefit of his family generally, even if he left it entire to his eldest son. And it appears that men did, in fact, do so, and, of course, continued still more to do so at a later period as the feudal system declined and disappeared. It is interesting to observe what a legal and antiquarian author of eminence says

of the conditions of Kent, at the end of the sixteenth century, the county in which the ancient law of division of land had longest prevailed. We learn from Lambard that the land of the gentry was mostly held as knight service, and of course subject to the right of primogeniture, if not displaced. As to the yeomen, he says that copyholds were rare in Kent, and tenant-right unknown; "but in place of that," he says, "the custom of gavelkind prevailing everywhere, in a manner every man is a freeholder, and hath some part of his own to live upon. And in this their estate (state) they please themselves and joy exceedingly, insomuch as a man may find many yeomen (although otherwise for wealth comparable with many of the gentler sort) that will not yet for all that change their condition, nor desire to be apparelled with the titles of gentry. Neither," he adds, "is this any cause of disdain or of alienation, or of the good minds of the one sort from the other; for nowhere else in the realm is the common people more willingly governed. To be short, they are most commonly civil, just, and bountiful, so that the estate of the old franklins and yeomen of England either yet liveth in Kent, or else it is quite dead and departed out of the realm." That is, it flourished as purely in Kent as anywhere; and this no doubt is an argument to show that the division of land had not led to any mischievous consequences; though, on the other hand, the very comparison implies that the rest of the country had not suffered from a different state of the law. Indeed, as Lambard tells us, if in Kent there were many small freeholders, in other counties there were copyholders and customary freehold tenants. And counteracting causes had modified the operation of both states of the law, so as to go far towards equalizing the results. Moreover, it is to be borne in mind that it does not follow because the law laid down the division of land, that therefore the land was always divided. Arrangements, dictated by mutual convenience and common regard for the family, would no doubt be made; where there were several estates, they would be distributed, and a large one might be divided; but when it was a small estate, no doubt the family would occupy in common, or in some way it would be managed so that it should not be divided. This argument, it is manifest, tells both ways, and the object is not to find arguments in favour of either view, but to present all the considerations which may fairly arise. It is to be added, however, that in the sixteenth century estates might still be so large as to bear division; but that at the close of that century population had so far increased that subdivision of estates would often be very inconvenient, and hence, as Lambard tells us, at that time and the following reigns, private Acts to disgavel lands in Kent became common, and they have, it is well known, been so numerous

since that time, that there is probably little land in that county now held in gavelkind. Lastly, it is to be mentioned, that in Kent the ancient power of this disposition of land by will always existed, and this powerfully tended to counteract the partibility of land, just as the same power, when it was re-acquired in the country generally, tended to counteract the right of primogeniture. If a man had an estate in Kent so small that it would not bear dividing, he could leave it to any child he pleased; and if he had several estates, he could leave one to each of his children, while in any other part of the country he could, if his eldest son was unfitted to hold property, leave his land to some one else.

This may explain why it was that on the whole there was much less difference than might have been supposed between the condition of Kent and of other parts of the country. And it also shows that the operation of law is so largely modified by counteracting causes arising out of the habits and ideas of the people, that the nature of our laws has a far less practical influence than is supposed; at all events, unless those laws are absolute and compulsory, and allow no scope for individual liberty. But that has never been the character of our law, and is never likely to be the character of the law of any part of the Anglo-Saxon race. In America, where the right of primogeniture is abolished, a man may still leave his land to his eldest son if he pleases, just as in England is the case where that right is recognised only in the *absence* of a will. There are occasional difficulties under either law. In this country, if a man dies intestate who has *several* estates, the eldest son takes them all; in America, if there is only one estate, however small it may be, it is cut up into pieces among all the children. Practically, however, as in both countries there is the power of disposition by will, in most cases the will of the owner prevails. This principle has always been the spirit of our law on the subject; and it is curious to trace its influence in substance through all the changes in *form*. In the case of an entail there is an apparent difficulty in the application of the principle; for if the donee or his issue were not allowed to alienate, there appeared a departure from the principle, and equally so if the conditions of the gift were allowed to be departed from. In America, the difficulty has been evaded by abolishing entails; in our law, adhering to its ancient principles, the entail is allowed to be barred whenever it is proper in the particular case; so that it may fairly be presumed that the donor, if alive, would approve of it. Indeed, the donor himself, if alive, or if not, his heir, would probably be the "protector of the settlement," charged with the duty of determining the question. With this safeguard entails are allowed, and they are all allowed to be barred; just as the

right of primogeniture is recognised, and yet is permitted to be departed from. Men may differ upon theory; but it appears difficult to deny that our law respects in the highest possible extent, the principle of *liberty* in the law as to the disposition of property. This was the basis of the statute *De Donis* itself: that the will of the donor be observed. This was the basis of the statute of Wills—that the last will of the owner should be observed. The one statute affords the best counteractive to the other; and their united operation secures that land shall go according to the will of the owner. In the law of America there is rather more regard to theory and less to liberty. But the principle of liberty is only thus far departed from that entails are not allowed; for, as already mentioned, men may leave their land as they like, and dispose of it in any other way than by entailing it. But in this country an entail may be barred for a just cause; and in America a man may leave his land to a son, and the one most certain to leave it to his: and so on, for several generations, in a virtual and practical entail. Thus, therefore, in both the great branches of the Anglo-Saxon race, the devolution of land will no doubt, on the whole, be governed far less by law, than by the ideas and habits of thought prevailing among the people. And it is in this way that Social Science Congresses and other modes of discussion may have eventually more effect than is supposed in exercising an influence upon the progress of those ideas and habits of thought upon which the formation and operation of law must, in these countries, so largely depend.

## VI.—THE ATTORNEY-GENERAL'S ADDRESS ON LAW REFORM.

WE propose to place before our readers the most valuable portions of Sir John Duke Coleridge's address, as President of the Jurisprudence Department of the Social Science Association. Its delivery, a fortnight ago at Plymouth, forms so important an era in the progress of law amendment, that those of our readers who have already seen such portions of it as were reported in the daily newspapers, will excuse us for transferring so much of it to our pages,

The recent attacks upon Sir John Coleridge were evidently in his mind as he wrote the opening sentences :—

“ I was asked to address you upon Law Reform. A subject indeed of vast extent and great complication, one in which some persons take a keen and intelligent interest, in which many more profess to take an interest without knowing anything about it but the name, and which, if newspaper criticism is correct, I am the very last man in England to handle. A lethargic amateur, knowing nothing about the law, and if possible, caring less, altogether wanting in breadth of view and manliness of mind, perfectly satisfied with everything as it exists, and the indolent but inveterate foe of all improvements; such is the flattering portrait drawn by candid and philosophical criticism of the chairman of this section of the Social Science Congress of 1872. It is very seldom worth the trouble to attempt a personal controversy. It certainly is not worth the trouble now. But even if it were, this is not the occasion for it, nor are you the persons to inflict it on. I propose, therefore, as I have been asked to do so, simply to lay before you some of the notions on this subject which have been in my mind for many years, careful only that the opinions shall be real, grounded on reasons which can be stated, and capable of being practically enforced.”

Then follow remarks on the unscientific character of English law, and on the best mode for practical statesmen to deal with Law Reform.

“ To apply remedies to those things which experience has shown to work injustice is no doubt far less showy, but I think it is far more real, than to attempt reconstruction from the very foundation of our judicial system; for which, as it exists, much is to be said, which has great positive advantages, and which I firmly believe, with certain obvious modifications, presently to be pointed out, may be made to do the work of the country to the reasonable satisfaction of reasonable men.”

Sir John Coleridge remarks, that in speaking of Law Reform we are thinking of two things perfectly distinct, law and procedure. In spite of Pope's line,

“ Whate'er is best administered is best,”

the Attorney-General believes that first in importance comes law. To settle your principles of law is of more importance than to improve procedure :—

“ Take, for example, the fusion of our two systems of law and equity; a thing, in my opinion, which is absolutely certain one day to be done. To have two sets of courts existing side by side, one main function of one set being to prevent the in-

justice which would result from the judgments of the other set, is in idea barbaric, and in practice highly inconvenient. But till you have settled, first, that law and equity shall be united, and next, at least, the leading terms of union, how can you possibly tell what courts will be wanted, or by what rule of procedure the courts shall be governed? It must be remembered always that the things themselves, law and equity, and the rights and liabilities arising out of them, are inherently distinct. The distinction is in the nature of things, and has not been created nor can be abolished by Act of Parliament. The courts which now respectively administer them have systems of procedure adapted, or intended to be adapted, to these respective jurisdictions; but if an entirely new system of law is to be evoked by legislation from the union of the two, the procedure by which it is to be administered will require the most careful framing. The principles, at least, of the new system must be determined and expressed in something like a code, or I venture to say that a confusion will follow, profitable to no one but to practising lawyers, and discreditable to a great country, which will leave the meaning of its law to be ascertained at the expense of suitors, instead of taking the trouble to have it clearly expressed by statute, or by rules to be sanctioned by parliamentary authority.

So much I think a very little consideration will show to be essential; but I see no reason for so far limiting our desires when a greater object is, I believe, attainable. I have often said, and I have been laughed to scorn for saying it, but I here deliberately repeat, that there is no reason why the law of England should not be expressed in a Code. I have never been able to recognise the force of the common objections to it. It would not undoubtedly put an end to litigation, nor prevent bad and conflicting decisions; it would not be an easy matter, and when done would be open to objections; but there is no difficulty inherent in the nature of English law, none which great and able lawyers might not well overcome; and the objections are too often only the expression of a prejudice in favour of the existing state of the law, or of an indolent disinclination to grapple with the difficulties of the work. That we shall have it some day I do not doubt; that we shall wonder we never had it before is almost equally of course; that we might have had it at this moment I am fully convinced, if we had spent upon a Code the money, the time, and the labour that have been comparatively thrown away in feeble and ineffectual attempts to make a Digest. A Digest of English law, though if we could have a good one it would be a great convenience to the practitioner, would be of very little service to the country, and would be the wonder of the jurist. In general, with a few magnificent exceptions, of whom Lord



Mansfield is the greatest, English judges having had to administer a system of unwritten law, except where it has been modified or created by statute, have brought to the task an almost superstitious reverence for decisions, and a determination to follow out a legal principle to its logical consequences, utterly regardless too often of moral and practical absurdities therefrom resulting. It follows that to all men not lawyers, and to most men that are, there is a multitude of decisions utterly worthless, to say the best of them, which, for the credit of the law, had best be passed by and forgotten. It is of melancholy interest sometimes to trace the ingenuity with which Courts and Judges have striven to evade the authority of a bad or unjust decision without in terms questioning its authority. The books are full of ingenious evasions, of subtle logical deductions from data, perhaps in themselves sound and sensible enough, but not calculated to be pursued with relentless logic to all their conceivable consequences; of decisions between courts of co-ordinate authority, really conflicting, though nominally consistent, which it is only useless and embarrassing to be obliged to remember and preserve. Take, for instance, the struggle between the courts as to the extent to which a principal can take advantage of or is liable for a fraud committed by his agent. Says a majority of one court, in a famous case, where a principal put forward an ignorant agent to tell a falsehood by which he benefited, and the person injured pleaded the fraud as a fraud of the principal: "Nay, the man who knew did not commit the fraud, and the man who committed the fraud did not know; there was no legal fraud, therefore, on the person who suffered by it, which he can plead against the person who profited." Such an outrageous absurdity is too much for the acquiescence of another court, which accordingly proceeds to accept the authority of the case, and at once to distinguish it, while accepting it, by a line too fine for any but a legal intellect to see and apprehend. And then follows a string of cases in which the equal authority of conflicting courts has to be admitted, and the courts have to steer their way between them as best they can, often, as might be expected, with very indifferent success. So, again, the struggle between the courts as to the extent to which the old rule is to be carried, that corporations can be bound only by a contract under their seal; one court deeming it right to endeavour to mould the law to the altered state of the times, and another to abate no jot of the strictness of the law laid down ages since, in a state of society wholly different from that to which it has now to be applied. These are but instances which might be multiplied fiftyfold, but they are enough to show you what I mean, and the worthlessness of a Digest as compared with a Code. For all these decisions will

be preserved in a Digest, bad and good, sensible and foolish alike, and a plain and intelligible rule, if it can be drawn from them, will still have to be drawn out by the ingenuity of courts and judges. But these decisions will disappear in a Code. A Code cuts the knot which a Digest leaves to be disentangled. Between two conflicting principles, a Code selects one, and clearness and simplicity, the two main elements in all good law, are at once and for ever secured. 1

That the thing can be done our own times have shown us. Perhaps the Code Napoleon can hardly be said in strictness to belong to our own time, but its date is only just before them. We have ourselves in the last few years enacted for India a Code, which in many respects is a model of what such a Code should be. In New York a great Code of Procedure was enacted but a few years since, which I understand to have worked to the satisfaction of those who had to administer it. These examples are enough to show the possibility, at least, of an English Code. But it will never be made by taking young barristers in no large practice, and setting them to make digests of different heads of the law. Such work is waste of time and money, and has led lately to disputes and heart-burnings much to be regretted. A Code, if it is to be made at all, must be made by the first lawyers in the country, men of power and authority sufficient not merely to digest the law, but, if need be, to make it. The Code of Justinian was made by the greatest lawyers in the Empire; so was the Code Napoleon; so was the Code of New York. To pass a Code clause by clause through the Houses of Parliament is utterly impracticable. But I do not think it is at all impracticable to pass a Code (as bodies of statutes are often passed), made by competent men, submitted to Parliament, and acquiring the force of law, if Parliament does not dissent. Choose your men and pay them properly, and I believe a Code, whether of law or of procedure, to be perfectly attainable. It would be the best return the country ever received for the expenditure of its money, and I believe there would be no difficulty raised by any Chancellor of the Exchequer. I think I can answer for the present one.

My plan would be something of this sort. Take three men, or, if you please, four, of the very highest position and reputation; give them, if they have not it already, the rank of Privy Councillors and the salary of judges; make their service, in the preparation of the code, count as judicial service, and give them, if not otherwise entitled to it, at the expiration of their labours, the pension of a judge. In some such way I am convinced a code might be prepared and sanctioned in its integrity by Parliament, and it would be a pure and noble triumph for the minister who achieved it, and

of great and permanent advantage to the country. Whether the opportunity might be taken to make one system of law for the three kingdoms is a question for politicians rather than for jurists. That there is much in the Scotch law and something in the Irish procedure which we might profitably borrow, I am sure; and, on the other hand, both Scotland and Ireland, it is possible, might with advantage adopt some things which at present are to be found in England only. It is inconvenient certainly to have a law which is not the same for England, for Scotland, and for Ireland: whether it is possible at the present moment to put an end to the inconvenience I am hardly in a condition to determine.

Such are my reasons for thinking a Code possible, if aimed at in a practical spirit, and with due adaptation of the means to the object. And, if possible, it is manifestly the first thing to be taken in hand, because, if well accomplished, it will save the doing of many others. Short, however, of a complete Code (if what other nations have accomplished should be deemed too great an undertaking for the English people), there are certain heads of the law which offer themselves willingly to a process of codification. Such are, for example, the law of evidence, the criminal law, the merchant law, and the law of real property. If a complete code be beyond us, portions of it may not be unattainable, and if attained will render the great result a work of less labour and of easier accomplishment. I have said in Parliament, and I here repeat, that if I can I will endeavour to deal with the law of evidence in this way next year. Through the labours of others, especially of Mr. Fitzjames Stephens, there is a mass of materials ready to hand, which a reasonable amount of trouble might without difficulty mould into a Bill. For reasons which will appear before I have done, I can give no pledge upon this subject, but at least I will try.

I have pointed out already how only I think, with any approach to scientific accuracy and completeness, a single harmonious system of law and equity can be evoked from the present conflict of the two. If this be denied us, I should wish to try what can be done by working with our present materials. Fusing law and equity by an enactment in terms that they shall be fused, and that whenever they conflict, equity shall prevail, appears to me—I say it with a sense that I may be quite wrong, when I remember the eminent men who proposed the clause—appears to me, I say, an utterly impracticable and slovenly way of dealing with the question. It would take twenty years of legislation, and ten hecatombs of cases to settle the meaning of a clause in a statute. I should propose to proceed experimentally, and to supplement the scheme as experience might show us what was wanted.

Clothe each class of court with the jurisdiction of the other class, make every court of law a court of equity, and every court of equity a court of law, reserve certain special jurisdictions, such as lunacy, bankruptcy, and, as now, divorce and probate (I do *not* in the list enumerate the Admiralty), and with these exceptions make every superior court of complete remedy to the suitors in it. Something of this kind was proposed nearly twenty years ago, amongst the great changes in their procedure then forced upon the reluctant courts of law. But the great lawyers who then dominated Westminster Hall would none of it. They summarily, by decision, reduced the Act of Parliament to nearly a dead letter, as, in this respect, though most beneficial in others, it has remained from that day to this. But endow them in terms with full equitable jurisdiction, and they would not refuse to exercise it.

I know very well the stock objections. The courts have no machinery for exercising another sort of jurisdiction. If that turns out to be so in practice, give it them when and as they want it. A Vice-Chancellor trying a horse cause, or a court of common law dealing with a suit for winding up a company, would be respectively unfitted for the subject matter before them. Very likely: but first such business as is, in its very nature, unfit for one tribunal, will never, as a rule, find its way before it; and next do what you will, if you alter largely the present system, and make one court and one procedure, there will be a period of transition in which the judges will have to learn their work, and will not all be equally fitted for the discharge of every separate portion of their duty. There is no change to which an ingenious mind which dislikes the change cannot make objections. There are very few objections which do not give way before a resolution to go on in spite of them. To such objections as I have made, and to the like of such objections, I answer, Try! Try (what works already, in most of our colonies) making every court a court of law and equity, and see what comes of it. You will find it, I believe, throw an unexpected light upon the number of courts and the amount of judicial power which the country requires to do its business. Such is the contribution I presume to make to the solution of this vexed question, which has at least the merit of simplicity, which would cost the country nothing, and which, if it failed in practice, would interpose no obstacle to the creation of another system.

It is not easy, and I do not pretend to be able to suggest a simple and perfectly inoffensive amendment of the court of final appeal. Because here any change, that is, any change worth making, involves destruction. It is indefensible in principle to have two courts of ultimate appeal; one for these islands and one for the rest of the empire, each entirely inde-

pendent of the other, which may conflict and may even probably make the law on the same subject different in England from the law in India, or Australia, or the Dominion. I suppose it is not indefensible in principle, because it has lasted for centuries; but the jurisdiction of the House of Lords (except that suitors are a small body, belong to no class, and have no power of combination) would have long since been swept away as an intolerable and outrageous abuse in point of practice. The endless delays of the House of Lords (one case in which I was myself engaged, against the last Bishop of Exeter, was pending for seven or eight years in the House), its immense expense, its intermittent sittings, its entire disregard of the proceedings and engagements of all other courts when it does sit, its absolute irresponsibility; all these things have long been known, and endured from a feeling of the hopelessness of any amendment. I do not pretend to speak with any full knowledge of the Chancery appeals, but I know that not long since they were practically decided by a single peer, at whose decisions a caustic Lord Justice was accustomed to say that he held up his hands "in respectful amazement;" but I do say that nothing can be more unsatisfactory than the present state of the Common Law appeals. Once it was the rule in all Common Law appeals to summon the judges, and although I believe Lord Eldon asserted his right to overrule the twelve judges if he pleased, it was a right practically never exerted. Now the House of Lords does not summon the judges as a rule, and often overrules them when it does. And who thus overrules them? The only Common lawyer in the House of Lords who takes part in the decision of appeals is the ex-Chancellor, whom many of us remember at the Bar as Sir Frederic Thesiger. Some little time since, and the example I give by no means stands alone, the law laid down by Sir James Willes, Sir Henry Keating, and Sir Montague Smith, and repeated in terms upon appeal by Sir Colin Blackburn, Sir William Channell, Sir Robert Lush, and others, was questioned and reversed in the House of Lords (the judges not being summoned) by Lord Chelmsford alone, the Chancery Law Lords being careful to decide the case upon fact. It is not for me to criticize the proceedings; but if there be any lawyer who thinks a state of things satisfactory in which this is even possible, I can only say what he probably would say of me, that the constitution of his mind is altogether peculiar. For my own part, no alteration will be satisfactory, and I can take no part, either officially or privately, in supporting any which leaves to the House of Lords as such, to the Hereditary Chamber of Parliament, the right of deciding causes. It is one thing to acquiesce in an anomaly which we have received from our ancestors, and which has the consecra-

tion of centuries. It is quite another to enact it afresh, and to stamp with our approbation what is unworthy of it.

Moreover, what we have before us now is not the tribunal which our ancestors sanctioned. It was the whole House of Lords to which the constitution intrusted the decision of causes in the last resort. And well or ill, as any one who knows legal history knows, it was the whole House of Lords which exercised the trust. This was the theory down to our own time. The House of Lords, assisted by the judges, and as a rule in conformity with their opinions, declared, without appeal, what was the law of England. It is hardly even the theory now. In the great State trial of the *Queen v. O'Connell*, the members of the House of Lords were present in large numbers, and the judges by a very large majority had pronounced their opinion to sustain the conviction. The Duke of Wellington strongly urged upon the lay members of the House not to vote upon the question, and to leave the decision absolutely to the law Lords. The Duke's advice was taken, and the decision was left to the law Lords only. Those noble and learned persons decided it, no doubt with perfect honesty, but so it was that the Lords who also supported the Government of that day supported the conviction; and the Lords who opposed the Government of that day, reversed the conviction which the judges were for affirming. I do not stay to inquire whether the advice of that great and upright man, the Duke of Wellington, was well or ill given. I say that the effect of it was to change the character of the tribunal. There is no prescription in favour of two or three ennobled lawyers—ennobled often quite as much from political exigency as for legal distinction—sitting in appeal upon and reversing all the judges of England. Still less, if there is no prescription in favour of the custom, can I think, speaking I hope with due respect, that there is any reason for continuing it, either personal or practical. I do not know what Lord St. Leonards would say now, but I know what Sir Edward Sugden did say in his great work reviewing the decisions of the House of Lords in real property cases. I have no means of knowing what the judges think of recent decisions overruling them, but I do know what they thought and said of the *Brownlow* decision, and one or two others which I refrain from mentioning. Moreover, small as the legal force of the House of Lords is at present, it is subject to continual diminution. Small blame indeed to those who can obtain the great powers of Lord Cairns and Lord Westbury for obtaining them if they can, for the decision of their private affairs as arbitrators. Most suitors would be glad to be so fortunate. But the absence of these Lords materially reduces the judicial strength of the Court of Appeal. And this small and fluctuat-

ing body, which has now become the Court of Appeal, feels keenly the necessity of clothing itself with what is in its case the unreal but imposing character of the House of Lords. They keep up the form of a deliberative assembly; the judgments are a debate; the decision is a vote of the House; and so tenacious are they (and from their point of view with good reason) of this utter unreality, that in the last scheme for a reform of the Court of Appeal, which we owe to Lord Cairns, the tribunal is to report both to the Queen and to the House of Lords; so that the judgment itself is proposed to be in one set of cases technically that of the Queen, in the other that of the whole House of Lords. Nay, more, a proposition in the Select Committee by Lord Redesdale that the House should pass a standing order, "intrusting the hearing of appeals to a committee of Peers selected by the House as specially qualified to discharge that duty," was (it is incredible, but true) negatived without a division!

I said it was not easy to propose a scheme for a Supreme Court of Appeal which should not be open to objections. Yet the field is fairly clear for us. The Judicature Commission, in its first report, pointedly and of set purpose abstained from saying a word about the House of Lords. Into its second report the subject of a court of appeal does not enter. The Lord Chancellor's two schemes of last year, and of this year, whatever be their merits, which I do not discuss, did not receive the approbation of Parliament. The only scheme before the country is the one proposed by the House of Lords itself, or rather by a Select Committee of the House, of which committee every lawyer in the House, except Lord St. Leonards, was a member, though it does not appear that Lord Penzance ever attended its sittings. This scheme proposes the creation of a Judicial Committee to exercise as far as the hearing goes the functions of the present Judicial Committee of the Privy Council and the House of Lords; but as I have already said, to report respectively to the Queen and to the House. The Court is to consist of the Lord Chancellor, four salaried members at 7000*l.* a year (1000*l.* a year being added to the original proposition on the motion of Lord Chelmsford), all law Lords, the Chief-Justices of England and of the Common Pleas, the Master of the Rolls, the Chief Baron, and the Lords Justices of Appeal in Chancery. None but the salaried members are to be obliged to attend more than twenty days in the year, and then only on the summons of the Lord Chancellor. All the members "with a view," says the report, "to the proper constitution and greater dignity of the Committee should be Privy Councillors." "With the same view" it proceeds to recommend that they should be Peers. But what sort of Peers—Peers for life?

No; only while they remain members of the Committee. Peers of Parliament? No; they may sit and vote in the Committee, but not even sit, still less vote, "in any legislative or other proceedings of the House." The House is to keep its jurisdiction, and to exercise it through men not worthy to share its dignities and functions. These are to be preserved for the noble and learned Lords upon whose minds it has at last been forced that they can no longer with satisfaction to the public discharge one of the most important of them all. To be sure, there is a precedent for reducing Chief Justices and Barons and Lords Justices, and such inferior dignitaries, to dimensions fit for the attendants upon superior powers. Change for a moment my poor prose for Milton's glorious poetry—

The signal given,  
Behold a wonder! They but now who seemed  
In bigness to surpass earth's greatest sons,  
Now less than smallest dwarfs in narrow room  
Throng numberless, like that pygmean race  
Beyond the Indian mount, or fairy elves.

But far within  
And on their own dimensions, like themselves,  
The great seraphic Lords and Cherubim  
In close recess and secret conclave sat

on golden seats  
Frequent and full.

I ought to add that a proposition to make those who were to exercise the jurisdiction of the House of Lords themselves real members of it was made by Lord Grey and Lord Redesdale, and was supported by Lord Salisbury, Lord Derby, Lord Powis, Lord Romilly, and others; but except Lord Romily (Lords Penzance and St. Leonards were not present) every other lawyer in the House was against admitting their brother lawyers to the same dignities and privileges with themselves. Where have these noble and learned persons lived since they left the Bar? What air have they breathed? What company have they kept? What waters of oblivion have they quaffed, that they should suppose that any Attorney-General with one grain of self-respect, or with the slightest feeling for his great profession, would make to the House of Commons such a proposal as this?

My suggestion shall be simple and direct. A court of eight members at the least, in which Scotland, Ireland, and the Colonies should be represented, and of which all existing law Lords should be *ex officio* and unpaid members, should sit during all the present legal terms and sittings, in two divisions if necessary, and I believe could well dispose of the business now disposed of by the House of Lords, the Judicial



Committee, and the Exchequer Chamber. Whether it could also dispose of intermediate Chancery appeals I am unable to say with confidence, but I should think it could. One source of supply for the future I would make the ex-Lord Chancellors and Chief Justices, whose pensions, whether maintained at their present rate or reduced, as I think they might be, should be dependent until some given age (seventy or seventy-five perhaps), or a permanent incapacity, on some fixed amount of service as members of the Court of Appeal. I myself think it very important to have on the tribunal of last resort some members who are not lawyers; but this is a matter as to which there is great difference of opinion, which I will not reason out, and on which I do not insist.

This subject leads me to consider, because it is so intimately connected with it, the very important question of the reconstruction of our judicial system, as to those matters which the Judicature Commission has dealt with in its recent report. On the character and work of the subordinate tribunals from which an appeal is to lie depends obviously the character and work of the court of ultimate appeal. Now the question raised, not in terms, but in substance, by this report is very grave indeed. Shall we continue as now a central Bar with central judges, sent round the country periodically to do the work; or shall we have Provincial Courts, with provincial judges and a provincial Bar, and with an appeal in certain cases only to the courts in London? A graver question it is scarce possible to have submitted to us. Far more than most men think is involved in maintaining, in even raising, if it might be, the character of our judges and our Bar. The interests of the Bar are the interests of those who have to employ the Bar, and the higher the character of its lawyers, the better, in all ways and in all times, but especially in troubled times, for the country. I protest with my whole soul against the mischievous and foolish assumption which runs through too many writings and speeches on this subject, that the one object of the whole of our judicial system is the cheap and speedy despatch of the business of suitors. It is one great object; perhaps taken singly it is one of the greatest objects; but it is not the only one; it is not to be pursued exclusively to the neglect of other objects very great and very important. Cheap law and quick decision are purchased far beyond their value at the expense of incompetence, of unchecked arrogance, of the suspicion even, far less the reality, of corruption. There is surely great force in what Mr. Justice Blackburn says, assuming it to be well founded. "The opinion of the profession," he says, in his note appended to the last report of the Judicature Commission, "is the only practical check upon the judges, and is a real check

to any abuse of patronage by the Government." I hope what he says is well founded in both instances. He ought to know as to the judges, and if I seem to hint a doubt as to the fact, it is, perhaps, only because our opinion often fails to reach the heights on which they sit. If I doubt it as to the Government, I can do no more than appeal to legal memories whether, if this check had had a real existence, many appointments during the last thirty years could possibly have been made. And further, as far as I can judge, the Government (I speak without distinction of party) neither knows much of, nor cares much, for what lawyers think. But no sensible man can doubt the great importance of such a check, supposing it to exist in fact. If possible, in the public interest, its strength should be increased, not lessened. Whereas, with the multiplication and decentralization of Bars and Courts, some diminution of power in the Bar and of authority in the Court is all but inevitable. I admit all this; and because I admit it I cannot concur in the present scheme to raise the County Courts somewhat, and make them do the work which our Superior Courts now perform in the provinces. I retain the opinion which, together with Sir Montague Smith, I expressed in March, 1869, either that the present system, which is based on the existing divisions of counties, and which brings justice reasonably near to the homes of suitors, witnesses, and jurymen, should, with some modifications, be continued; or that the present system of circuits should be altogether discontinued, and Provincial Courts established, with assigned districts, having judges who should go frequent circuits to convenient places within such districts, and with appeal in certain cases to the Metropolitan Court of Appeal. I believe that with a more sensible distribution of the present judicial power, our thirty-one paid judges could do all the work now cast upon them with ease, and with largely increased despatch, and consequent satisfaction to the suitors. But if these arrangements cannot be made (which I deny), then I come, with great reluctance, but I do come, to the conclusion, that England should be broken into provinces, and that there should be Provincial Courts, sitting *in Banco*, in the capital of each province, and going frequent circuits within it as the County Court judges now do.

Time warns me to refrain from entering upon the subjects of land transfer and registry, as to which, in some place and at some time, I should like to say a word. But there is one subject most intimately connected with Law Reform, on which, as I have long had a clear opinion, which can be shortly stated, I will speak before I end. The first great Law Reform I believe to be the creation of a minister who shall

really be responsible for the administration of the law and for its amendment. There is such a minister in most foreign countries. There is such a person in many at least, and those the most important, of our colonial possessions. Nay, there is such a person, in substance though not in name, in Scotland and in Ireland. In England his functions are divided between, and if performed at all are most imperfectly performed by, the Lord Chancellor, the Home Secretary, and the Attorney-General. The Lord Chancellor is a great judge; he has also a large and troublesome department of State to administer; and if he undertakes law Bills he must undertake them at such time as the routine, but most important, work of his Court and his department leaves at his command. The Home Secretary in a country like ours is at least as hard worked as the Lord Chancellor; yet upon him recent custom has imposed the duty of undertaking many Bills which are certainly more properly the work of a Minister of Justice. The Attorney-General remains, whose official work is enormous and of unspeakable importance—it is said, at least, that delay in a law officer's chambers is about to cost the country three millions of money—whose private practice ought to be considerable if he is to retain his proper weight in the courts and the profession, and to keep up with the law of which he is the head, and whose position, if he is not a man of altogether extraordinary and commanding powers, is curiously and completely inadequate to the functions which some men expect of him. The Lord Advocate of Scotland is now a Privy Councillor, and has always been a great minister of State. He governs Scotland, and has the weight and authority due to such a position. The Irish Attorney-General is a Privy Councillor also, but does not govern Ireland, nor is he consulted except by the Irish Government; and if he attends to Parliament, has time for the consideration and the carriage of Bills through the House. The English Attorney-General, alone of the heads of the profession in the three countries, has no rank beyond that of the first Queen's Counsel. He is not in the Cabinet; he is not consulted by, nor does he consult, the Lord Chancellor; and one of the very greatest and most powerful Attorney-Generals of modern time told me that he found his position in this respect utterly unsatisfactory, for that he often knew nothing whatever of law Bills till he was asked to support them in the House of Commons. Supposing that I had the best and most comprehensive measures of Law Reform ready in my chambers, I should in practice be dependent on the Secretary to the Treasury, and on such fragments as I could snatch of the Prime Minister's time for any chance of getting them understood or recommended to the Cabinet, or of bringing them forward.

With the creation of a Minister of Justice all this would disappear. He would have his chance with other ministers he would be able in the Cabinet to compel attention to his measures; his office would collect about it a school of able and intelligent workmen; and if this year or next year he had to submit to the fate of other ministers and to postpone his Bills, his time would come, and his Bills would have their turn. Do not let me be misunderstood. I am not speaking in the tone of personal complaint. I have nothing to complain of. I have enjoyed, if not the confidence, at least the friendship, of my colleagues, and I have had to do with a Lord Chancellor whose noble and gracious character makes it a privilege to be near him. My fate has been only the fate of former holders of my office, and, unless things change, of future holders too.

Unless things change! I have made out for you a list of measures which can hardly be only called small or unimportant. A minister of justice, a code, if not a code, a codification of certain portions of the law, a system of procedure, a complete jury system, a court of appeal, a reconstruction of our tribunals, a simplification (on the Australian plan, which we owe to Sir Robert Torrens) of land transfer—these are all measures to which I am quite content to be considered pledged—pledged in this sense, that I have for years thought them desirable; that, as to them, I am now ready; as to others, if I saw any chance of success, I could get ready to bring them forward. But it would be the idlest vanity, the grossest dishonesty, to lead you to believe that there is any probability of my being able to deal with many of them. It is so easy for men who have no responsibility, and who do not see the working of the machine, to say that this can be done, and that can be carried, and the other can be made law. I wish they had to try. In this country, to carry any large and complicated measure, you require a great force of public opinion and great public interest. On this subject effective political leverage has yet to be created. Take the subject of legal education. It is an important and interesting one. Nothing, or next to nothing, is now done for it. The Inns of Court, with their great incomes and unequalled advantages, have touched the subject but feebly and slightly. It is taken up in the House of Commons by Sir Roundell Palmer, a man whose position in the House is unique, whose personal weight and influence is enormous, whose eloquence invests with interest everything he takes up. There was full notice of his motion, and the House was barely kept up to its complement of forty members during his speech and the subsequent discussion. What is the use of railing against the Attorney-General in the face of a fact like this? Mr. Vernon Harcourt, a very able man and a popular speaker,

takes up the subject of Law Reform, and but for the life unexpectedly thrown into the debate by a most vigorous and uncompromising speech, enough to stir up any House, made by my excellent colleague, the Solicitor-General, that debate too would have languished and collapsed. Mr. Vernon Harcourt spoke as ably on this subject as upon the Ballot, but his speeches on the Ballot were made to Houses inconveniently full, his speech on Law Reform to empty benches. Neither the Government nor the Attorney-General have anything to say to this result. It arises simply from the fact that one subject interests the House and the other does not.

It is also to be remembered that the session of Parliament is limited, that the time at the disposal of the Government is limited; and that the absolutely necessary business of the country—I mean Supply and other essential business—takes up most of the time of what the Government has the command. More and more the time of the House of Commons is not only consumed, but wasted, not by business, but by debates on all kinds of subjects, which too often begin in nothing and end in nothing but a large consumption of time. Besides, a Government becomes pledged in character and honour to certain measures which it is then a political necessity to bring forward. I speak without any special information, but it seems to me that Irish Education, Public Health, and Local Burdens, are matters which it is impossible the Government should *not* bring forward next session. The question arising upon the subject of Local Taxation alone afford, if thoroughly dealt with, materials for a session by themselves. I leave you, and all candid men, to judge what is the chance of any great and disputed measure in the House of Commons, in 1873, if these subjects should be undertaken by the Government. All I can promise is to do my best to leave no opportunity unimproved, and to seize every chance to advance one or more of the measures which I have recommended to you to-day. One thing I will not do. I will not bring forward measures I have no chance of passing, and I will not be guilty of what I think the littleness of making speeches for the sake of a spurious popularity, which can only take up valuable time, and end in nothing.

One word, and I have done. You, and all of us, have it in our power to do something to turn the public apathy on law reform into active and hearty sympathy. Let me urge you to do what you can. See very clearly what is the mischief you would remove. Do not suffer vague and rhetorical phrases to stand in the place of practical knowledge. See very clearly also what is the practical remedy you would propose. The mischief and the remedy being thus clear to your own minds, it is not very hard to make them clear to

others. So, and so only, you can really help those in Parliament who are in earnest in the matter. And when law reforms are carried, as sooner or later they certainly will be, the credit of them will be due not so much to those who have sailed upon the current, as to those who have created its volume, and directed its flow. Forgive me that I have so long detained you, and forgive me that I have detained you with what has so ill occupied your time.

After such an address from the Attorney-General, the prospects of Law Reform ought to be brightening.

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## VII.—CONDITION OF PRISONERS OF WAR.

**M.** DUNANT, the originator of the work of the Red Cross, and of the Convention signed at Geneva, in 1864, for ameliorating the condition of the wounded in time of war, has favoured us with a copy of a paper, printed for private circulation, read a few weeks since at an influential meeting, over which Lord Elcho, M.P., presided—a proposal for introducing uniformity into the condition of prisoners of war.

M. Dunant gratefully remarks at the outset, that the admirable devotion and the immense services rendered by Miss Nightingale to the English army in the Crimea first inspired him with the idea of his work in behalf of the sick or the helpless soldier.

His book, he says, entitled, “A Recollection of Solferino,” made women weep. He related the tortures of the wounded, and the thousand evils caused by war. In this way he gained his cause, and struck the imagination and the heart. Thus he ventured to lay bare and expose those scenes of desolation, those cruel sufferings, those painful agonies which always accompany the splendid horrors which men so pompously and foolishly call glory. Charles Dickens honoured him by producing, in *All the Year Round*, the most heart-rending pages of his “Recollections,” in which he depicted the “orgy of bloodshed,” as he so truly called it.

His object, it would appear, was to endeavour to mitigate the horrors and evils of war by means of national committees, by which he hoped to be able to obtain the consideration of belligerents in time of war, and in time of peace to create a bond of union between men of different nations, who seek to spread among their fellow-countrymen notions of tolerance, concord, and peace. The white flag with

a red cross was the chief standard of the Crusaders, and the work that he had undertaken being a pacific crusade, it appeared to him a suitable flag to propose. Moreover, no nation had a flag precisely similar to it; its colours are the reverse of the flag of the Swiss Confederation, which is red with a white cross. It is wrong to call the flag of the wounded the flag of Geneva, which is yellow and red, and the badge of this ancient imperial city is a key and an eagle.

Having received encouragement, in the first instance, from Miss Nightingale, and afterwards from most of the sovereign houses of Europe and ministers of state, it was proposed to have an assembly of official diplomatists, which should draw up an international treaty, securing the neutrality of the wounded, of surgeons, and of all belonging to the ambulance department. The congress was held at Geneva, and lasted from August 8th to the 22nd, 1864. Twelve representatives of Powers, whilst the congress sat, signed "The Convention for the Mitigation of the Condition of Soldiers Wounded in the Armies in Campaign," for such is its name. Besides these, many other States speedily gave their adhesion to the treaty. The British Government ratified the convention, 18th February, 1865, after it had been laid before the two Houses of Parliament. The articles of the Convention are as follows:—

1.—Ambulances and military hospitals shall be acknowledged to be neutral, and, as such, shall be protected and respected by belligerents as long as any sick or wounded may be therein. Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

2.—Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality while so employed, and so long as there remain any wounded to bring in, or to succour.

3.—The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw, in order to rejoin the corps to which they belong. Under these circumstances when those persons shall cease from their functions they shall be delivered by the occupying army to the outposts of the enemy.

4.—As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property. Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

5.—Inhabitants of the country who may bring help to the wounded shall be respected, and shall remain free. The generals of the belligerent powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it. Any wounded man

entertained and taken care of in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house, shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

6.—Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong. Commanders-in-chief shall have the power to deliver immediately, to the outposts of the enemy, soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties. Those who are recognised, after they are healed, as incapable of serving, shall be sent back to their country. The others may also be sent back on condition of not again bearing arms during continuance of the war. Evacuations, together with the persons under whose directions they take place, shall be protected with an absolute neutrality.

7.—A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must, on every occasion, be accompanied by the national flag. An arm-badge (*brassard*) shall also be allowed for individuals neutralized, but the delivery thereof shall be left to military authority. The flag and arm-badge shall bear a red cross on a white ground.

8.—The details of execution of the present convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective Governments, and in conformity with the general principles laid down in this convention.

9.—The High Contracting Powers have agreed to communicate the present convention to those Governments which have not sent plenipotentiaries to the International Conference at Geneva, with an invitation to accede thereto; the protocol is for that purpose left open.

10.—The present Convention will be ratified, and the ratifications will be interchanged at Bern in the course of four months, or earlier if possible.

In Austria and Bohemia, under the white flag with the red cross, there were many instances of devotion by men and women nurses of the hospitals. M. Dunant then goes on to say :

“The great Art and Industrial Exhibition of Paris, held in the Champs de Mars in 1867, attracted a vast number of visitors. Amongst the numerous objects of interest was the little building, over which waved the new and universal flag of humanity; the symbol indicating the abolition of frontiers by charity represented one of the noblest ideas of our age. Visitors on leaving the Exhibition, dazzled by the marvels they had seen, on coming to our little tents could find nothing but symbols of charity for the practical relief of the evils of war. At this time, 7th July, 1867, the Empress Eugénie requested me to attend at the Palace of the Tuileries. Her Majesty



manifested the greatest sympathy and anxiety for all sufferers; and begged me to inform the various international committees of Europe, that she desired to see the benefits of neutrality extended to the navies as well as to the armies of all nations. I replied to the Empress that my mission appeared to me to be finished, and that the French Government was happily situated for undertaking an initiative of this nature. 'No,' said the Empress, 'it must be undertaken by you.' I therefore hasten to communicate this desire to the commission of delegates from the European societies for the succour of wounded soldiers, which was then assembled near the Exhibition at Paris. A second diplomatic congress was the result. It drew up, 20th October, 1868, some additional articles respecting the navy, and also made some slight modifications in the text of the convention itself.

At the commencement of the war between France and Prussia, I went to the Tuileries to beg the Empress Regent to give the greatest possible publicity to the principles of the convention, which, in spite of the repeated efforts both of myself and of the committee, were little known in France. After an exchange of correspondence, I submitted the following note to the consideration of the Empress: 'Does not her Majesty the Empress think it will be highly desirable to propose to Prussia, that a certain number of towns should be declared neutral, to which we might send the wounded?' The wounded would in this way be preserved from the chances of war, and the inhabitants of the towns who protect them would benefit by the safe conduct granted in similar cases by the diplomatic convention. I was convinced that the Prussian military authorities would on their side readily support their project. Moreover, the Germans, who were then marching on Paris, conducted the campaign in strict conformity with the stipulations of the Geneva Convention, which had been popular in Germany from 1866. On the 23rd of August, 1870, the Chamberlain of the French Empress wrote me the following note: 'Her Majesty requests me to inform you that the note you have sent will be communicated to the Council of Ministers.' After the catastrophe of the 4th of September, I renewed my efforts, and on the 11th of the same month, the new Minister of Foreign Affairs said to me: 'This very evening I will submit your note to the Council of Ministers.' The next day the text of the Geneva Convention appeared in the official journal. All the houses of Paris were immediately decorated with the white flag, which till then had been ignored in France, and the red cross was displayed on the arms, hats, and breasts of men, women, and children; also on the panels of carriages, even on the harness of the horses. What a profanation! The international flag had

thus become only a supposed means of protection against the Germans. It was too often raised to make believe there were ambulances, where in reality there were none.

However, all this is now passed for ever. "I will say nothing of the siege of Paris, nor of the Franco-Prussian war. These events are too recent to require mention. One thing remains well established by the universal testimony of witnesses of great authority of all nations, that the Convention of Geneva, as well as the international work of the voluntary hospital attendants, rendered immense services by diminishing to a very great extent, notwithstanding some failures arising from ignorance, the horrors of the Franco-Prussian war. The ignorance of the usages of war was so great in Paris that the French thought *la guerre à outrance* deprived the flag of truce of the protection admitted by all civilized nations. By this misunderstanding an interview, previously arranged at Versailles, by Colonel Loyd-Lindsay, between Prince von Pless, Knight of the Order of St. John of Jerusalem, representing the international societies of Germany, and Count de Flavigny, president of the French international society for the wounded, failed through the mismanagement of the Minister for Foreign Affairs. About the same time, I asked General Le Flo, Minister of War, to allow me, accompanied by some members of the diplomatic body, to visit, under any restriction he pleased, the German prisoners of war, who had unfortunately been put in the prison that had been occupied by the assassin Tropolmann. I received a formal, but very polite, refusal. This then is established, that it is especially owing to the diplomatic convention, that the wounded were generally well cared for during the last war by both belligerents, except in a few cases, which confirm the general rule. Public opinion in our age has immense force. But we do not yet fully know how the German prisoners were treated at Paris. It is a point of history which has yet to be cleared up.

Since the battle of Solferino, the fate of prisoners of war has constantly engaged much of my attention. In my first publications, and during the conferences held in 1867, I earnestly demanded that they should be kindly and uniformly treated, and placed under diplomatic protection. This idea has been approved on the Continent by committees for prisoners of war, particularly in Belgium. . . . . Without a diplomatic convention—without an international law, which uniformly fixes, in some way, the fate of prisoners of war, or which at least declares that they shall be treated with humanity—nothing can be guaranteed; all is left to the arbitrary will of men, and we shall have, unless we take care, deplorable scenes of inhumanity, which will occur under our own eyes at a time when every nation is boasting of its civil-

ization. Society in general reposes on its conventions, and there must be a restraint—a barrier—an embankment between nations as between men, which we call public opinion, respect of man for man, call it what you will, self-love or national vanity."

The convention which he proposed he said would form this barrier. It was therefore desirable to obtain the sympathy of the Governments of Europe for the realization of a special international treaty, which will uniformly fix the condition of prisoners of war in all civilized countries. But in order that each Government may be previously and properly informed of the object to be attained, it would be necessary to constitute in each country, in time of peace, a national committee which shall pursue, either patriotically or internationally, this work, and which shall act in harmony with the Government. The Committees of the Red Cross, he said, and many similar institutions, like the committees formed in many countries during the last war, would give their hearty support. A congress would be held in one of the capitals of Europe, probably at Brussels, in order to draw up the preliminary basis of the convention, and the various Governments will be respectfully requested to send delegates *ad audiendum et ad referendum*. When this basis is once drawn up, one of the neutral States of Europe, Belgium, probably will take the initiative in sending an invitation to all civilized Governments, and then the object will be attained by ordinary diplomatic agency.

We heartily recommend M. Dunant's propositions to the consideration of the public, and to the representatives of all European governments.

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## LEGAL GOSSIP.

THE results of the Geneva Arbitration are now known. For the shortcomings of a few men, notably of Mr. Laird, and, as the Attorney-General remarked at Plymouth, for the delays in the chambers of a law officer of the Crown, England has to pay a good round fine to the United States. The word everywhere publicly uttered is, "Let us cheerfully acquiesce." As we went into the arbitration, of course we must acquiesce. Of course, too, arbitration was infinitely better than war. But it is not a pleasant page in English history. Recklessness of the consequences to the nation in the pursuit of gain, delay

in forbidding the sailing of the *Alabama* till it was too late, uncertainty as to the way in which she should be treated when she visited our colonies and was again in our power, approving cheers in the House of Commons to the builder of the *Alabama*, intense soreness on the part of the Americans, and one concession after another in order to get the question to arbitration, ending with *ex post facto* legislation as its basis, constitute elements in a picture which is not attractive. Fortunately or unfortunately, the American obverse is not much more satisfactory. Their over sensitiveness, and the attempt by a trick unworthy of a pettifogging lawyer to insert huge claims in the reference which they had consented to withdraw, have made their share in the transaction appear even more undignified than our own. On the principle, however, that all is well that ends well, we may join in the general cry and cheerfully acquiesce. A great danger has been averted, and two nations, which with decent statesmanship ought never to have been divided, have had a great barrier between them removed.

The Foreign Enlistment Acts of the United States and of England were certainly not intended to increase the liabilities of those nations in respect to belligerents. On the contrary, the policy of these statutes was to prevent the national shipping from being abstracted for belligerent purposes by foreign nations, and so to be rendered unavailable for domestic security. Unless, then, the United States had a right independently of our municipal legislation, no statute of ours, not expressly referring to the point, could give them a right. Mr. Adams's authority, as cited by the Lord Chief Justice, was also an estoppel as regards the United States. But the basis we adopted for the arbitration really cut the ground from under our feet.

The Lord Chief Justice's views on the law of contraband do not appear to us to be sound in point of morals. He thinks that, unless the trade in contraband is allowed to be carried on as at present, a powerful nation could the more readily crush the weaker one. This argument assumes that the stronger nation would not buy any more guns or warlike stores, while the poor and weak nation could continue buying "to the bitter end." The fallacy is obvious. The fact is, of course, both nations would buy, and, consequently, their *relative* strength would exist exactly according to the old proportion. One scale is weightier than another. A pound weight thrown into each scale still leaves one side of the balance inclined as before. But the stronger nation would have two swords cast into its scale for every sword the weak nation could purchase. The time is certainly ripe for a

change in the law of contraband. It seems to be no more moral to sell large or small arms to a belligerent, than it is to supply duellists with pistols, or a drunken man with more intoxicating liquor.

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The *Saturday Review*, which has consistently attacked the Social Science Association, remarked some years ago that the salt of the Association was its Jurisprudence Department. Clearly this salt has not yet lost its savour. It is not too much to say that Mr. Vernon Harcourt's address last year at Leeds, and Sir John Coleridge's a fortnight ago at Plymouth, take rank among the best addresses ever delivered on Law Reform, and are quite the best which have been produced for the last few years. A comparison between them would be absurd, because they deal really with altogether different parts of the same subject. Each, however, in its way is masterly. The address itself has been very badly reported, but the summary, which we are able to lay before our readers in the present number, will present them with an accurate account of what the Attorney-General said.

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The *Pall Mall Gazette*, which, while it has lately attacked almost everything and everybody connected with the present Government, has always been an able and wise advocate of Law Reform, gives to Sir John Coleridge's proposals the weight of its cordial approval. The summary of these proposals which it gives affords a very good bird's-eye view of the substance of the address. It is as follows:—

- "1. All law is either substantive law or procedure.
- "2. As the law of procedure depends upon substantive law, the first step to be taken is the codification of the substantive law.
- "3. This might be effected simply enough if the country is in earnest about it, and is prepared to pay for it. This is the true and only sufficient way of fusing law and equity.
- "4. In the meantime, fuse law and equity by investing each set of courts with the jurisdiction of the other set.
- "5. Deal separately with the question of a Court of Appeal, by having a court of eight members, 'of which all existing law lords should be *ex officio* unpaid members,' to sit regularly if necessary in two divisions to do the work of the House of Lords, the Judicial Committee, and the Exchequer Chamber, and, possibly to dispose of the intermediate Chancery appeals as well.
- "6. Do not break up the existing Central Bench and Central Bar by establishing the system of local courts proposed by the Judicature Commission."

One of the great results of the cheap press of this country has been the creation of a periodical literature of no great pretensions, but exercising a vast and silent influence. We are so accustomed to think of the newspapers as all important, that we are apt to forget that there are tens of thousands, nay, hundreds of thousands, who never set eyes on the fashionable periodicals, who yet are constant and regular students of the cheap popular periodical literature of the day. These publications may, generally speaking, be divided into two distinct classes, that on the one hand the promoters whereof are merely actuated by an unprincipled trade spirit, and who pander to the lower instincts of natures which they have helped to deprave; and, on the other hand, that class of literature, the aim of whose promoters is decidedly not merely mercenary, but moral and educational. The first class depends for its success on coarse and sensational press matter, and equally objectionable illustrations. Either openly obscene, and barely, but at the same time ingeniously, escaping the clutches of the law; or lurkily depraved, or ridiculously sentimental and unreal, there is often enough in any one of the papers we now refer to to corrupt the youth of a generation, and to sap all manly and womanly virtues. The songs which go along with this class of literature are particularly hurtful, as immorality in that form is perhaps most infectious. One of the distinctive features of these publications is the gilding they put upon vice. "Tyburn Dick" is presented as a fascinating hero to the fancy of thoughtless boys of an enterprising nature; and the shocking illustrations of the *Police News* have a strange charm for a certain order of minds, as actual facts too plainly have shown. Amongst other cases, it so happened, a short time ago, that a gang of boy-burglars, sons of respectable parents, on apprehension, confessed that the daring deeds of some of these hero-robbers suggested to them the idea of going and doing likewise. Again, a soldier who shot his corporal in Raglan Barracks, Devonport, a short time since, on the smallest provocation, confessed that a similar murderous deed graphically portrayed in the *Police News*, which he had seen that morning, suggested to him the crime which he committed. These are but instances amongst a great many which might be gleaned from the calendar of Newgate and every police court in the kingdom. What is the remedy for these things? We answer, the remedy lies partly in restrictive measures, but chiefly in active counteracting measures. First, we can invoke the strong arm of the law, more certain in its striking force now than it was, but yet frequently difficult of application. There is no doubt that in principle the law visits open and unmistakable obscenity in the press with condign punishment; but

when you come to the application of the principle, it is surprising with what numberless shifts the practical consequences of the law are evaded. However, the criminals do not always escape. Under Lord Campbell's Act, which gives the magistrate power to grant a search warrant, and thus confront the offenders at the bar of justice with the evidence of their guilt, old offenders have been swooped down upon in Holywell Street and elsewhere, the publisher of the *Days' Doings* amongst the number. But the latter is just a case which will illustrate the difficulty of dealing with crafty offenders of this kind. He was fined provisionally fifty pounds, the same to be enforced on a repetition of the offence; and he was informed that if this should not suffice as a deterrent, he would be liable to imprisonment. The Society for the Suppression of Vice was at the same time requested by the magistrate to exercise a surveillance over the paper, and to bring any fresh offence before the notice of the court. The chief result has been that the *Days' Doings* was immediately discontinued, and another paper brought out in its stead, under the name of *Here and There*, thus rendering a fresh indictment necessary in case of another offence. This new paper, or, rather, old paper in a new name, is scarcely less objectionable than the *Days' Doings*. We have spoken of restrictive legal measures, but we think a great deal more may be done to hinder the spread of the noxious influence of the low-class publications, by means of active and positive measures for the circulation of a healthy and moral literature.

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A controversy is being carried on as to the expediency of giving a Stock Exchange committee the power to grant a settlement and quotation to a new company. But, there are no means of preventing the Stock Exchange committee from doing anything or laying down any rule it pleases, if it does not violate some law. Indeed, as in the case of Sir John Barnard's Act (now repealed, except that it has been renewed as to banking shares), the committee has frequently placed itself in opposition to an Act of Parliament, and has carried out its own views very effectively by means of the threat of expulsion. On the whole, the present functions of the Stock Exchange committee appear not to be unreasonable, although we admit that, as the members of the committee may have an interest in promoting or impeding the establishment or growth of a new company, their operations are not above suspicion. However, no proof is at present forthcoming of any recent abuse of their powers.

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The judges in the State of New York, and, we believe, in every State throughout the American Union, are elected for

short periods, say, a few years. The result is, that the judges are thought to devote themselves to the interests of the stronger political party, and to become warm partisans of certain suitors. They are also accused of opening the gaols and giving the prisoners their liberty upon shallow pretences on the eve of an election. The rowdies, when let out, know, of course, that the judge expects some voting, and perhaps a little intimidation in return. This was one of the numerous charges against Judge Barnard. It is remarkable, however, that no charge of bribery was proved against this judge. Fisk's counsel was charged with receiving unusually large fees, which he was said to have divided with Judge Barnard. On the impeachment, however, he was not accused of this, but of intimidating the judge, with whom, it appeared, he was not at all intimate. Now, a suitor who did not know Judge Barnard personally, might give a large fee to counsel, with the purpose that the counsel might confer with the judge, and give him, like the vouchee of old, a recompense. But Fisk knew Judge Barnard only too intimately, and, therefore, he would bribe the judge himself, rather than give to a third party so adhesive a commodity as money, for so precarious a purpose as a clandestine and confidential delivery of it to a third party. The Bar Association of New York has taken this question of the appointment of judges into their consideration, and will seek to have a Bill passed by the State Legislature, transferring the appointment of judges from the people to the executive, and making the tenure of the judicial office to endure either for life or for a long period. If the judges were appointed for life, it would not be so important that the executive should have the appointment of judges. For an official for life becomes, on his election, independent of the power that appointed him. However, the Bar Association are resolved to try every means to purify the administration of justice in New York. It was no ordinary scandal to see, last summer, the whole executive of the State undergoing trial for frauds of various kinds, while even the judges had to be impeached. One of the body, Mr. Cardozo, resigned, rather than plead to the impeachment. Another judge, Mr. McCunn, was found guilty, and died soon after; and Mr. Justice Barnard has also been found guilty, although we must say the delicts proved are not of the nature the public anticipated.

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As our relations, political, social, and commercial, with the United States will increase every day, the following explanation of American political nomenclature may not be without interest to our readers. "Republican" means a citizen of the great republic, who is a Radical, and would impose no property qualification on the voter. He is also a Protectionist, and



opposed to State rights. The old "Know-nothings" belong to the present Republican party. "Liberal Republican" means a Republican who is in favour of State rights, though not of the right of secession. He is also Protectionist and Radical, but is not so hostile to the foreign population as the Republican *pur et simple* usually is. Grant heads the Republicans; Greely leads the Liberal Republicans. These correspond very much to what in England have been known as Liberal Conservatives, except that the Liberal Republicans would impose no qualification on voters. The "Democrat" represents the interests of the foreign population. He is also, strange to say, Conservative, and would impose a property qualification on voters, although he is himself generally "an exile from Erin," or an equally poor refugee from Fatherland. Roman Catholics are generally Democrats. The category includes the advocates of State rights and of free trade. Democrats, too, are not so virulent towards England as are the out-and-out Republicans, of whom General Butler is a better type than Grant. The "Straight-out Democrat" bears the same relation to the Democrat, *pur et simple*, that the Know-nothing does to the Republican. The Know-nothing and Straight-out Democrat denote respectively extreme Republican and extreme Democratic views. Both are now fossils, and are merged in the Republican or the Democrat. The Straight-out Democrat is, or rather was, a pro-slavery man, and is sometimes termed a Bourbon, because, like the Bourbons, he learns and unlearns nothing by experience. Horace Greely was the head of the Protectionists. He now leads the Democrats, and has made a jettison of his protectionist views, so far as to promise that, if elected President, he will not use the vetoing powers to promote protectionist interests, in which, however, he still trusts. The judges of the Supreme Court of the United States are the authorities that decide on all conflict of claims between a State and the Federal Government, or between various States. These judges are appointed by the President, who also appoints and removes all civil servants. Every four years, therefore, there is a great clearing out in the customs, excise, and post-office; while there is also a corresponding crowding in of shoals of hungry expectants for the loaves and fishes of office. Civil service reform, however, has been promised both by General Grant and by Dr. Greely. The judges of the Supreme Court of the United States review, unlike our House of Lords, their own past decisions. Accordingly, the Legal Tender Act has been declared by this court to be constitutional, although the reverse was previously decided by the same court. One of the judges, who was of this opinion, died, and his successor did not hold the same views. As a rule, however, the decisions of

this court are very sound and uniform. Owing to the frequent conflict of State with State, and with the Federal Government, international or inter-state law has been very well developed in America. Of this the works of Story, Wheaton, and Kent, furnish sufficient evidence.

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The working of the ballot is found not to be inconsistent with the promotion of Conservative principles. As to secrecy, the ballot in America is like the veil of the sculptured vestal, which only adds to the beauty of the features beneath. Whether our ballot will be more effective in this respect remains to be seen. Mr. Holker, Q.C., the representative of Preston, is the first *new* member elected under the ballot. He was called to the Bar in 1854, and received a silk in 1868. It is fortunate for the profession that the ballot so far has not been unfavourable to us, and that it does not appear to be an institution that can work only for the millionaire or the landed aristocrat.

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The Annual Congress of the Social Science Association, at Plymouth, terminated on the 18th ult. The purport of the President's address was mainly on the tenure of land, and the law of primogeniture. The Attorney-General's address too, on Law Reform, is treated of in a separate article. The business of the Jurisprudence Department was not so attractive as at some previous meetings, notwithstanding many excellent papers were read and discussed. Some rather outside questions were considered of much importance. The meeting on the Colonial question was numerously attended, as was also that on International Arbitration. Dr. Wadilove read a paper on the Law of Evidence. The Attorney-General, in summing-up the discussion upon it, said, he apprehended that the real reason why the prisoners had not hitherto been subject to examination and cross-examination was that, in the opinion of those who had gone before us, such a proceeding would not tend to arrive at the real truth, and without expressing an opinion, he must point out that to alter that principle was as grave an alteration as the law would admit of, because he could not agree that witnesses could be treated as anything but a witness for all purposes. If a man was to be a competent witness, in his opinion he must be a compellable witness; he, at any rate, could never be a party to a half-hearted change of the law, which should allow a clever, unscrupulous, cool, and practised man to call himself as a witness and tell his story, while in another case a person would not be called whose examination would probably tend to the real investigation of the truth. Whether it was wise to make a change whereby the prisoner would not only be the subject

matter of the inquiry but himself a party to it and a witness in it, was not for him to say, but he was clearly of opinion that if it did take place, the wife ought to be placed in the same position with the husband. A paper on the Second Report of the Judicature Commission was read by Mr. Daniel, Q.C., in which he advocated unlimited jurisdiction of County Courts, and the establishment of tribunals of commerce; but in reference to which he said, the necessity for establishing such tribunals could be met and avoided by a thorough reorganization of our judicial system in the interests of all classes of the community, and the elements of such a reorganization were to be found in the reports of the Judicature Commissioners, and required only able and willing hands and minds to mould them into form. This done, it may be hoped that the art of advocacy will be less in danger of degenerating into a trade, and be raised to a dignity of a science.

Sir Robert Torrens, M.P., read an exhaustive paper on the Transfer of Land, which was followed by an interesting discussion. Mr. Joseph Brown, Q.C., contributed to the question of the liability of railway companies and other carriers to an unlimited extent for the acts of their servants; and Mr. Serjeant Cox, with his accustomed ability, spoke on the subject of the primary aim of punishment, to deter or to reform, in which he held that the object was to deter. The purpose of all criminal law was the prevention of crime. First, by way of warning to all its subjects, that if they offend they will have to suffer a certain amount of pain, and therefore to deter them from offending; secondly, by the pain he has endured to deter the offender himself from again offending; and thirdly, by example, to bring home to the minds of evil-disposed persons the fact that the law is not a mere name, but a stern reality.

Mr. Barwick Baker read a paper in favour of the commutative system of punishments; the Rev. Dr. Ace, one on the reform of the Ecclesiastical Courts; and Mr. De Tracey Gould and Mr. T. H. Murray Brown, one each on the treatment of prisoners before trial. The latter gave a stirring account of the police cells of the Metropolis. He says:—

“In London these are of two kinds. There are, firstly, the cells attached to every police station, in which prisoners are confined immediately on being taken into custody, and until they can be brought before a magistrate for examination. In these, therefore, persons are frequently, or most commonly, confined for a night. The second class are the cells attached to each police court. To these prisoners are usually brought in the morning, and remain there until four or five o'clock p.m., when they are transferred to the regular houses of detention, or (if summarily convicted) to the house of correction. In the

police-court cells, therefore, prisoners pass the entire day, but seldom if ever the night. Now, bearing in mind that the persons here confined are not only unconvicted, but untried, the first requisite for the police cells of either kind would seem to be complete separation between the prisoners. This, however, is not even attempted or professed. A number of prisoners sit together in a cell nearly dark, without any attempt being made (so far as I can learn) to check conversation. I lately visited one of the Metropolitan police courts, and was shown over the cells, which I was assured were if anything better than the average. There were some five cells in all, one of which appeared to be appropriated to women. All were of much the same character. They were larger and higher than ordinary prison cells, supplied with fixed wooden benches running round the walls, but with no other furniture, and were connected by a grated door with a passage, by which they were approached. They had no window or aperture of any sort, communicating directly with the open air, and were consequently nearly dark; so that until the eye became accustomed to the gloom, it was difficult to discern even large objects. The air was close and unwholesome, notwithstanding a ventilator in the ceiling, which, however, as I was informed, led only into an upper chamber. At the time of my visit there were not more than five men in one cell, but the officer stated that there were sometimes as many as ten. There was an officer in charge of the cells, but he seemed to sit principally in a room outside the passage into which the cells opened, where his presence could not possibly exercise any check upon the prisoners, except in the case of positively outrageous conduct. Indeed, there was no place provided for him to sit in the passage; nor was it considered in any way part of his duty to do so. As to separation between the prisoners, I was informed that no attempt was made to do anything in this direction, beyond separating the sexes, and if possible keeping the two classes of misdemeanants and felons apart from each other.

"On the same day I visited the cells at a neighbouring police station. These had been lately built; yet they differed in no important particular from the police-court cells already described. The system of confinement was also the same.

"This state of things prevails, as I am informed, throughout the police courts and police stations of the Metropolis. The evils of such a system are obvious, especially when it is remembered that the persons thus promiscuously confined are of all ages and conditions of life; that all of them are unconvicted and untried, and some, at least, entirely innocent. In the first place, the darkness and bad ventila-

tion of the cells are very objectionable. There can be no reason why police cells should not be made, like prison cells, with windows communicating with the open air, into a yard or otherwise. But this objection sinks into insignificance when compared with the evil of the unrestrained intercourse permitted between the prisoners. A young boy, as yet unaccustomed to guilt, is thrust into a dark cell, filled with criminals of the very worst description, and is left there all night, with no effective supervision whatever. I will not stay to dwell on the hardship which might be inflicted upon a man in the position of a gentleman who might be similarly confined. Again, a girl in service accused by her mistress of peculation, and perhaps entirely innocent, may be shut up all night with a parcel of prostitutes in a state of drunkenness, shouting forth blasphemies, and giving way to conduct of the most indecent character. And yet undisguised foul language and indecent conduct are a far less evil than may be produced by the quiet but subtle conversation of some agent of Satan, whether male or female, who thus becomes for hours together the companion of a comparatively innocent person. It is true that the time thus occupied seldom exceeds twelve hours, but enough poison may be administered in twelve hours to last a lifetime. There is another evil attending the present system which I have not mentioned. The women's cells immediately adjoin those of the men, and open side by side into the same passage. The consequence is that the women, although unseen, are within full hearing of the obscene and foul language, which is not unfrequently levelled at them by some drunken and brutal blackguard in the next cell."

In continuation, Mr. Brown says that the magistrates are not responsible for this state of things, but that "the Home Office alone has power to correct the evil. The obvious and most complete improvement would be to confine each prisoner in a separate cell, properly constructed, and to provide such a number of separate cells as should be sufficient for this purpose, except under circumstances of extraordinary pressure. This course would no doubt be expensive. Another plan, which would at least be a great improvement upon the present system, would be to resort to the simple course of placing the prisoners on separate seats round a room, under the charge of an officer, whose duty should be never to leave the place, and to suppress the first attempt at conversation. If, in addition to this, the prisoners were divided from each other by partitions of wood or iron, while separate stone cells were provided for the drunken and violent, the system would at least be tolerable; and this might be done at small expense. Any existing room in the station, or in the buildings attached to

the court, might be fitted up with open wooden partitions like a series of sentry-boxes, and placed under the charge of an officer, while the existing cells, bad as they are, would, perhaps, be good enough for those who are actually drunk or violently insubordinate. It appears that the attention of prison reformers in America has already been directed to the condition of the smaller houses of detention in that country, corresponding to our police cells."

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## IRELAND.

The Right Hon. John Richards, who died at an advanced age last month, had led an active life, in the course of which, attaining to prominent positions, he had done the State some service. While at the Bar, to which he was called so long since as the year 1811, his practice had been to a great extent in equity. The knowledge so acquired proved of service to him when he was promoted to the Bench in the Court of Exchequer, which then, and for some years afterwards, had a co-ordinate jurisdiction in equity. The proceedings on the equity side of the Exchequer were not unlike those in Chancery, and the decrees were worked out under the superintendence of an officer now abolished, who was called the Remembrancer. When Baron Richards was about sixty years of age, the most active portion of his career began. In 1849 was passed the Incumbered Estates Act, which enabled a court of three commissioners to sell all the mortgaged estates in Ireland, ascertaining the several claims, and satisfying them so far as the purchase-money extended. The operations of this Court were expected to be large, and no inconsiderable difficulties in working out the Act were anticipated. Under these circumstances the choice of commissioners became a question of great moment, and it was deemed essential to place a lawyer of established fame and wide experience at the head of that which was destined to be for some years, by many degrees, the most important amongst courts of justice in Ireland. Baron Richards was selected for this duty, on the understanding that he was to retain his seat in the Exchequer, while devoting a large portion of his time to the business of the new commission. His comparative unfamiliarity with the mysteries of real property law was of small moment, as there were associated with him two efficient colleagues, one of whom was the late C. J. Hargreave, Q.C., a London conveyancing counsel of eminence, of whom a biographical notice appeared in this *Magazine*\* shortly after his premature decease in 1866.

\* No. XLII. old series.

The sales of property in the Court soon reached to between two and three millions sterling per annum, and it may readily be imagined that the selling and conveying all these properties to the new owners, and the ascertainment and adjustment of the numerous claims, often conflicting, on so large a fund, involved labour of the most difficult and responsible character that could possibly exist. After presiding in this Court, with a dignity and firmness which in no small degree contributed to its successful working, Baron Richards resigned the post of Chief Commissioner in 1857, soon after which occurrence the Court was made perpetual, as the Landed Estates Court, by Act of Parliament. Detraction has not been wanting; but those who are best qualified to pronounce an opinion on Irish questions do not fail to connect the wonderful increase in the material wealth and prosperity of the country, with the operations of the Incumbered Estates Court between the years 1850 and 1858. In those years, overburdened as it was with business, the Court was both economical and expeditious; and in both these points its later history offers a remarkable contrast, which demands and would well repay investigation.

Baron Richards lived to see peerages and baronetcies conferred on many public servants, whose labours had been of far smaller public importance than his own. He had, however, the satisfaction of seeing a son and a son-in-law promoted to chairmanships of counties. His later years were spent in retirement, and he died in August, at the age of 82.

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The Right Hon. Henry G. Hughes, whose recent death created a vacancy in the Irish Court of Exchequer, was, as it happens, the actual successor in that Court to Baron Richards. Baron Hughes enjoyed few early advantages; but he had attained before reaching the prime of life to very large practice in the Rolls Court. He was in Parliament for a short time, and after serving as Solicitor-General for Ireland twice under Liberal administrations, he was in due course promoted to the Bench. No advocate ever transacted his daily business more efficiently and more smoothly than Mr. Hughes when leading in the Rolls Court. The Master of the Rolls at that time (Right Hon. T. B. C. Smith) was a severe critic, not to say a legal martinet, and also a staunch Conservative; but Mr. Hughes's bland and persuasive, though perfectly straightforward, method of opening the case rarely failed to produce a marked effect on the Court. After realizing a considerable fortune in the Rolls Court, Mr. Hughes became a Baron of the Exchequer, and in that capacity he, although not a brilliant judge, gained a high reputation for courtesy and efficiency. He could hardly have attained the age of sixty when he was attacked by the fatal illness which ended his life in July last.

We regret to record the death of Thomas Kennedy Lowry, Esq., Q.C., which occurred recently at his residence, Ballytrim, in the county of Down. The deceased gentleman was called to the Bar in Michaelmas Term, 1835, and had a successful career as a junior on the North-East Circuit, which, at the time he joined it, boasted of such men as Gilmore, Holmes, Tomb, Whiteside, Napier, Joy, and O'Hagan. He got quickly into considerable practice, principally in the Court of Exchequer, which at that time was a court of equity as well as a court of law. Few men knew better the actual practice of the Equity Exchequer, which was a *rudis indigestaque moles*, till he undertook the labour of collecting the rules of that court, and publishing them in an available form. He also, in conjunction with the late Mr. Ross Moore, M.P. for the city of Armagh, published the rules of the three law courts, with notes, a compilation which, even at this day, notwithstanding the change of practice, is referred to as casting light on doubtful or questioned authorities. His industry was great, and though he never attained a leading position at the Bar, his practice was at all times considerable. Mr. Lowry was called to the Inner Bar on the 4th of July, 1860, and until the abandonment of the more active exercise of the profession, he still continued to have a large share of practice. Consistent as a Liberal throughout life, he justly thought himself entitled to the professional rewards of steadiness and energy, but his party did not adopt him, and he was left in the shade. He got nothing from them but a Crown Prosecutorship, till on the return of the Whigs to power he was offered and accepted a District Judgeship in Jamaica, which resulted in his going to that colony; but being disappointed both as to the nature of the duties required, and the position of the office, he resigned it and returned to England with embittered feelings. Lord Dufferin, who had been his neighbour and friend, had succeeded in the Chancellorship of the Duchy of Lancaster in the interval, and his lordship offered him one of the prothonotaryships of the Manchester District of the Court of Common Pleas, which he accepted, and in that office his health gave way. Mr. Lowry was the editor of a life of the celebrated Hamilton Rowan, in conjunction with the late Dr. Drummond, and he edited the Hamilton MSS., a voluminous collection of papers on the rise and fortunes of the Clandeboy family. This originally appeared in the *Ulster Archaeological Journal*, and was ultimately produced in a neat quarto volume. His knowledge of these subjects was copious, and his researches into them were pushed with energy. In the early stages of the Municipal Commission Inquiry, Mr. Lowry was named on the Commission, and acted as commissioner with the late Mr.



Isaac O'Callaghan. In private life he was much esteemed, and his kindly nature when left to its own impulses secured for him many friends. He was generous and hospitable to a fault, and no one applied to him for aid, professional or otherwise, but received it readily and without reward. His many acts of kindness to individuals will be remembered when his faults—and who is without them?—are forgotten.—*Irish Law Times*.

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The vacancy caused by the death of Baron Hughes is not filled up, nor is there any authentic information as to whether the Attorney-General, Mr. Dowse, M.P. for Derry, will avail himself of the opening. It is hardly expected that this and the consequent arrangements will be completed before the opening of Michaelmas Term.

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The new Court established under the Irish Church Act has found Dr. Maturin guilty of some of the charges brought against him for High Church practices. The Act referred to, it appears, is more favourable than the previous law in respect to granting compensation to clergymen who express their dissent from alterations in the service of the Church of England.

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#### SCOTLAND.

A CASE of importance as connected with criminal jurisdiction, has recently been decided in the High Court of Justiciary. William Edward Bradbury was charged with twelve separate acts of "falsehood, fraud, and wilful imposition." The prisoner lived in England, but within the last two years he had swindled a number of persons in Scotland by written communications. His mode of operation was to write to persons asking the lowest price of certain articles which had been advertised for sale, and by plausible communications to purchase and secure transmission of the goods before a remittance was made. In all the cases the seller never received payment of the article, and as the prisoner traded under different names, he could never be reached. Mr. M'Kechie, who defended the prisoner, contended that the case was beyond the jurisdiction of the court, in respect that he resided in England, and that the offence was committed in England. There was nothing charged as having been committed by the prisoner in Scotland, and the question therefore came to be whether the crime was committed in England. If the crime had been committed in England, the High Court of Justiciary of Scotland had no jurisdiction. A peculiarity of criminal jurisdiction was that no court in any country had jurisdiction beyond its own territory, except in

the single case of piracy. He took it, therefore, to be clear in the present case that unless the Crown could satisfy the Bench that the crime had been committed within Scotland, the court had no jurisdiction. The prisoner was only said to have written letters from England to persons in Scotland in order to obtain goods under false pretences, and to have received goods in England from certain quarters in Scotland. In these circumstances the acts had been committed in England, and the prisoner ought to answer the charges there. The answer to the question why the prisoner had not been tried in England was simply that the charges brought against him in Scotland were not a crime in England. They would not be described in England as cases of fraud, but of unfair dealing. He contended, therefore, that the indictment was irrelevant. On the other hand, it was submitted that the most essential part of the crime was committed in Scotland, and therefore came within the jurisdiction of the Scotch courts. As soon as the owner had parted with the goods by placing them in the hands of the railway company for transmission to London, he held the crime had been completed. That being the case, the crime was within the jurisdiction of the Scotch courts, and the prisoner was amenable to prosecution in Scotland. The Solicitor-General and Mr. Campbell Smith were afterwards heard on both points, and Lord Neaves held that the court had jurisdiction, as all the injuries which had been caused by the fraudulent transactions had been sustained by Scotch subjects. The injury done was the essence of the crime; and though the person who committed it was domiciled in England, and had planned and carried out his schemes there, these schemes had exploded in Scotland. The damage, therefore, had happened to Scotland, and he considered that there was sufficient grounds to constitute the *locus delicti*, and the crime was cognizable by the Scotch laws. The Lord Justice-Clerk concurred. He considered that the placing of the goods in the hands of the railway company in Scotland completed the offence. He was likewise of opinion that a conspiracy of this kind, formed in one country and carried out in another, was a crime in both countries. The prisoner was then tried, convicted, and sentenced to five years' penal servitude.

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## BOOK NOTICES.

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

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The Indirect Claims of the United States under the Treaty of Washington. By W. Beach Lawrence, LL.D. New York. 1872.

ANY publication from the pen of a jurist so distinguished as Dr. W. B. Lawrence cannot fail to be of interest to the student of public law; and the letters which he has prepared on the Treaty of Washington are valuable as tracing to their origin, and giving a useful summary of the chief points in dispute. Our limited space will not allow of our doing more on this occasion than to notice in outline the more prominent questions of which he treats.

In the first place, it is satisfactory to note the general tone of fairness, and evident desire for impartiality, with which this accomplished writer examines the English position in our remarkable controversy with the United States. It augurs well for the future equitable adjustment of international differences that there should be men who endeavour to subordinate their feelings of nationality to the higher aim of maintaining the integrity of the Law of Nations, as at all events a rule in the intercourse of independent sovereignties in time of peace, and, it is to be hoped, of no less influence when grave complications pointing to a state of war arise. In his first letter, accordingly, Dr. Lawrence, in alluding to the position assumed by England during the civil war in America, observes that the recognition by Great Britain of a blockade as an incident of a state of war, *de facto*, was not a measure of an unfriendly character, and even in some of its consequences; as, for instance, exempting the Federal Government from any responsibility for hostile acts of Confederate cruisers towards British ships—advantageous to the United States. And though Dr. Lawrence disclaims being the “apologist of Great Britain,” yet it is only with justice that he observes that “had England wished to avail herself to our detriment of the international difficulties in which we were involved, she had many opportunities of doing so without exposing herself to any claims for vindictive damages.”

This is an example of the general spirit in which these essays, which necessarily only deal with points on the surface, are written. They are rather a series of memoranda, materials on which to found a larger work, than a regular treatise on the questions involved. Nor will any formal statement be found of the author's own view on controverted matters of international law. But in the same spirit in which he acknowledges the practical obligation imposed on

England to recognise the Confederacy as a belligerent State, does he distinctly and in terms express, in his third letter, his justification at the withdrawal of all pretensions to indemnity growing out of such recognition of belligerency. He repudiates the idea, falsely it would seem ascribed to him, of any responsibility as advocating the indirect claims; objects to those "criminations for past events," as he terms them, which he holds to be opposed to the spirit of the Treaty of Washington; and views the claim for indirect damages as equally opposed to the construction of the terms of the treaty itself, as to his own views of public law. Indeed, as he justly observes (Letter III. p. 41), it is a received principle of the jurisprudence common to England and the United States, that damages must always be "the natural and proximate consequence of the act complained of." Had the matter been one of ordinary litigation as between individuals, the idea of consequential damages would never have suggested itself as an incident to the settlement of the dispute.

In his brief notice of the celebrated rules which were the basis of the adjudication under the Treaty of Washington, Dr. Lawrence, while giving no direct opinion as to how far these rules will influence, or the place which they will take as accepted propositions of international law, yet observes significantly that what ought to commend this portion of the treaty to an American, is the fact that the rules are essentially the same as were adopted by the Government of the United States during the presidency of Washington, and when Jefferson was Secretary of State. On this we may remark, that should this view of the historical aspect of the question prove, on subsequent examination, to be the true one, it will show, in the first place, the extent to which English jurists and statesmen were at fault in their conceptions of the obligations attaching to a true neutrality; and secondly, it will go far to secure for the rules a wider reception by other nations as an essential part of the Law Maritime to a far greater degree than if they had been merely an expedient, adopted *ad hoc*, so to speak, for the purpose only of solving one great difficulty which separated two leading Powers, between whom it was at the same time felt to be almost an impossibility that actual hostilities should arise.

And so of the principle of arbitration generally as a method of adjusting difficulties between nations. We must not too hastily assume from its recent success that it will take its place as a recognised international institution. In order that this should be so, it is at least necessary that the composition of the Court should be of a more distinctly judicial character than that which marked the tribunal at Geneva. The arbiters, as Dr. Lawrence points out (introduction, p. 11), should not be, as in two instances they were, the advocates of their respective countries; but should, equally with those members of the Court who are appointed by foreign Powers, occupy a position as judges of absolute impartiality and independence.

With this brief notice we must take leave of these letters, which will be read with great interest and advantage. They form a useful contribution at this time to the literature of a great question, which occupies a foremost place in men's thoughts, and they will be found

to suggest many points to which the attention of the student of international law may with profit be directed.

**The Licensing Acts of 1828, 1869, and 1872 ; containing the Law of the Sale of Liquors by Retail, and the Management of Licensed House. With Notes to the Acts, a Summary of the Law, and an Appendix of Forms. By J. M. Lely, and W. D. I. Foulkes, Barristers-at-Law. London : H. Sweet, 3, Chancery Lane ; Stevens & Sons, 119, Chancery Lane. 1872.**

THE present volume is one of those classes of books which generally follow immediately after the passing of a Consolidation Act or some comprehensive measure characterized by a radical change in the law. Substantially speaking, the amendments in this particular case are not very sweeping, and the references necessary to make a work of this kind complete in itself were as easily accessible before the passing of the Act as after. If the "authorities," therefore, had not been properly worked up, there would have been no excuse for the authors. On the other hand, they appear to have taken considerable pains in bringing together all the operative law on the subject. The reader is introduced to the Acts by a history and summary of the law, in which an outline of the principal heads is given. The Licensing Acts are given in full, and the comments on the law are freely given after each section. The arrangement in this respect is very good ; and a copious index renders the information on any given subject easily attainable. We have no hesitation in predicting that the work will be a valuable assistance to the legal practitioner in London and the large provincial towns, for whom the work appears to have been exclusively written, and not from the innkeeper's point of view, as "Tidwell's Legal Guide."

**The Indian Evidence Act (I. of 1872), the Oaths Act (VI. of 1872), and the Code of Criminal Procedure (X. of 1872), so far as it relates to the Law of Evidence, annotated, and showing the alterations in the Law. By L. A. Goodeve. Calcutta: Thacker, Spink & Co. 1872.**

THIS is a supplement to the new edition of "Goodeve on Evidence," which was favourably noticed in these columns some short time since. Its character and contents are sufficiently indicated above. All that we need say, that those who possess the book must invest in the supplement, and then they will have a complete treatise on the Indian Law of Evidence as in force at present.

**A Summary of the Principles of a Comprehensive Measure for the Improvement of the Sanitary Laws. By Henry W. Rumsey, M.D., F.R.C.S., late Crown Member of the General Medical Council. London: William Ridgway, Piccadilly. 1872.**

DR. RUMSEY, who strongly opposed the Public Health Bill of last Session, which eventually passed into law, has given us his personal reasons why he did so, in a small pamphlet under the above title. Conceding certain primary and underlying principles not the least

important of which is *mutual responsibility*, Dr. Rumsey says that :—

“Primitive as these maxims may be, we must come back to them even under the most elaborate system of polity, or society will become an effete, dependent, over-governed and corrupt mass of human life. What we call *Local Self-Government* also must be founded on these maxims, or else it will deteriorate, as it has already deteriorated in most places.”

He then proceeds to discuss the general question. Property should bear the burden of sanitary improvements, and occupiers should, under a penalty, observe all sanitary regulations; local effort should be encouraged, and the best men should be chosen for the task of administration. On the subject of areas for common objects and for statistical purposes, he differs from the Act, and recommends the registration of sickness, and the appointment of chief medical officers, prohibited from private practice; and finally urges the consolidation and simplification of the statutes, “so that less trouble may be given to the lawyers in interpreting, and to the people in understanding the sanitary laws.”

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### LAW LECTURES.

The following days have been fixed by the Council of Legal Education for the delivery of the public lectures of the Readers of the Inns of Court during the ensuing Michaelmas Educational Term:—The reader on Jurisprudence, Civil and International Law, Joseph Sharpe, Esq., LL.D., at the Middle Temple Hall, Fridays, at 2 p.m., first lecture November 8; the reader on Hindu, Mahomedan Law, and the Laws of India, Standish Grove Grady, Esq., at the Middle Temple Hall, Saturdays, at 10.45 a.m., first lecture Nov. 9; the reader on the Common Law, Herbert Broom, Esq., LL.D., at the Inner Temple Hall, Mondays (elementary lecture at 2 p.m., advanced lecture at 3 p.m.), first lecture November 11; the reader on the Law of Real Property, &c., Frederick Prideaux, Esq., at Gray's Inn Hall, Tuesdays (elementary lecture at 2 p.m., advanced lecture at 3 p.m.), first lecture November 12; the reader on Constitutional Law and Legal History, Thomas Collett Sandars, Esq., at Lincoln's Inn Hall, Wednesday, at 2 p.m., first lecture November 13; the reader in Equity, Wm. Lloyd Birkbeck, Esq., at Lincoln's Inn Hall, Thursdays (elementary lecture at 2 p.m., advanced lecture at 3 p.m.), first lecture November 14.

## APPOINTMENTS.

Mr. Henry W. Cole, Q.C., has been appointed Judge of the County Courts of the Warwickshire District Circuit, No. 21; Mr. W. Charles Trevor has been appointed Deputy Clerk of the Peace for the North Riding of Yorkshire; Mr. E. M. Wright, Registrar of the Bacup County Court; Mr. F. J. Malim, Solicitor, Coroner for the Western Division of Sussex; Mr. Edward Coxwell, Clerk of the Peace for the Borough of Southampton; Mr. Joseph Button, Clerk to the Justices of the Sessional Division of Newmarket.

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## OBITUARY.

*August.*

- 10th. TREVOR, T. Tudor, Esq., Solicitor, aged 56.  
23rd. BLENKINSOP, James, Esq., Solicitor, aged 53.  
26th. HANMER, William, Esq., F.S.A., Barrister-at-Law, aged 79.  
27th. TOOGOOD, Henry, Esq., Solicitor, aged 55.  
28th. TAVERNER, Lewin, Esq., Barrister-at-Law, aged 69.  
30th. DAY, George, Esq., Solicitor, aged 62.

*September.*

- 2nd. WELFORD, R. Griffiths, Esq., County Court Judge, aged 67.  
3rd. KELSALL, T. Forbes, Esq., Solicitor, aged 72.  
4th. HODGSON, James, Esq., Solicitor, aged 76.  
4th. FIDDEY, Charles, Esq., Barrister-at-Law, aged 69.  
8th. GRIGOR, Elgin W., Esq., Solicitor, aged 68.  
9th. BRUNSKILL, J., Esq., Solicitor.  
11th. WILLIAMS, R. Edward, Esq., Solicitor, aged 39.  
11th. LEVINGE-SWIFT, Richard, Esq., Barrister-at-Law.  
14th. JONES, Henry, Esq., Solicitor.  
17th. DIBB, J. Edward, Esq., Barrister-at-Law.  
20th. BUCKLAND, Charles E., Esq., Solicitor, aged 77.  
21st. BERNARD, C. Colston, Esq., Barrister-at-law, aged 74.

THE  
LAW MAGAZINE AND REVIEW.

No. X.—NOVEMBER, 1872.

I.—THE INDIAN CRIMINAL LAW. By JOHN CUTLER, Professor of Jurisprudence at King's College, London.

**A**LTHOUGH it is not true to say that the whole of the Indian criminal law and criminal procedure may be found within the four corners of the Indian Code of Criminal Procedure 1872, and the Indian Penal Code, with its short Amendment Act, still it is correct to say that the bulk of such law and procedure is therein contained.

These codes, with copious notes, and a couple of capital indices, are to be found in a very useful work which we noticed briefly in a previous number, Currie's "Indian Criminal Codes." \* To this work must be referred those who desire more information on the subject than they can glean from this article.

This new Code of Criminal Procedure is an Act of the present legislative year, but does not come into operation until the 1st of January next. It will then supersede Act XXV. of 1861, which contains the present criminal procedure, and which may be spoken of as the old code. The new code does not work a revolution in Indian criminal procedure; on the contrary, it makes but few changes therein. It is in fact the old code rearranged, with some few additions and

\* Fourth Edition, published by John Flack & Co., 3, Warwick Court, Holborn.



alterations. The criminal courts remain the same; the High Court, the Court of Session, and the courts of the magistrates of the first, second, and third classes. But an innovation is made by giving the local governments power to order the magistrates to sit in Benches, whereas at present a magistrate always sits alone. The procedure remains substantially the same, except that a system of summary procedure is introduced for minor cases. As at present, juries are only to be employed in Courts of Session, and then only when the local government orders it, or the accused, being a European (but not a British subject) or an American, demands it. The number of the jury may now be three, as well as five, seven, or nine, as the local government may direct. The verdict of the jury is the verdict of the majority; but if the court disagrees with the verdict, power is given to it by the new code to submit the case to the High Court. Another new provision, and one equally foreign to the principles of English criminal law, is allowing an appeal against an acquittal; but this is only feasible by the public prosecutor at the direction of the local government. From convictions there is, under the new code as under the old, a regular system of appeals, viz., from magistrates of the second or third class to the magistrates of the district; from magistrates of the first class to the Court of Session; and from the Court of Session to the High Court; with these conditions, that when the trial is by jury there is no appeal on matters of fact; and when a magistrate of the first class passes a sentence not exceeding one month's imprisonment or fifty rupees fine, or of whipping only, there is no appeal. One convenient feature of the new code is this, that if a question arises whether a magistrate has power conferred upon him by the code to do any particular thing, it can at once be settled by reference to sections 20, 21, 22, and 24, which contain a catalogue of the powers conferred upon magistrates by the code, with a reference to the section by which they are conferred. The other branch of the Indian criminal law is the Indian Penal Code. This code was drawn up by four commissioners, with Lord Macaulay at their head, who were appointed for the purpose in 1835, and completed their labours in 1837. Although those commissioners reported strongly against the then state of the criminal law in India, and in favour of an immediate alteration, it was not until 1860 that the Penal Code passed into law, and it then did so with considerable alterations, although the frame and the most important parts of the Penal Code of 1860 are identical with those of the Penal Code drawn up by the law commissioners. The state of the criminal law in India anterior to the Penal Code was eminently unsatisfactory. There was no uniform system for the whole of India. But the English criminal

law prevailed within the local limits of the Presidency towns, while in the Mofussil each Presidency had its own Regulations, or local Acts, for the punishment of crime. These Regulations were in Bengal and Madras founded to a great extent upon the Mohammedan criminal law, which had superseded the Hindoo criminal law in the territories governed by the East India Company. In Bombay nearly the whole criminal law was contained in one Regulation (XIV. of 1827), which partook therefore of the nature of a code, but was open to such grave objections, that it was disregarded *in toto* by the framers of the Penal Code. There being thus three systems of criminal law in force in the Mofussil was productive of some curious anomalies. In Bengal, a forger was liable to double the punishment of a perjurer, while in Bombay a perjurer was liable to twice as much punishment as a forger. This being so, it is not surprising that the desirability of one uniform system of criminal law for all India was felt. What is surprising is, that although the draft of the Penal Code was in the hands of the Indian Legislative Council in 1837, it was twenty-three years before it became law.

On reading the Indian Penal Code for the first time, the sweeping character of its provisions at once attracts attention. This is however prevented from working any practical injustice or inconvenience by the operation of the following section (95):—"Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." This section prevents it from being, as it otherwise would be, theft, when one man dips his pen into another man's ink without his consent, and from being a user of criminal force, when one man presses against another in getting into a public conveyance. Another salient feature of the Penal Code is the definitions. The principle adopted by the framers of the code is to define something by one section, and then by a subsequent section to render it an offence by making it punishable. Some of these definitions are extremely elaborate. Thus, "force" is defined as follows:—"A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion or change of motion, or cessation of motion, as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situate that such contact affects that other's sense of feeling: provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion, in one of the three ways hereinafter described,

First. By his own bodily power.

Secondly. By disposing any substance in such a manner that the motion, or change, or cessation of motion, takes place without any further effort on his part, or on the part of any other person.

Thirdly. By inducing any animal to move, to change its motion or to cease its motion."

Then comes this definition of "criminal force." "Whoever intentionally uses force to any person without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause, injury, fear, or annoyances to the person to whom the force is used," is said to "use criminal force" to that other. A subsequent section erects the user of criminal force into an offence.

Although the English criminal law forms the basis of the Indian Penal Code, there are a great many differences between the two. Thus, in the Penal Code there is no division of crimes into felonies and misdemeanours. The term accessory is not found in the code; nor is conspiracy an offence under that name; but knowingly harbouring or screening an offender is an offence, and abetting an offence is also an offence, whether that abetment is by instigation, by aid, or by conspiracy. Again, the term, "manslaughter" does not appear in the code, yet in lieu thereof we have "culpable homicide," which may or may not amount to murder. Here it may be remarked, that care has been taken to frame the sections relating to culpable homicide so as to exclude anything like the unjustifiable rule of the English law, that the accidental causing of death in the course of committing, or attempting to commit, a felony is murder. In this case the penal code is less stringent than the English law. In most cases, however, it is more stringent. A forcible example of this is afforded in the Indian offence of Cheating, which is thus defined: "Whoever by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do, or omit to do, anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to cheat. *Explanation.*—A dishonest concealment of facts is a deception within the meaning of this section." This, it may be observed, renders criminal many transactions which in England are treated simply as breaches of contract, and redressible only by civil proceedings. One more point of difference may be noted. In England, only written or printed defamatory matter can be the subject of criminal proceedings, whereas under

the Penal Code the crime of "defamation" includes oral as well as printed or written matter. For ten years the Penal Code continued unaltered; but in 1870 was passed an Amendment Act, which, in addition to altering some of the sections which practice had shown to be defective, created three or four new offences. Of these the most important are those which were deemed necessary owing to the increase of treasonable conspiracies, and of attempts to excite disaffection to the English Government. Accordingly, the Amendment Act made it an offence to conspire to wage war against the Queen, or to deprive the Queen of the sovereignty of British India, or to overawe by criminal force the Government of India, or any local government; and also to excite, or attempt to excite in any way, feelings of disaffection to the British Indian Government, with the proviso, that making comments on Government measures calculated to excite disapprobation, is not an offence, provided such disapprobation is compatible with a disposition to obey the Government, and to support it against unlawful attempts to subvert or resist it. The proviso is a wonderful effort of legislative wisdom, leaving, as it does, to the court the almost impossible task of drawing the line between that disapprobation which is legal and that which is not.

## II.--THE METAPHYSICAL AND POSITIVE METHODS IN JURISPRUDENCE.\*

THE subject to which your attention is invited possesses an interest for the student of literature or science as well as of law. I propose to examine whether the philosophy of law has been affected by the great intellectual revolution of the sixteenth century, of which Lord Bacon may be taken as the exponent. Great as is the contrast between the rich harvest of truth gathered during the past two hundred years, and all that was done during the preceding ten centuries, it is not more striking than the wide interval that separates the thought of the middle ages from the thought of the present day. The revolution in astronomy, led by Copernicus, is a great landmark in the history of science; it parts off, on the one side,

\* Being the Introductory Lecture to the Faculty of Arts and Laws University College, London. By Professor W. A. HUNTER. October 2, 1872.

the men who took this little globe to be the centre of the universe, and who estimated everything with reference to that centre, from those who do not look even upon the sun as a fixed point in the universal movement; but this vast difference in the standpoint of the ancients and the moderns is only one example of the revolution that has affected the spirit of speculation in every department of thought. Has this remarkable change penetrated the domain of law? Have the spirit and the philosophy of legislation been charged with the new life? Has jurisprudence thrown off its garment of metaphysical cobwebs, and clothed itself with the sober garb of true science?

There is an accidental but singular propriety in the development of this theme within the walls of University College. The great representative of the modern spirit, the man who, to political and legal science, was all, and more than all, that Lord Bacon was to physical science, the man "who found law a jargon, and left it a science," was one whose earliest friends and disciples were among the founders of this institution. All that was mortal of the greatest jurist of this century, Jeremy Bentham, is now enshrined within these walls. If Bentham ought to be taken as the apostle of legal reform, the Roman jurists afford an equally happy instance of the old jurisprudence—the system that Bentham set himself with heart and soul to destroy. We may describe the method of the Roman jurists as metaphysical, Bentham's as positive or scientific. Jurisprudence, therefore, like the rest of the sciences, has undergone an intellectual transmutation; it dwelt for ages in the cloud-land of metaphysics; it has now been brought to the earth and planted on a solid foundation by Jeremy Bentham.

The characteristic of the metaphysical method is that it proceeds in the explanation of nature by assigning as causes to events, not the physical antecedents of those events, but some abstraction. One of the favourite abstractions employed for a great variety of purposes was nature. Why does water rise in a pump when a vacuum is made? Because, said the metaphysical method, nature abhors a vacuum. This explanation, although really no explanation at all, but a disguised re-statement of the very fact to be explained, held its ground until Torricelli made his famous experiments. It was then found, by actual trial, that in a tube of water nature abhorred a vacuum up to about thirty-two feet, but no farther. The imaginary cause, the abhorrence of nature for a vacuum, was thus found no longer to answer; and the real cause, a physical fact, the weight of the atmosphere, took its place. The metaphysical gave way to the scientific explanation.

Although the abstraction "nature" was thus given up in the explanation of pumps, it has with many held its ground to

this day in the explanation of law. The Roman juriconsults borrowed the theory of a law of nature from the Greeks, through the Stoics, and from them it has descended as a heritage of modern jurists. This law of nature was made to serve two purposes: to explain historically how law originated, and to be a standard according to which the laws of any particular nation should be improved and corrected. The defects of law were explained as arising from a failure to copy nature. Now, if we ask what this law of nature is, we can find no better answer than before. It is an empty name. Nothing can be taken out of it, but what is first put into it. It may perhaps echo the voices addressed to it, but none the less is it a dumb oracle. How then, the question may fairly be asked, should an abstraction so barren as the law of nature not merely have retained its sway for ages, but have given birth to numerous and valuable principles of law? Was it not the law of nature that Grotius invoked, when, after the close of the desolating thirty years' war, he called upon the nations of Europe to observe among themselves those rules of justice that distinguish civilization from anarchy and savagery? And was not this single service enough to raise the law of nature to a pinnacle of fame? Was it not the same spell that Rousseau invoked to shatter the edifice of the French monarchical oppression? How, then, could the law of nature, if it be indeed barren, give forth such fruits? In considering these facts, we are indeed perplexed, as when looking on a juggler who draws endless stores of ribbon from his mouth, or vomits forth volumes of flame; we feel sure that the thing is not what it seems, although we may be unable to explain how it seems to be what it is. To explain how the law of nature has accomplished the feat, it is necessary to go far back, and to trace it to its source.

To three ancient peoples are we indebted for the main factors of our social system. To the Greeks, we owe our science and philosophy; to the Jews, our religion; to the Romans, our law. It is true, that our science is not the science of the Greeks; our religion, not the religion of the Jews; our law, not the law of Rome; but, nevertheless, it was their evolution that enabled ours to proceed. The special value of Roman law is in showing us how a people, with the genius for order possessed by the Romans, evolved out of a rude customary law a majestic system, capable of welding together millions of people in the unity of a single state. Moreover, this system of law was not a mere mechanical extension, so to speak, of their early customs, but possessed new ideas and principles, which had this invaluable peculiarity, that they were consistent with economic progress. A single but instructive example of their contribution to social pro-

gress, is the last will or testament. The power of leaving one's property on one's death, a privilege without which we can scarcely imagine the possibility of great industrial enterprises, is, according to our ideas, so inherent in the very notion of property, that we suppose it to be coeval with the first institution of property. Yet the will was a discovery of the Romans; from them it has passed into modern law; and, but for their assistance, we might still have been without the least conception of a will. It might have transcended the inventive powers of our ancestors. The face of society would have been altogether changed by the absence of this single discovery.

In the laws of the Twelve Tables, the most ancient written law of Rome, we find the scanty rules characteristic of a primitive and patriarchal state of society. Free labour is unknown; the community is divided into two groups: a small one, consisting of heads of families: and a large one, containing all the rest of the population, wives, children, and slaves, under their despotic authority. As each family supplied its own wants, with only occasional assistance from its neighbours, commerce was very restricted. The law of property consisted of some precise and tedious ceremonies; the law of contract was scanty; and the Roman testament was just recognised. As the Romans proceeded in the subjugation of Italy, they had to deal with vanquished communities, whose customs, differing often in detail, resembled their own in rudeness. Later on, Rome became a centre to which many strangers resorted for occasional business, or for employment. In the earliest times, the Romans probably strengthened themselves, by admitting new tribes to the privileges of citizenship; the necessity of keeping up their numbers reconciled them to the admission of foreign elements. But a time came when Rome closed its gates, and henceforth the aliens that came to dwell in it, unless specially privileged, were excluded from the rights of citizenship, and refused the protection of law. A proud and jealous guild, such as the Romans formed, a brotherhood—of one blood, real or feigned—refused to share its laws with those who did not belong to the old Roman stock. Aliens were ignored by the law; they could not enjoy a legal title to property; they could not make contracts. At length, however, the existence of a large body of aliens in Rome, outlaws among a law-abiding people, became too great an inconvenience and danger to be overlooked. The remedy adopted was characteristic of a people at once proud of their achievements and tenacious of their privileges. Instead of admitting aliens to the privileges of their law, excluding them only from political rights, they appointed a judge (the *Prætor Peregrinus*) specially to administer justice where an alien was concerned.

This step had unforeseen consequences of momentous importance. The new judge refused to apply the laws of Rome—the jealously-guarded birthright of its citizens. But he possessed, as an acknowledged right of his office, a power that has often without acknowledgment been exercised by English judges, he could make law, as well as judge, according to the existing law. The prætor had, therefore, unlimited discretion in deciding cases in which aliens were parties. What happened was probably this. If the two litigants belonged to the same state, the prætor would give judgment according to the law of the country to which they both belonged; but if they came from different states, he must make such compromises between the rules prevailing in their respective countries as common sense and a desire to do justice would dictate. In the course of time, a body of rules was gathered together, to which the name of the law of nations (*jus gentium*) was given. In the strict and original meaning of the word, the law of nations was the collection of rules formed by the Prætor Peregrinus out of the laws of the various communities whose members appeared from time to time before him. Such a body of law growing up under the care of one of the two highest judicial officers of Rome, could not fail, sooner or later, to react on the peculiar law of Rome, and modify the estimate in which it was held. The effect was to some extent the same as might have been expected to happen if the fiction about the Twelve Tables had been actually true, if commissioners had been sent to Greece and the other countries known to the Romans, to inquire into the laws by which the various nations were governed. It was to open their eyes, as an acquaintance with foreign systems often does, to the imperfections of their own. The old customary law, from whose shelter aliens had been so rigorously excluded, was very cumbersome, ceremonial, strict, but misplaced in its strictness, looking to the form only, and little, if at all, to the substance of justice. Its pedantic formality afforded the opportunity, and created a temptation to fraud. A single illustration from the time of Cicero will place this matter in a clear light. A Roman knight at Syracuse was induced by a banker to buy some gardens from him at a price so exorbitant, that the sale would have been set aside for fraud. To prevent this, the wily banker took advantage of one of the rules of the old law. He persuaded the knight to allow him to enter the transaction as for money due in his books, by means of which the sale was merged in what English lawyers would call higher matter,—the written contract of the old civil law. This written contract could not be set aside on the ground of fraud, and so the unlucky knight was obliged to complete the bargain. A case like this, which exhibited in unfavourable



contrast the civil law with the law of sale, the rules of which were derived from the law of nations, could not fail to impress on a people less tractable than the Romans the necessity of reform, and the direction that reform ought to take. The inherent superiority of the rules of the law of nations, a superiority constantly brought under the notice of the highest law-making authorities in Rome, could not fail to lead to the amendment of the old civil law. It was inevitable that the narrow and mischievous system of which the Romans were at first so proud should lose in their esteem, and that the laws of the despised aliens should become the chief corner-stone of Roman jurisprudence.

I must now advert to the manner in which the body of rules thus originated, the law of nations, became connected with the metaphysical abstraction, the law of nature. The idea of natural law was taken from Greece. The sophists had asked whether the laws governing man's conduct originated from nature, or whether they were as artificial as dwelling-houses and cooked food. Plato is full of such discussions. The Stoics took up the idea of nature from a moral point of view. Their famous maxim, which was to them what "Do unto others as ye would they should do unto you" was to Christianity, was "to live according to nature." This was the sum and substance of the moral law. But what is "nature?" That is a question to which the Stoic never could give a satisfactory answer. Nature, as we have seen, was an empty phrase; it taught and could teach only what they pleased it should teach. The word "natural," when opposed to "artificial," has a certain meaning; but it is just as likely to suggest shallow whimsicalities as sensible and useful improvements. Epictetus tell us, that by nature all men are free; but the confidence we feel in this dictum of nature is somewhat diminished when we learn from the same author that it is against nature to shave. It is putting oneself in antagonism to nature when one desires a rose in winter, says Seneca. "Do they not live contrary to nature," he confidently inquires, "who plant orchards on their turrets, so that trees may wave over the tops of their houses; and strike their roots in those places where it would have been presumptuous to hope to reach with their highest boughs?" Again, "Do not they live contrary to nature, who lay the foundations of their baths in the sea; nor think they can swim delicately unless the warm water be likewise ruffled with waves?" If it had ended with the Stoics, nature would have remained what it was from the beginning—a name for a collection of arbitrary principles; and the law of nature would have met the same fate as the Stoic Philosophy, and would not for so many ages have been a name to charm with.

We know that many of the eminent Roman jurists adopted the Stoic Philosophy, and to them we owe the identification of the law of nature, with that very sensible collection of laws made by the Prætor Peregrinus. Indeed, the identification was by no means difficult. Underlying the superficial differences of the customs of the various communities known at Rome, there was a common element, and, as it happened, out of that common element it was possible to draw rules of law very much better than the laws of any one of the communities. Now, if nature means anything, it must be the common and universal, and not the peculiar or particular. It was, therefore, a short step to say that the law of nature, if sought at all, must be sought in the common element. But the case does not end here. The Stoics held the doctrine of innate ideas—the theory that there are certain common principles or maxims impressed on all mankind from birth. What more easy, then, than the question, are not these common principles to be found in the law of nations, which has been derived by eliminating the idiosyncracies of different systems of law, and bringing to light the substratum of truth underlying them all? This was a question that to a Stoic admitted of only one answer. The law of nations sprung from the customs of the despised aliens, was now invested with dignity and eminence, as the law of nature itself.

It has been suggested that the law of nations gained much by its association with the more dignified theory of natural law. There was nothing in a body of rules derived from the practice of various communities to excite the admiration of a citizen of the ruling state. Exclusiveness and privilege, distinctness from his neighbours, not likeness to them, were the favourites of a haughty burgess of Rome. Men in general are not over fond of learning from their neighbours; and when we remember the disgrace involved in the opinion of many in what has been called "Americanizing our institutions," we can understand the repugnance that a Roman would feel to giving up the cherished heritage of his ancestors for a nondescript body of laws, made, in the absence of anything better, to suit a motley collection of foreigners. As a matter of fact, this nondescript body of laws was, from every point of view, better, a nearer approximation to ideal justice, than the municipal law of Rome, but the difficulty was to get the Romans to overcome their prejudices, and see the thing as it actually was. That the law of nature enabled them to do so, is claimed as its special service, and if the claim be just, a notable service it was. It was the law of nature, so it has been urged, that raised the law of nations out of its contemptuous neglect, and made it the model of a just and wise system. It was the talismanic touch of nature that converted the law of nations

from being treated as the scum of law, to being regarded as the cream of all law. Or, to vary the figure, the law of nature found the *jus gentium* employed as a menial in the house, and proved that it was the true son and long-lost heir of the family. There may be some truth in this view, but it seems to us to be much less than has been supposed. The old civil law was so clumsy and inconvenient, as law, so thoroughly bad, and the law of nations was so manifestly good and excellent on the very points where the civil law pinched most, that it seems scarcely possible for the two to have existed long side by side without leading to an adoption of the better system. Nor must it be forgotten that the author of the law of nations was one of the two highest judicial officers; and that he, at all events, was not likely to remain blind to the merits of a system of his own creation. His colleague, the Prætor Urbanus, having full power to alter or amend the civil law, was not likely to remain long insensible to the discoveries of the law of nations. But the question does not rest upon conjecture. Long before Stoicism had any considerable influence at Rome, the task of superseding the old civil law by the law of nations was well begun. The contracts made by consent alone—or at least one of them, sale—were in existence before the time of Cicero, and probably very long before that time; but these were contracts of the law of nations superseding the clumsy nexual obligation mentioned in the laws of the Twelve Tables. If the Romans showed this alacrity in strengthening and reforming a very weak part of their civil law, by the law of nations, we cannot doubt that, even if Stoicism and the law of nature had never been heard of, the law of nations would have modified, improved, and supplemented the very narrow jurisprudence of the early ages.

In this connection, it is interesting to observe how completely powerless was the law of nature to effect any reform, when it was not supported by the law of nations. Perhaps the only case of importance where a conflict arose between them was on the subject of slavery. The law of nature was credited by the Roman jurists with an abhorrence of slavery. This amiable opinion is what we should expect from the Stoics, especially from Epictetus, and the gentle emperor, Marcus Aurelius; but a different view was put forth by Aristotle. He considered it was as natural for the master to govern his slave, as for the soul to govern the body; that there must be a class of persons to do manual labour, whose bodies were suitable for the purpose, and whose minds were fit for nothing better. Slavery was thus determined by the fitness of things, and sanctioned by nature. Whether Aristotle or Justinian was correct in their interpretation of nature does not much matter; because the only thing of interest to

us, is that Justinian should have held the opinion he did. But, whichever was right about nature, there could be no mistake about the practice of nations; all the countries in the ancient world, known to the Romans, had slavery; there was not a single institution that had a superior claim to a place in the law of nations. It is interesting to inquire whether the law of nature was able to correct the injustice of the civil law, when it was not assisted, but opposed, by the law of nations. As might be expected, it did and could do nothing. Even in the mouth of an emperor, the assertion that slavery was contrary to nature remained a barren protest.

It would be easy to show that while the theory of natural law as imported from the Stoics did not affect legislation, whatever good it appeared to accomplish was due really to the law of nations. But what is equally true, is that it was owing to an ignorance of this fact that the errors committed under the sanction of the law of nature have arisen. Those who inherited the tradition, without understanding the origin of the law of nature, ascribed to its dictates a universal sway. The mischief of this error has been severely felt. One of the doctrines attributed to the law of nature was that things without an owner became the property of the first person who took possession of them. As a rule of the *jus gentium*, nothing could be more reasonable. Trifling articles abandoned by their owners, wild animals, pearls, gems, and jewels found in a state of nature, with good reason may be given as property to those who find them. The Roman jurists, however, stretched this moderate rule much farther, and created a bad precedent for their mediæval commentators. They held that the property of an enemy, including his land, was to be regarded as without an owner, and the capturing foe as acquiring a right to them as first in possession. This fiction barely conceals the real motive of such a rule, which was simply the right of the stronger; but it is extremely moderate when we consider the lengths to which jurists went, upon the principle that what belongs to nobody is the property of the first possessor. When America was discovered, and laid open to Europeans, the whole Continent, despite its being peopled, was held to belong to nobody, and therefore to fall to the first-comers. Questions too knotty for jurists to decide speedily arose, and were cut with the sword. What constituted a possession? Did planting a flag on the mainland give a right to all the Continent; and if not to the whole, then to how much of it?

Not the least pernicious consequences of exalting the law of nature, has been the encouragement of a metaphysical treatment of political questions. The law of nature is, of course, unalterable; the rights it confers may be denied, but they cannot be changed or modified. The rights of man are a

given quantity, admitting neither increase, diminution, nor compromise. They are essentially extreme, and stand in the way of those temporary accommodations which are found so useful in smoothing the path of revolution. They form a class of "irreconcilables," who, unless completely victorious, are crushed under foot. We may thus conclude this account of the law of nature, by the observation, that while itself is not capable of giving birth to any useful doctrines, and is of doubtful utility to those valuable principles that are taken under its wing, it often perverts them, and leads to abuse.

In striking contrast to the metaphysical abstractions of the Roman and mediæval jurists, is the scientific or positive method of Jeremy Bentham. The works of Bentham supply us with amusing illustrations of this antagonism. Bentham, in one place, describes Roman law as "a mischievous and absurd system of jurisprudence;" and in another says its judicial procedure was prepared by jargon, and sown thick with iniquity, delay, and vexation. Of Heineccius, who seems to have been almost the only writer he consulted on Roman law, he speaks in even stronger terms, "his school of fraud and nonsense." This language, although in an objective sense too strong or even unjust, does not misrepresent the contempt and loathing with which Bentham regarded every rag of metaphysical verbiage. If it displays a fervour and vigour of hatred which we do not look for outside the pale of theological controversy, we must remember that Bentham can plead the privilege of an iconoclast; his work was to shiver in fragments a mighty framework of jurisprudence that had lasted for ages, and had for ages encumbered the ground; and he thought more of accomplishing his task than of critically examining the edifice, to find some little corner that he could admire. We, however, seeing that Bentham has successfully begun and carried far on a great revolution, can afford to do justice to the fallen foe, without disparaging the great deliverer. Politically, Bentham's judgment was right; the system of the mediæval jurists was bad, and deserved to perish; historically, his judgment was unjust; he did not recognise the essential service that Roman law had bestowed on mankind; but in his defence it ought in fairness to be said that Bentham's standing point was political, not historical.

It has been alleged that Bentham's famous aphorism, that the only proper object of legislation is the greatest happiness of the greatest number, is really as barren as the rejected law of nature. But for two reasons I cannot admit this. In the first place, Bentham's maxim condemns by implication two of the besetting sins of all law-makers—the temptation to legislate not for the greatest number, but for small and influential cliques; and the danger of acting upon mere impulse or senti-

ment. If Bentham's maxim did nothing but nail to the ground those two cardinal vices of legislation, it would be of essential value. But, in the second place, the fruitful principle in Bentham's method is not the maxim of utility. It is induction. Undoubtedly happiness is the object of laws, just as truth is the object of science; and although it is important and sometimes necessary to keep in mind those elementary propositions, yet their recognition does not tell us how to find out truth, or how to secure happiness. According to Bentham, utility was the end or purpose of legislation, but experience was the guide to it. In the same way, as truth in physical science is gained by experiment and observation, so the legislator must depend on sound induction to enable him to make good laws; that is, laws whose tendency and effect are to increase human happiness or avert misery. Bentham, therefore, must be classed among the inductive philosophers; his special merit was to apply the scientific method with which men were familiar enough in physical science to jurisprudence.

The best testimony to the value of Bentham's principle is the success of it. When he studied law he found justice buried beneath a load of abuses. Lord Eldon's delays had made the procrastination of Chancery a proverb; and the Chancery procedure was so defective as in a great measure to impair the value of its excellent jurisprudence. The technical procedure in the common law courts strewed the path of the honest litigant with quirks and pitfalls, and in the same degree afforded to impudent rascality the means of defeating justice. The principle of the penal law was a barbarous severity of punishment, mitigated by barbarous caprice. The rules of evidence were so contrived as to place great and often insuperable difficulties in the way of finding out the truth. During the last forty years the worst abuses have been removed, and every department of law has felt the touch of the reformer. Comparatively few of the statutes made to improve the administration of the law can be mentioned on which in justice the name of Bentham should not be written. Nay, more, such reforms as Bentham advocated, and have not yet been adopted, may to a great degree be confidently reckoned among the Acts of Parliament that have yet to be passed. Space forbids any extensive illustrations of this subject; but there is one department of law on which Bentham has left a deep mark, and which affords a favourable means of comparison with the Roman law, and is sufficiently compact and narrow to admit a rapid survey. It is on the law of evidence that the value of Bentham's method receives one of the most conclusive proofs. Upon this subject I have also the advantage of being able to quote the impartial opinion of the

greatest writer on the English law of evidence, the judge of the Greenwich County Court.

"Jeremy Bentham, at the commencement of the present century, in vain undertook to expose the abuses of this system [the exclusion of witnesses], and ventured to assert that, if the discovery of truth were the end of the rules of evidence, and sagacity consisted in the adaptation of means to ends, the sagacity displayed by the sages of the law in defining these rules was as much below that displayed by an illiterate peasant or mechanic in the bosom of his family, as, in the line of physical science, the sagacity shown by the peasant was to that evinced by a Newton. Lawyers, wedded to a system which they arrogantly deemed the perfection of reason, listened with impatience to arguments which, if adopted, would compel them to unlearn the lessons of their youth; while the uninitiated, for the most part, regarded the controversy with indifference, as though, forsooth, it related to a subject in which they had no interest, or else refrained from expressing, if not from forming, an opinion upon matters respecting which they felt themselves incompetent to decide. The truth is, that when Mr. Bentham's work on evidence first made its appearance, the world in general regarded the author as a gentleman who delighted in paradox, and wrote bad English, while, in the judgment even of the discerning few, this great apostle of judicial reform ranked little higher than an ingenious theorist. But truth, though long discountenanced, will at length prevail; and thus by little and little, Mr. Bentham's opinions were at first canvassed, then recognised as correct, and finally, in a great measure, adopted by the Legislature."\*

The principle of the law of evidence, when Bentham began his juridical work, was to exclude from the witness-box every one who might be suspected from his character or position before the court to be likely to tell lies. Husbands could not, either in civil or criminal cases, give evidence for or against their wives, nor wives for or against their husbands. The Newgate Calendar contains the trial of a shoemaker who was convicted on the evidence of his daughter of having hanged his wife. If he had hanged his daughter in the presence of his wife, he would probably have escaped, as his wife could not be a witness against him. The parties to a cause, whether as plaintiff or defendant, could not give evidence. A debtor, let us suppose, pays his creditor when no one is present, and neglects to require a written receipt for the money. If the creditor were dishonest he could make the debtor pay the debt over again, because neither the creditor nor debtor, who alone knew anything of the payment, could give evidence. In the time of Bentham, Quakers were admitted as witnesses in civil, but not in criminal proceedings; as if the law, not content with being wrong, must also be self-contradictory. In contrast

\* Taylor on "Evidence," 5th edit., p. 1161, s. 1212.

with this caprice is one that the law subsequently made. A defendant in the Divorce Court was not allowed to give evidence in his own behalf, but he had only to cross the street, as it were, to indict one of the witnesses against him for perjury, and he was competent not only to testify on his own behalf, but even to have the witness punished for perjury. Thus a man who was regarded in one of her Majesty's courts as so untrustworthy that he could not be suffered to say a word in his own defence, was in another of her courts considered sufficient not only for his own exculpation, but to deprive another man of his liberty. All those restrictions have been removed. Of all that Bentham inveighed against only two remain on the Statute Book. The defendant in criminal proceedings, and the defendant's husband or wife, are incompetent as witnesses. But the days of this rule are numbered: if not in the next, at all events in a very early session of Parliament, this last remnant of exclusion will be swept away.

The English rules of evidence excluding witnesses were probably borrowed, directly or indirectly, from the Roman law. It is perhaps not quite fair to put the Roman law to the severe test of Bentham's principles of evidence. On the subject of evidence, Bentham is perhaps at his best; the Roman law is certainly at its worst. Its list of exclusions is long; and one wonders how it was ever possible to prove even the simplest fact in a Roman court of law. To begin with slaves. These were inadmissible as witnesses for or against their masters, and not even against other free men, unless no other testimony was forthcoming, and then only after they had been put to the torture. Even after they had been freed, slaves could not give evidence against their old masters. Parents and children could not appear for or against each other. Youths under fourteen could not be witnesses in any case; and those above fourteen, but under twenty, could give evidence in civil cases only, not in criminal proceedings. All persons convicted of crime, and even gladiators, were stamped by the law as for ever unworthy of credit in any causes whatever. Persons who had any interest in the result of litigation were inadmissible as witnesses in their own case. Religious antipathy, under the Christian empire, forged new chains. Jews and heretics were prohibited from giving evidence to injure any orthodox person; Pagans and Manichæans were treated with more severity, and were peremptorily excluded from the witness-box; while bishops were indulged with the privilege of giving evidence when it suited them, and withholding it if inconvenient. This is a formidable catalogue, but it does not exhaust the devices of the law to hinder the discovery of truth. After having reduced



the possible witnesses to the lowest number, the law completed the mischief by refusing to admit any fact as proved, unless it were attested by at least two witnesses. The wonder is how, with such laws, justice could have been administered.

Some of the restrictions of the Roman law were justifiable in their origin, but were maintained for centuries after the justification had ceased. Thus women could not be witnesses to a will, because in the early period of Roman history wills were made in the *comitia* or parliament of the Roman burghesses, to which women were not admitted. But the making of wills in the *comitia* became obsolete at a very early period; and, notwithstanding, women could not be witnesses to wills, although they could appear and give evidence in the courts of law. So in the case of slaves, the master had at first the power of life and death, and it would have been useless to examine the slave as a witness, when his master could kill him if he said anything to his disadvantage. But the rule of exclusion was kept up for hundreds of years after a master could have exercised so cruel a power. The same explanation applies to children, over whom their fathers had at one time the power of life and death; and the same observation may be made, that the exclusion subsisted for ages after the reason for it had gone. The intensely conservative character of the Romans, which opposed itself to every change in their law that did not seem urgent or necessary, was, in continuing the exclusion of witnesses, fortified by a feeling common enough at all times, the dislike of powerful classes to be worsted in a lawsuit, or convicted of a crime by the testimony of their inferiors. A curious evidence of this disposition is afforded by the terms applied by the Emperors Honorius and Theodosius to the testimony of freed slaves against their former masters. "We do not permit," say these guardians of the law, "a freedman to raise his unlawful and base voice against his old master, and shall punish him if he ventures to do so." In this law, public justice is set aside, as unworthy of comparison with the evil of convicting a criminal by the testimony of an old slave. Such is one way of looking at the purpose of judicial evidence.

We may well ask, Where was the law of nature all this time? Ancient abuses maintained, accidental errors turned into perpetual rules, gross ignorance of the purpose of judicial evidence in the highest quarters, constant miscarriages of justice, what stayed the arm of natural law, that it did not smite the fabric of error and injustice? Elijah did not with more confidence invite the priests of Baal to consume the sacrifice on the altar, than Bentham might have implored the devotees of natural law to sweep the Augean stable of legal

procedure. The law of nature proved a dumb oracle; there was nothing in it; and out of nothing, nothing comes. It had not, as in other instances, been inspired by the law of nations; for the law of nations seems to have done little for the improvement of judicial procedure. The prætor, in deciding causes in which foreigners were parties, was compelled to consider the law of their country, but had no occasion to concern himself with any other rules of evidence than he was accustomed to at Rome. This is a distinction always preserved. For example, when an English court of law enforces a contract made abroad, it accepts the law of the country where it is made as to the validity of the agreement; but it compels the parties to adopt its own procedure. In the same way, we may conclude, from the manner in which the *jus gentium* grew up, that it would contribute little or nothing to amend the law of evidence; and thus the Roman law lost the inestimable advantage of comparison with foreign systems of procedure. Had it been otherwise; had the law of nations corroborated or confirmed the Roman practice, we should have found modern writers ascribing the rules of evidence to nature, and attributing to them infallibility. How plausible it would have been to say, that for a son to give evidence against his father is contrary to nature! It might have been alleged to be a natural right for a man to give evidence in his own favour, but quite unnatural that he should be forced to speak to his own disadvantage. We should have had a great conflict among jurists upon the subject of oaths; whether the swearing of witnesses is a dictate of nature, or only an institution of man. But the law of nature was dumb, and we have been spared those entertaining and endless controversies.

Now it is precisely when natural law is weakest, that the strength of Bentham appears. The object of all procedure and evidence must manifestly be to discover the truth and execute the law. It is a utility of means to an end, the end in question being precise and narrow. A good system of procedure is one that best accomplishes the objects of the lawgiver; a bad system is one that defeats his purposes, or delays or hinders them. When the object of utility is thus narrowed, it should not be difficult, after the experience the world has had of judicial institutions, to frame a system reasonably good, or at least to point out the errors of a bad system. The one indispensable condition of success is a faithful adherence to the end in view, and a suppression of all irrelevant sentiments. In England, for many years, the penal law was deliberately employed as a weapon to crush the Dissenters from the Church Establishment. In Rome, also, the instances are not rare in which the law was turned aside from its legitimate objects, to forward the schemes of an ecclesiastical organization. At other times, law has been

used by the few as a screen to hide their offences against the many. But from all such perverting influences, Bentham was entirely free, and his success is due greatly to the unswerving fidelity with which he worked out the great problem of legal reform.

I have now concluded this attempt to pourtray the characteristics of the scientific method of jurisprudence. I shall not attempt to do justice to the great man who first showed us the true path of legal progress. The time has not yet come for such an effort. We are too near him; not until the lesser lights have fallen into the darkness of the past, will the splendour of Bentham be fully perceived. It may with some confidence be expected, as year by year his ideas are transferred from his writings to the statute book, and as his principles are better understood, that his fame will grow and his disciples increase. But the lesson to be drawn from the facts recited is of more importance than the reputation even of a great man. It is the overwhelming value, the necessity, of a *right method*. Even with all Bentham's intellect, with his leisure, his long life, and his unwearied devotion to work, he could not have accomplished a tithe of his achievements if he had not seized the true principle of legal reform, and adhered to it with perfect fidelity. His genius lay in discovering the right method. To us is given the easy but profitable task of using it aright. We enter into the splendid inheritance he has bequeathed to us, and the fruits of his genius and labour will remain with us.

### III.—THE RIGHT OF PEERS TO VOTE IN THE ELECTION OF MEMBERS OF THE HOUSE OF COMMONS.

**A** JUDGMENT on a constitutional question of great importance has just been delivered in one of the revising courts. It is a question which most people thought to have been settled long ago, but it has now revived itself in a vigorous manner. In the year 1841, Mr. Arnold, now a police magistrate, but then a revising barrister, had the question brought before him whether a peer was entitled to be put on the register as a voter in a parliamentary election. The learned gentleman took time to consider the point, wrote an elaborate judgment on it, and decided that peers were not entitled to be put upon the register. In 1867 a

new Reform Act was passed, and by sec. 5 it gave the right of voting to "every man" under certain conditions. One of these was, that he should not labour under any "legal incapacity." The old habit which the uncourteous laity used to call, vituperatively, the "love of special pleading" is not dead amongst us, and to say truth is rather a greater favourite with the laity who pretend to abuse it, than with the profession, whose members are often obliged to employ it, to please their lay clients. That feeling gave rise to the pretence two years ago that "man" in the statute meant "woman," in support of which odd contention Lord Brougham's Act (erroneously called Lord Romilly's Act) was cited. That miscalled Act had however nothing to do with the matter, and the Court of Common Pleas, being governed by common sense and sound rules of construction, rejected the fanciful interpretation. A similar fancy has now been put forward. It is insisted that the expression "every man" means every man whatever, which, if it did, would create universal suffrage, and render the restrictions as to property and residence little better than idle pretences. And then it is said that, the phrase "every man," meaning every man whosoever, a peer is a man—his right is declared, and, being declared, cannot be taken away from him by anything but a decision of a court, or the direct provision of a statute. On antiquarian and legal grounds, Mr. Arnold had disposed of the claim on the law as it existed before the recent statute, and it only remained, therefore, to see whether the general terms of this recent statute could resuscitate it. The Marquis of Salisbury resolved to try the question, and his agent put his name on the list of persons claiming to have a vote for Hertfordshire. The revising barrister has on constitutional principles disallowed the claim, and we lay before our readers the report of the case published in the *Hertfordshire Mercury*. The matter will perhaps be made the subject of argument in the ensuing term; for a Case has been asked for and granted.

On Thursday, the 10th ult., Mr. Charles Clark, revising barrister, held his court for the revision of the list of voters for the polling districts of Hatfield and Welwyn, at the Red Lion, Hatfield. Amongst the claims to be inserted on the list of voters for the county of Hertford, objected to by the Liberals, was the claim of the Marquis of Salisbury:—

Mr. Armstrong said he had the honour to appear in support of this claim. He understood that it was not intended to raise any question as to the property qualification as set up in the notice of claim delivered to the overseers, but that the real question for consideration would be whether, as a peer of the realm, his lordship was legally incapacitated, and therefore not entitled to be on the list of voters. He should venture to

argue that there was nothing in the common law of the land, or enacted by statute, that would have the effect of such disqualification. By the Representation of the People Act, 1867, sec. 5, it was enacted in the plainest terms—"Every man shall, on and after the year 1868, be entitled to be registered as a voter; and when registered, to vote for a member or members to serve in Parliament who is qualified as follows:—Is of full age, and not subject to any legal incapacity, and seised at law of certain lands and tenements, &c." Now his lordship was of full age, and it is not disputed possessed of ample property qualification as set out in this section—*prima facie*, therefore, he is entitled to be registered. But it is to be contended that as a peer he comes within the exception, and that he is "subject to legal incapacity." What, therefore, can properly be called legal incapacity? He was well aware of the grounds upon which this objection was to be supported. There was no doubt that from time to time the House of Commons had passed formal resolutions to the effect that "no peer hath a right to vote at the election of any member to serve in Parliament." The first of these resolutions was passed 14th December, 1699. Again, a similar resolution 13th February, 1700, and again, 24th October, 1792. At the union with Ireland it was also resolved, "That no peer of the realm, except an Irish peer, duly elected, hath any right to give his vote in the election of any member to serve in Parliament." These, he believed, were all the resolutions of the House. They were abstract declaratory resolutions, and he should with great respect contend that they had not the force of law, and could not create a legal incapacity. He could not find that the question had ever been formally discussed in a court of law; he had met with no decisions upon it. He would not pretend to say that the House could not pass resolutions which would be legally binding on its members, especially with reference to its own course of procedure. This was well understood, but he hoped he should not be guilty of a breach of privilege in saying that it was not in the power of the House of Commons, as one branch of the Legislature, to abrogate or virtually repeal and render nugatory express enactments passed by the whole legislative body. The statutory disabilities were well defined. Among others, down to 1868, persons entrusted with the collection and management of the revenue were by several Acts of Parliament deprived of the right to vote; but in that year the Act 31 & 32 Vict., c. 73, expressly repealed all the enactments by which they were so disfranchised. At the present time he believed the only persons prohibited from voting by Act of Parliament are idiots, police officers, and agents at elections. If the House of Commons could by resolution deprive a peer of a vote, why was it necessary to pass

Acts of Parliament for the purpose of taking away the votes of revenue officers, the police, and others? It would have been only affirming and establishing their alleged power if this had been done by resolution also. It could not be contended that the non-user of the right of voting, or the silent acquiescence of the House of Lords in the resolutions of the Commons, would give those resolutions the force of law. It was not necessary for him to suggest a reason for this acquiescence, though he believed that at least on one recent occasion a peer had voted at an election for the University of Cambridge—his vote was tendered, received, and formally recorded—and if this had been a violation of the law, it would certainly have been brought under the notice of the House of Commons, which was ever so jealous of its privileges and any infringement of them. It should always be remembered that the Act for the Representation of the People was an enabling statute, granting and giving the franchise most extensively, and to restrict the obviously intended effect of that statute would be virtually repealing its spirit and scope. He trusted he had said enough to satisfy the Court that inasmuch as the Marquis of Salisbury was, and undoubtedly in every respect, qualified under the Act, he was not legally incapacitated; that was to say, there was nothing in the common law of the land or any Act of Parliament which would deprive a peer of the realm of that right. This question was a very important one, and ought to be set at rest.

Mr. Bontems said he was quite aware that there was no statute which prohibited peers from voting, but there was an old constitutional law which was recognized by the whole community, by the peasant as well as the peer, and nothing would surprise the inhabitants of Hatfield more, notwithstanding the great power and influence of the noble marquis at that place, than his presenting himself in the polling booth to vote for a member of Parliament. He had no personal or party reason for opposing Lord Salisbury's claim, because if the claims of peers were to be allowed he could put on more than enough Whig peers in Hertfordshire to counterbalance all the Conservative ones. He could not have imagined that Lord Salisbury would wish his name to be on the county register, and thought that some zealous agent had put in the claim, without his lordship's knowledge. He thought that the noble marquis might be satisfied with the privileges of his own order, without interfering with those of the commonalty. The whole peerage by common consent yielded to the constitutional practice that had been in force for centuries, and made no attempt to interfere with the election of members of the House of Commons. With regard to the House of Commons, peers were much in the same position as women; they

could neither vote nor be elected, although there was no positive statute to that effect. He looked with confidence for the decision of the revising-barrister that peers are "legally incapacitated" from voting, and therefore from being on the register.

Mr. Armstrong said he disputed the words "common law of the land," as interpreted by Mr. Bontems, and again contended that in cases such as the present the resolution of the House of Commons could not make the law, and with regard to the incapacity of women to vote, it required only to read the Act to see that woman was not intended, and this had, he believed, been decided by the Court of Common Pleas on appeal; at all events women are not deprived of this right, if ever they possessed it, by resolution of the House.

Mr. Clark (the revising barrister) then delivered judgment. He said, I am clearly of opinion that the claim of the Marquis of Salisbury to be put on the register as a voter for the county of Hertford must be disallowed. After the decision of Mr. Arnold, pronounced in 1841, and never attempted to be questioned, it might have been thought that the matter was considered settled. But, of course, a new claimant may again bring it into discussion. As to the antiquarian and constitutional part of the question, I adopt, so far as it goes, the judgment of Mr. Arnold, but I think that there are, perhaps, a few observations which may usefully be added to it. The argument has been to-day that the statute (30 & 31 Vict. c. 102, sec. 5) gives the right of being put upon the register to "every man," and that the restriction on that general expression is that he shall not be subject to any "legal incapacity." It is argued that no "legal incapacity" can be created but by the decision of a court of justice, which has never been pronounced in a case of this kind, or by a statute, that is, by the declared will (which has never been so expressed) of both Houses of Parliament, assented to by the Sovereign. As a rule, that is true. No subject's individual and legal rights can be taken away from him but by Act of Parliament. But there is necessarily an exception to that rule in matters which relate to the constitution of Parliament and of the two Houses of Parliament. Each of them, with a view to its own safety, freedom, and dignity, has the power to declare, with authority, those matters which it deems necessary to preserve its constitutional rights as between itself and another branch of the Legislature. The House of Commons has done this in repeated instances with regard to the House of Lords, and in every instance what it has so done has been acquiesced in by the other House. The House of Lords in a recent memorable instance asserted, with relation to the Crown, the same right and exercised the same power, and

for exactly a similar reason; it did so in the case of the Life Peerages. I cannot exactly quote from memory the words of the resolution adopted by the House of Lords, but their meaning was that no patent granted by the Crown creating a Life Peerage, nor any writ of summons founded on that patent, could enable the grantee to sit and vote in that House.\* This was acquiesced in by the Crown. Though, therefore, a resolution of the House of Commons or of the House of Lords is not law in the ordinary sense of that term, so as to bind the rights and liabilities of any subject in the business of his every-day life, it is law so far as it relates to the preservation of the constitutional rights, the dignity, and freedom of the body which makes it. And this has been in fact admitted with regard to the resolutions of the House of Commons by the House of Lords, which, not being in the least deficient in the power or the means of asserting its own privileges or those of its members, has never contested the validity of the resolutions of the House of Commons passed with relation to this matter of parliamentary elections. Though, therefore, there can be no common law rule in the ordinary sense of that term, except what has been pronounced by a decision of the common law judges, nor any legal incapacity created in a particular subject by statute, except such as has been created by the will of the two Houses, assented to by the Sovereign, there can be a common law of Parliament which is not so created, a law of Parliament necessary for the dignity and freedom of each House of Parliament, and declared to be so by each House. And when that declaration has, for all time past, been left uncontested by the other House, that fact gives it the authority of an admitted right and invests it with the character of a law. It is of necessity that it should be so. In this way the common law of Parliament has been declared and its declarations have been in this way admitted, to the effect that no peer of the realm has the right to "concern" himself in the election of persons to serve as members of the House of Commons. By this common law of Parliament a "legal incapacity" is created in a peer of the realm which prevents him from being entitled to be put on the register of voters for electing members of Parliament. I must, therefore, disallow this claim and strike the name of the Marquis of Salisbury off the list of claimants.

Mr. Armstrong asked for a case for the court above, which the revising barrister granted.

\* After reciting the grant of a Life Peerage, and expressly referring to such grant, the words of the resolution were, "Neither the said Letters Patent, nor the said Letters with the usual Writ of Summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in Parliament."



If this judgment is not right in principle, it is difficult to understand how there can be any such things as "Privileges of Parliament" distinct from (to say nothing of opposed to) the ordinary rights of ordinary citizens.

#### IV.—MAINE ON ANCIENT LAW. PART II.

THERE are few of the mass of errors into which this writer has been led, that I approach with more repugnance than the contents of his fourth essay, and to which he gives the title of "Modern History of the Law of Nature." What that history must needs have been we had occasion to suggest already. It could, in brief, be but confusion of the Stoic contortion of that primitive law, with the Roman notion of it, which as legislative was not radically wrong; and this confusion, worse confounded by the Gothic purview of personality, which must invert it absolutely to a reflex of man's will or conscience. For the Natural law is seized but by viewing the persons still as things, or through them: and this accordingly was the vantage view of the Roman race in jurisprudence. The race prepared to overhaul or analyze this amalgamation, and which I have thence termed Personal, must do of course the exact contrary, and contemplate the things but through the persons and their volitions. The consequences of this somersets to Natural law must be self-evident.

Mr. Maine, in fact, begins with declaring to us himself, that the "Law of nature confused the past and the present." Precisely. But he should have explained that the law he was alluding to is only miscalled natural by the Gothic jurists; by the race of the Present in all things, as of the personal. Other writers, he says, referred this law to the future. But here he again must be crudely mistaken; for even the theologians, who pretend to guardianship of this law, yet oppose to it broadly the "reign of grace" as of the future. Any jurists of the sort alluded to must have intended the *jus gentium*; which our author, it is true, takes for the same as the Natural law. But this was only his own error, which he should have taken such broad hints to rectify; instead of talking to us of "two inconsistent theories;" which are both in truth his own, and even but results of the lack of theory.

The writer superadds self-contradiction in the next sentence. "The tendency," says he, "to look not to the Past but to the Future for types of perfection was brought into the world by Christianity." But Christianity, as noted in my article of last month, was a popular idealization of the *jus*

*gentium*; and like it therefore (speaking humanly) an offspring of the Roman race. It was the religion of the *Gentiles*, as stigmatized by the Personal Jews. This in fact was the profound sentiment that led some Fathers of the Church to propose the term *Romanity* as a synonym with Humanity; and which also used to fire the heathen multitude of ancient Rome, although surrounded with a horde of slaves, to start to rapturous applause, upon hearing in the theatres the famous enthymeme of Terence:

Homo sum; et nihil humani me alienum puto.

This was surely a rabble that had the Future in its organism; and who thus could descry further than Aristotle with all his genius, when he insisted, and with exact truth, that the state of slavery is of Natural law. For he conceived the Law of nature in its precise limits and its Past domain; whereas the Roman Law, in gainsaying him, meant the *jus gentium* of the relative Future. With a sophistry instinctive as well to national as personal interests, the Romans availed themselves of the authority of the latter Law, to countenance the enslavement of three-fourths of their own people, while parading their liberality in exonerating Natural law. But, on the contrary, it has been in reality the *jus gentium* that corrected those excesses of the Natural and Civil laws, which allow, and perpetrate, the sacrifice of the weak to the strong; corrected them in *war*, by assuaging massacre into servitude; corrected them in *peace* by redeeming slavery into freedom—which was precisely the social part of Christianity as just alluded to; and which will correct them in *progress* also, by sweeping from the world every vestige of oppression and of tyranny, if not even misery. Thus the conflicts of the two lower Laws are brought into harmony in their correct objects. We may judge, then, of the state and history, not alone of the Law of nature, but also those of its Civil and International coordinates, when such crudities are still decanted in the merest fundamentals.

The *jus gentium* would therefore be the Law referred to, and not the Natural, as affected to the Future, if any ancient could have had the notion. But this statement of his own the author again proceeds to contradict. "Ancient literature," he says, "gives few or no hints of a belief that the progress of society is necessarily from worse to better." Did he forget that it not merely hints, but inculcates quite the contrary; as in the dogmas of the personal Jews about Eden and the Fall: and of which also we thus conceive the profane rationale? This perverse notion of social regress was duly common enough; even down to the Roman satirist's *laudatores temporis acti*: as even the Romans had also naturally their golden age, or reign of Saturn. For the conception of

men's self-progression must for epochs have remained impossible.

However poor at explanation, the author well enough observes, that the Natural law gave its bond and basis to the Roman jurisprudence; and also that for want of it the sprightly Greeks failed of a jural system. The Greeks belonged by position to what I called the Personal cycle, although in this department the supreme or synthetic race. They were therefore still a race, not of jurists, but of politicians, even in their Ionic element, which masked the Doric stolidity; and could never bring their paltry states into even a stable confederation, such, for instance, as the Gothic peoples are seen to fall into spontaneously. But the Romans, though proceeding on the great unity of the Natural law, did not conceive it (as the author says) as if it ought to absorb the Civil: they treated both as coequal contraries, and the Prætor's equity as their conciliator.

In fact, Ulpian himself notes these bearings quite distinctly: *Jus civile id esse quod neque in totum a naturali jure recedit, neque per omnia ei servit; itaque cum aliquid addimus vel detrahimus jure communi, jus proprium, id est civile, intelligimus*. Here was the conception that prepared this first of Roman jurists, not only to distinguish, as I stated in the previous article, the *Jus gentium* from the Natural law, but nearly give it the correct supremacy. By calling the Civil law *jus proprium*, he means differential; while the Natural would be the genus, and the International thus left the species. I do not give the definition for quite exact in the civil branch; or at all events without more explanation than would here be possible. For how it can be differential and nothing more is a recondite question.

Keeping therefore to the law of nature, our author further spoils his fair remark, by declaring that he "sees no reason why the law of the Romans should be superior to the laws of the Hindoos, unless (that) the theory of the Natural law had given it a type of excellence different from the usual one!" But where did the "theory" obtain the type to give, or the men to cast the type, or to conceive the theory? The Romans, unlike the Jews, did not receive such things from heaven. Mr. Maine does not think of asking, any more in this than other cases. The single step is enough for him; he is a commentator or mere critic; and never thinks of rounding his enquiries into reasons: it is another trait which he inherits from the race. Thus he elsewhere alludes to the same Hindoos, as unable to separate the idea of law from that of religion, and remarks upon it that the Chinese transcended them in this particular. But the Hindoos we saw explained to be the third and supreme race, of that Asiatic cycle, in which the Chinese are the first and lowest. And conformably, if the

Chinese can conceive their laws apart from religion, it is simply that they never had a native religion to interfere with them; and are incapable to this day of apprehending a religious principle. Any grimace of doctrine which they have is Hindoo Bhuddism. The author's work is crowded with such oversights and interversions—not alone as to the Asiatic and African races, but above all in the European, as of higher social mechanism.

For example, quite at home, he presents Jeremy Bentham as supplying to English law a "type" analogous to the law of nature! To this he ascribes Bentham's "immense influence in England; he gave us a clear rule of reform." But where, in the name of the five senses, is this rule or type? Why do not our reformers ever use it, or any other? Do they ever breathe the name of Bentham in their constant projects, or their prate in Parliament? They are careful to avoid it, and for the prudent or practical reason, that Bentham's services have lain in giving neither type nor rule, but outright anarchy; a chaos still more utter than the Law he used to ridicule for its "perfection of reason" and its "glorious uncertainty." For Bentham was himself a type of the race, though in its higher faculties; and with an honesty which was his own, and the means of indulging it. He never probably made a five-pound note by all his labours, and never could have even published them, save at his own expense. And the only recognition which he ever received from his native Government was that these clever traders, when they heard him talked of by some shallow Frenchmen, got one of these to put him in a readable and French dress, and pensioned the tailor with a full five hundred a year. For how could the Law that produced such a Jurist be then deemed barbarous; and not quite worthy of the model polity which Montesquieu gave the same country? To talk of Bentham's immense influence upon England would, then, be *cant*, if Mr. Maine were not too honest and too educated for the impudence.

He returns to the Natural law; but it is to replunge in fresh errors. Who would think that it could have been the "theory" of this law, in its Gothic posture of a sugar-loaf reversed upon the personal apex, that has been upsetting society for half a century back in France? For, were the orators or press ever heard to descant upon it? Was it Nature that the Revolution in its wildest triumph enthroned as goddess? Or was it even the old Gothic deity, who the other day fought for Emperor William? No; but for the first time in the history of all mankind, it was Reason that this noble populace would place upon the throne; in concurrence with the philosophic reveries of Pluto! But remonstrances of this refinement seem out of place with the author; and this chapter must be dismissed with another note that might have jogged him.

He remarks truly that the French Bar, emerging from the subject race, rose to a footing with the Feudal oligarchy and at last supplanted it. "In all the qualities of the advocate, the judge and the legislator, they far exceeded their compeers throughout Europe." But how could all this come to pass unless through their being of the race who would enthrone neither physical nature nor human will, but social reason? More especially, how came the miracle, if they were "cursed" (as the author has it) "with a jurisprudence the most anomalous and dissonant of any European country," to wit, the *Droit coutumier* alluded to in the former article. Now, on the contrary again, it was this Law, as I there intimated, that was made for such a Bar, and that made it in turn, in spite of both the Feudal and the Roman rivals that beset it; the remnant or recurrence of the Clan customs of the Gallic communes, and which to-day make their civil code the jural model of the civilized world. It has even added also to the supreme Law of Nations the most compact, and, as yet, most rational department of the system; only known to the Germans in the absurd form they call "Private;" and unknown wholly to the English save in Story's American compilation, obtained at third hand through the Southern States, from the remains of French and Spanish.\* And, in fine, it is from the same great Nation, great in all things, down to even finance—the Solar nation, as Napoleon used to style it not inaptly, that this supreme Law of society shall receive its full embodiment, when they have dashed aside the Gothic cloud of the moment, and reappear in an effulgence more benignly terrible than ever.

VI. Much the same subjects are repeated in the next chapter, under title of *Primitive Society and Ancient Law*. Discarding the law, I will note some fresher ingredients.

The earliest nucleus of society found by Mr. Maine is patriarchy; or the patriarchal theory, as he rather loosely phrases it. And this is right enough at the bottom of his meaning. The family, undoubtedly, is the prime element of society. But then the patriarchate is an advanced source of the Family government, and borders on the counter personality of the House regimen. The Chinese to this day are an empire of Families. They never had a patriarchate, in the proper acceptation; but, on the contrary, it seems to have been the rule in primitive Assyria, from which it was accordingly derived

\* The founders were D'Argentrè a Breton, Boullenois, Froland, Dumoulin, and some others, with their able Dutch coadjutors, the two Voëts. The French customs presented, in their conflicts and concurrences, a sort of internationality not unlike the American States, but with the advantage of being spontaneous and independent of each other, while the State laws were imposed factitiously by legislation, and thus imitation.

by the Hebrews. For it was alien to this people, although deemed in England to be the type of it; much as the same English deal it to the clans of their Celtic neighbours.

Nay, it could perhaps be shown, if the present were a time or place, that the primitive and natural ruler of the family is the Mother. *Partus sequitur ventrem* is still a maxim of our Law, and should be deemed to hold as well in matters social as in physiology. A present proof of it may be used also to expose a remark of the author, to the effect that the family government is now "eliminated from society." For reasons shown, he may be countenanced by the English family, or the American; where the mothers are contending to become hustings politicians; and their pretensions are espoused by men supposed to be philosophers. But the fact is, that even where weakest, which is of course in the Personal races, the Family continues an ineradicable institution; and also essentially in the government of the mother. The French have still their *Conseil de Famille*, as well as *Conseil d'Etat*; and the mother, since the days of Cæsar, is the favourite parent with the male offspring. Amid all the revolutions of France and Spain, and even Italy, the women never showed a symptom of the coarse mania for mannish politics; being too well balanced by the instincts of their fundamentally social province. I will not mention the tradition about primeval Attica, and its government by women, under patronage of Minerva.

Mr. Maine is more novel in his second principle of social concourse, or, as he calls them, "conditions of political community." He must have meant a cause, not a condition, which is widely different; and should have noted that the second of them, and no more could have been *political*. However, the cause is here called "Local Contiguity," which was, in fact, the basis of "political" community; and which, he says, "is everywhere now recognized as the condition of community in political functions." The "recognition" I own not to be familiar to myself; nor do I think the true principle to be so to even our author. He seems to take it in the sense of the politicians of his race and country. For example, with Mr. Bright even, it is England's title to Ireland, which is evidently nearer to England than *vice versâ*. I once suggested this blind side to a learned English personage, who was remonstrating, with solemn candour, against Home rule for Ireland. He paused and mused, and then replied with a sour smile: "Yes, of course, we are as near to Ireland, but let the Irish come and take us." He did not see that he fell over into a deeper slough of fallacy, by confessing that the hold on Ireland was brute force, and not his contiguity. Recalling him from his hilarious laughter to the thesis, I

again asked him if its contiguity was the claim of England to India? He here coloured, and lost temper; or only muttered, "Hanged nonsense."

Mr. Maine, instead of contiguity or local contiguity, which phrase, moreover, is pleonastic, should have said *local concentration*; that is, a segmentation by a multitude of serial centres, intersecting each other in all collateral directions; and with thus the points of union not the most contiguous, but the most *distant*—thereby best fortifying each other through the contact of the mere circumferences. This is nature, as may be noted in her simplest structure, which is freezing water. In matters social, the Family amassment is the simple water; while the ice with its network of concentrations is the House regimen. This second stage is thus the portion of the personal races. It may be seen in full maturity in the Gothic confederations. It is what England so much prides herself upon in her internal regimen of counties, boroughs, parish parliaments, by the counter name of "decentrality;" and which *à multo fortiori* would extend their Home rule to the Irish.

The principle was felt already by the antique homologues of the Teutons. It kept the empire of the Assyro-Persians as fluctuant as a sandy desert; save when amassed into the avalanches that swept those empires from the earth. It scattered likewise the Semites through their petty cities and commercial colonies; and would account, without a miracle, for the "dispersions" of the Chosen People. While the *House* of Israel flourished, they were concentrated by the Temple; which stood, *ad hoc*, as near as might be to the centre of the parish territory. The divine owner of this temple-palace they entitled *Lord*, and never *Father*. They spoke of one another as "neighbours," not fellow citizens; an expression, by the way, which recurs curiously with the Americans. "Going to Boston, neighbour?" drawls the Yankee to an English cockney, who seems to be awaiting the cars. In fine, the Jews, in their very laws, addressed the public but as *Thou*; through incapacity of social or even political expansion beyond the physical *person* and his assumed presence in space before them.

That Mr. Maine sees nothing of this epochal transformation, is positively clear from the following queer conclusion: "It may be affirmed, then, of early *Commonwealths* that their citizens considered *all the groups* in which they claimed membership to be founded on *common lineage*." What language, in the first place, for a jurist, or even a draughtsman! I note the expression here for a twofold reason; or because such defects are commonly a sign of falsity in the knowledge, and that Mr. Maine, above most English lawyers, expresses fairly what he conceives clearly. Thus the locution "early com-

monwealths" is meant to cover this vacuity. It includes the counter principle of patriarchy, already treated by him; and the name "commonwealth" is quite incongruous, as of modern and Gothic origin. So with the "citizens," of which there could have been as yet no idea; nor indeed is there to this moment, by name or notion, in English politics. Then again, whether citizens or serfs or clients, how could they have claimed membership in "all" of the groups? But above all, how should the groups or members be supposed founded on a "common lineage," since this was just the principle of the counter epoch of the Patriarchy?

The writer, then, had not a gleam of clear distinction between them. Yet it is well known historically, as now moreover by the theory indicated, that those communities and races which I distinguish as the personal, were composed of the refugees and general offal from the family empires. It was, no doubt, to this origin from stolen love they owed their greater energy. In the case of the Jews just mentioned, though the highest but one of the ancient homologues—an eminence attested by their choice of deity for Lord and master—they are recorded by the profound, but no doubt the profane, Tacitus, as having been a horde of vagabonds, the offscouring of all Asia. And this was certainly sound in theory; though inspiration must be higher authority.

But Mr. Maine's further and capital confusion of the Gens with the House condemned him fatally to overlook the third and supreme stage of his Social aggregations; which is based upon *time* and composes Nationality. He therefore can say nothing of the Celtic clans but the sheerest drivel. He has learned of the Scotch portion but merely that the chieftain distributed food to needy clansmen; as if charity could be an ethnical institution, not a social duty. Does not England, by her Poor-laws, do the same, in form, to this day? And does not English nobility take its title of Lord, which means the "loaf-man," from a similar distribution to dependants. Even the Americans commemorate it in the converse term *loafer*, which they give to unproductive vagabonds who live by others. Not that the Clan recipients were either vagabonds or paupers; but received this hospitality as a rule of social obligation. The chieftain was their servant, as the Gallic magistrate replied to Cæsar.

Our author, it is true, goes a little deeper than the mouth, and remarks that the Scotch clans, instead of Gothic primogeniture, preferred the mature uncle to the infant offspring, in succession; and this he calls "the rude devise of a rude people." He might see with the people from whom the Scotch derived it, that the custom was an election upon the principle of presumed merit; which has been the ideal government with the



philosophers of all ages, and is now the first distinction of the leading nation of civilization—in whose army the common soldier may achieve the marshal's staff, and the peasant's son, whom the State has educated, as at present, come to rule it sovereignly.

Mr. Maine might have learned something of the Clan system had he looked to Ireland. By the way, is it not curious that a "jurist and a scholar," in ransacking antiquity and earth for "archaic codes," should have overlooked the Irish Brehon Laws, at his elbow? Nor could it well be, that he dreaded to chafe the policy of the English government, which has itself just wasted thousands of pounds upon their publication. And of the authority of the great Anglo-Irish jurists who *traduced* them, he could doubt no more than of the governmental love of science and of Irish honour. However, the part of Mr. Maine would have been worthier, had he passed over wholly those Celtic Laws and Clans, in a silence which reflecting readers could easily appreciate.

The author is equally, and indeed consequentially, out at sea upon the great matter of lineage or pedigree; and not merely in its state of science, but even in its Roman rudiments. The lines with Mr. Maine, as in truth with all the codes and text books, are but the dual partition, named Agnatic and Cognatic. The terms are correct, because descended from the Romans; but the latter law remains unfathomed by either Romans or moderns. Even Blackstone, who pretended to special lore upon this subject, seems unable to distinguish cognation from consanguinity; which is however in its essence a veritable opposite. But this, I once more repeat, is no place to correct these secular errors. I will merely complete the series, and certify it by examples.

The foremost line called the Direct has of course been also noted by the Romans; but seemed so natural, that they have left it in mere description without designation; and thus misled posterity to take it for informal. The description was: *own heirs*, or *heredes sui*; and I shall therefore designate this primary lineage as the Suitic. The next was the Agnatic, and was most prominent with the Romans, who were a highly composite society, not one of families. The lineage called Cognatic is the third and scientific form, and accordingly received but tardily the sanction of the Roman law; and even then but pragmatically through the Prætors and the Emperors, and with a justice which, though substantial, remained without a gleam of science. I may add that, as the Suitic line is direct, so the Agnatic is collateral, a term also quite familiar; but even the mere geometry of the third department was unimagined. The noblest approach to it is in a passage of Cicero. But certain jurists also have described

it well by the name *Oblique*, which answers to the medium between the Direct and Collateral.

Now of these forms of descent respectively the Social types will be our test examples. The Suietic and Direct species is the lineage of the family epoch, which holds together by generation, or, so to speak, by Social *matter*. The Agnatic or Collateral, is that which moves by series, in which the terms are composed of centres of aggregation through the means of *space*. This is noted nicely by the very name, as with Suietic. The members are not born *of* the House, as they were of the parent; nor even *to* the parent, as is denoted by the word adoption—which was the expedient of the tottering Family, that led transitionally to the House. Here the members were born *to* the House—*ad-gnati*—and its despot master; and merely had from him the livery of his name, but nothing more. They were no longer *Mac*s nor as yet *Os*, as with the Irish Celts.

Supremely then came the Cognatic mediator of those extremes, which was enabled to round them both into social Union through *length of time*; and was the lineage of the Clan system, as of Nationality and of jural science. It is the regimen of “cousins,” which the English laugh at in the Welsh and Irish.

I may add, in allusion to the primary rule of the Mother, that as she thereby answers to the reign of the Family, and the Father on the other hand to that of the House; so the Clan, as the name says formally, is the rule of the *Children*.

VII. We are treated in the sixth essay to another of those early histories—*The Early History of Testamentary Succession*. But in this title, the writer comprises wills along with Testaments, though answering to different species and successive epochs of the subject. The Will, in form as well as name, is really modern and of Gothic origin; the Latin *voluntas* being very tardy, when used at all. The Testament had nothing to do with the willing faculty. It was defined so late as Ulpian, to be even in the testator, not at all the will itself, but a *just sentiment*, directed by it; *voluntatis nostræ justam sententiam*. And moreover its force or sanction was from the witnesses, as says the title. It was not the instrument, which at this epoch was not written; but the oral declaration before *witnesses*, that was named Testament.

To try and give the author's rambling some seizable coherence, these notes will take him first upon the nature of Testament, and then upon the Roman forms, and the Gothic afterwards in due succession. “A will or Testament,” says Mr. Maine, “is an instrument by which the devolution of an inheritance is prescribed.” He meant the *mode* of the devo-

lution, as the fact itself was of legal course; or else, the disposition to be made of the inheritance. But here too, as with the fact of devolution, there was no prescription. They were both of them effectually above the arbitrament of the Testator. The author further perpetrates a vicious circle by the word "inheritance," which is the thing itself whose definition was proposed; and therefore should be shown in substance, before passing to the accidents.

He perhaps tries instinctively to make escape from these blunders, by proceeding in the next place to define the inheritance. But unfortunately here again he commits gross ambiguity. The name inheritance denotes a species, to which succession is the genus; but that is not the author's meaning, as seems clear from the sequel. So, drawing out still the verbal catenation of feeble fallacy, he once more defines in turn the "Universal succession" to be a "succession to a *Universitas juris*, or University of rights and duties." Even this however is no definition, but an identical proposition; nor does the *universitas* admit of rights, but of duties solely. The whole heap, besides, revolves upon the term "Universal;" which should be modified to *Universatory* for this limited and special subject. The notion is so alien to the English law and its personal genius, that it has no designation or distinction in even the language.

We may thus describe inheritance as being, not "a form," but the form of the species of succession termed *Universatory*; and also add, that the ceremonial for its devolution is precisely Testament. For in the jural University, the testator can have no will; and by consequence no right, but only duties to the whole; and which duties he can devolve to the heirs but before witnesses. I say the *jural* university, for this is not the only species, though our author presents it as a curiosity in jurisprudence. He says in fact that any trace of it in modern laws must be of Roman origin. I do not like on this small occasion to open large innovations, as there can be neither space nor opportunity to support them. I must however here remark that the *Universatis* is threefold; to wit, of Law (*juris*), of Fact (*facti*), and of Law and Fact combined, which might be designated as *de jure*. The two latter are the *collegium* and the *societas* (company) of the Romans. I will further note that they are all, however variously and rudimentally, inherent in all bodies of Law, and not the Roman solely. And this may be explained by adding, that they respond respectively to what the English law itself calls the Realty, and the Personality, with, for the third stage, the *choses in action*, which would be likewise the Remedialty. So in conformity with this analogy, more accurate than elegant, we might English the *Universitas* by the form *Universalty*, and

then set off the species as Real, Personal, and Remedial. Thus much by way of preparation for Mr. Maine's exposition, which may provoke some comments to reflect a gleam of explanation.

Rambling still "about" the definition and "about it," he comes at last to describe the *Universitas juris*, as a "bundle of rights and duties, united by the single circumstance of their having belonged at one time to some one person." Good heavens, can this medley, and most the rest of this clever book, be English law, or English notions of general Law, in even the Universities? Why, this generic institution is, on the direct contrary, united, not by the circumstance (which would at all events be an odd tie), but by the negative condition, of having belonged, at no time whatever, to any one owner; and more especially one vested with the qualifications of Personality. Consequently it could also be no bundle of "rights;" nor even of duties in the rigorous sense. "I observe," quoth the author, "that not a few Continental jurists have much difficulty in comprehending the nature of the connexion between the conceptions blended in a Universal (Universatory) succession, and there is perhaps no topic in the philosophy of jurisprudence on which their speculations possess so little value." Here is a sublime sample of his usual verbose moderation, and a good one also of what the French call the English *à plomb*; very leaden assuredly in its self-complacency, as its intelligence.

It might, however, be first observed, that as the idea came to us from "the Continent," it is more normal to suspect that the fault lies with the insular jurists. The presumption was besides confirmed by a whole system of opinion. The difficulty of this *Universitas juris* and its fellows is no other than the mediæval problem of the Universals; and which even the ablest schoolmen of the Gothic race could never compass, but were driven to erect the counter sect of Nominalism—which responds but to the Universality of Fact, of Will, and of Personality. From logic and metaphysics, let us now advance to Law; and this will likewise show conformably that the islanders are still in fault.

Mr. Maine proceeds: "Much light is cast upon it by a *fiction* of our own system. English lawyers classify corporations as Aggregate and Sole; the former true, the other fictitious. The king or parson of the parish is a corporation Sole. Now" (he proceeds) "in the old Roman law the individual bore to the family precisely the same relation which, in the rationale of English jurisprudence, a corporation Sole bears to a corporation Aggregate. The derivation and association of ideas are exactly the same." As I have not the author's space for ceremonious language, he will excuse me for replying bluntly that this is absurd and preposterous.

In the first place he omits to explain that the English term corporation is itself an effort to express the Gothic notion of the *Universitas*; and that it does so but by amassing its mystic texture into brute matter—having as the maxim tells us no “soul,” that is no system. Then to mend this crude excess, there was need to qualify it by the term “aggregate.” So this in turn provoked the counter term “Sole” for the part of Personalty; of which the tie is, not “the series of kings or persons,” but the Name or title. Mr. Maine must know that the word *Nomen* stood for debts and personalty in the Roman law; and it did so because the ownership was specific to the House community. In fact, the *Universitas* in the three species above noted, might be also designated as, in order, Aggregate, Segregate, and Congregate; which the student may work out by aid of previous indications. Thus of both the corporations even in themselves, the account is sorry. But when the author compares them with the Roman family and its individuals—since he must by the latter term mean a member of the family—he does no less than confound contraries, and travesty the whole subject.

No doubt the primitive purview of the Roman law itself co-operated with the English personality to perplex him. It presented the entire succession in a huddled state of generality. Duly opened into the species, the succession would be, in order: Testament, Legation or Will, and Administration; or Abintestation, as the Romans named this last stage privately. In Rome accordingly, the Testament was so dominantly primary as to impose the general name, and retain its fellows as a sort of adjuncts. But this was mended by the outline of them in its primitive subdivision; which however remains unnoted to this day by codes or jurists. The forms of Testament were for times of Peace, of War, and of residual Casualties; and they were said to be made respectively *Comitiis calatis*, in *Procinctu*, and *Per as et libram*. The first or Testament proper was thus made before a public meeting, convened expressly twice a year, and for people on the grave's verge. The second was for soldiers on their departure for war, and was the germ of the Legatory and personal form of the succession. It took accordingly the name of *Nuncupative*, still familiar to the lawyers, but of which the correct import is, I think, now noted for the first time. What is this? The word itself will answer, which means to occupy or take by Names; being the mode of seizing Personalty, as the *manu-capere* was for Realty. The third form, or *Per as et libram* was our usual medium for combination; and applied to people not either moribund, nor in life's vigour but going to war: it was intended for more prudent persons, who would forestall accident or disease; and who had also perhaps larger fortunes

which they wished to regulate with more precaution. This they did by the simple means of a fictitious sale, to avoid the umbrage of their deviation from the legal form of the Testament; the *æs et libram*, or scales and price, being the rude symbols of the transaction. But palpably again, this form with its regularity, method, measure, was the unconscious germ of the Abintestate and supreme succession; and like it most characteristically in being made by *anticipation*.

We are now prepared to *measure* Mr. Maine upon the whole subject. In fact, he huddles all under the duplicate name "Will or Testament." "Wills," he tells us, "were first executed in the *Comitia calata*, THAT IS, COMITIA CURIATA, or Parliament of the Patrician burghers of Rome, when assembled on private business." The inevitable Parliament everywhere and always! It is however the smallest item of the crudities of this opening. The *Comitia calata* was no parliament, but a mere meeting; nor of the patrician burghers (which beside would be social centaurs), but of the mass of the citizens without distinction; nor consequently was it "when assembled for private business" (which would again be rather oddly managed by a public body); but expressly called *ad hoc*, as the very name distinguishes. *Calata* was old Latin, from the Greek *καλεω*, to call. The assembly was thus a *called* one, in distinction from the stated meetings, or exactly what would now be described a "special meeting." And what evinces all this, with the composition too of the meeting, is that the call was made, we are told, by horn—*per cornificem*. A magistrate, not a horn-blower, convoked the assemblies of the Patricians; before which bodies manumissions and the like matters were effected. A fact that possibly led Mr. Maine or his authorities into this jumble.

Amid the chaos, however, he discovers the "key" to the Abintestate or supreme succession, which he transposes to the primitive end; in spite of its refined structure and the express import of the very title. Of the Military testament, he says nothing as a distinct form; or rather, has no notion of a grade or series in the subject. The import of its Nuncupative character he sees still less; as will appear immediately by a scandalous example. His whole wonder is engrossed by the raw materials of the *æs et libram*, which as savouring of the shop must, he knew, be relished by his London readers. He cites the mysteries in detail, as the *Libripens*, the *Emptor familiæ*, the *Æs et libra*, and finally the *Nuncupatio*. But is it that this also was a Nuncupative form of Testament? The writer does not seem to mean it; but he explains the term here as "the testator's ratification or publication of the transaction." This is widely different from the naming of the heir *orally* and aloud to the witnesses, which marked the Nuncupative will or testa-

ment; but our author did not see enough of either form to explain the difference.

The Testament *per æs et libram* must, I noted, as the supreme species, combine something of both the extremes, I mean the Military and the Public forms. The distinctions of these respectively were to be *public* and *nuncupative*. But here we have the final formula the *æs et libra*, called *Nuncupation*, interpreted by Mr. Maine to import "publication" and ratification. What is then the deeper element which reconciles these two meanings? It was premised when I noted that the term Nuncupation, or the seizin of things by *Name* or tongue, instead of *hand*, was typical of all Personalty, as the Manu-caption was of Realty: and so in a transaction like this Testament *per æs et libram*, which, though fictitious, was a formal sale, and thus an affair of pure Personalty, the conclusion would be most aptly described as a Nuncupation. For this reason, it was also not a "Plebeian will," as our author styles it; but was palpably, in structure, in rank, and contrivance, the form adapted to a class much nearer to the "Patrician burghers," whom, with a counter impropriety, he conceived the makers of the primitive Testament. Another of his crotchets is to imagine that it was these burghers, that drove the equally fantastic Plebeians to the invention of the supreme Testament. But there would be no end to his divagations on the question.

Among all those "archaic" details revealed by him from Gaius, there is however one singular and most important omission. Yet it was what prompted his discovery, that the Intestate form was the primordial. "We know," says he, "the name that was given to the Successor before that of heir." But strangely he omits to mention his master curiosity, and moreover the alleged foundation of his own discovery. Was it that he really did not understand, and could not utilize it? At all events, the name recorded by Gaius was *Ante-status*. But what did this mean? Why, simply what it says, as now explained, if we analyze it. There is a natural crasis, the word in full being *ante-testatus*; or the testator who made his will by *anticipation*, or before the time. Now this, we saw, was but the testator of the third species, or *Per æs et libram*; from whom the inheritance had passed outright; not upon death, as in the previous forms. And moreover the name was given to the *testator* of this third class, not to the *heir* in the first, as our author found mysteriously.\*

\* Since writing, I refreshed my memory by reference to Gaius, and find the word has remained to us but by extract in a Gothic code, and the compiler of which might mislead both himself and Mr. Maine. But my correction and explanation would be, for this, no less important, and may compensate the failure of our author's discovery.

I cannot touch his echoed notions on the passage of the Twelve tables, supposed cardinal upon the question, beyond

The edition which I found at hand was that of Professor Poste, of Oxford, who mentions the term *antestatus* with like reserve. His whole account of it, according to the Index, is merely this: "The epitomator of Gaius in the code of Alaric mentions as present at an emancipation, besides the five witnesses and *libripens*, a seventh person, whom he calls *antestatus*, who is not elsewhere noticed."

Thus the Oxford jurisconsult seems no wiser than his Cambridge compeer. Indeed, he seems a still greater curiosity of jural lore, if I may judge from a cursory glance through his volume. For example, the foremost class of the Roman contracts, called in *Re*, he translates and expounds by the phrase, "*created by performance*"! The common notion is that all contracts are, on the very contrary, annihilated or discharged, not created, by performance. But moreover, in the special case, the title in *Re* means, as must be known to schoolboys, contracts Real, or based on subjects physical; but which our learned Professor takes for meaning matter of fact or effect! Surely this must speak a folio of our editor of Gaius, and of the country and the University where he professes jurisprudence.

Again, notwithstanding his reserve upon our *Antestatus*, I fell upon a passage at the close of the volume, in the shape of a fragment (of course copied from an erudite German), presenting an inscription that has been found upon a tablet, recently it seems discovered in some part of Spain; and consisting of a mortgage form of some advertising usurer, who would be strict to technicalities, and has amongst them the *antestatus*. How Mr. Poste should not have grasped at this, if but to supplement his former silence, will seem strange to those who do not know the *prudence* of our British bookmakers. Even Mr. Maine, while making a discovery on the subject, does not so much as mention this name, we saw, at all.

The opening lines of the inscription are these. After stating the subject mortgaged, and the sum to be advanced, the passage proceeds: *Fidei fiduciæ causa mancipio accepit ab L. Baiano (the mortgager), libripende, antestato*. These two last words, which are obviously descriptive of Baianus, the learned Professor translates as thus: "In the presence of A B as balance-holder, and C D as *antestatus*." But where did he find the Latin for "presence," or for those initials? Why, it is one of the Vandal "restorations" of his German sources. For when an Englishman or an American can cite an angularly Gothic name, as in this instance that of *Kreueger*, he feels that no one will dare breathe dissent. The honest German "restored," as usual with him, on the ground of some profound crotchet, derived from nothing more substantial than the depths of his moral consciousness; and which was probably in this case what Mr. Maine too obtained from him—to wit, that the *antestatus* was the ancient name for *heir*.

But may not the Professor have intended the initials to indicate the witnesses to the transaction? Not at all, for the tablet immediately proceeds: *Adfines fundo dixit L. Baianus, L. Titium et C. Seium, et populum, et si quos dicere oportet*. Here were the witnesses in all technical varieties—the substantial neighbours to the estate, the common people around it, and any particular individuals whom it might be desired to question. But how, again, does the Professor even translate this simple passage? Here it is: "*As abutting on the estate, the mortgager, named L. Titius, le Seius, the public highway, and whoever else were proper to be named.*" Thus Titius and Seius "*abutted*," like a bridge, upon the estate. The public highway (*populum*) was also



a caution to the student. The phrase is familiar enough to the lawyers—by citation: *Uti Paterfamilias de PECUNIA TUTELAVE rei suæ legassit; ita jus esto*. This seems construed universally as according to the testator an absolute power of disposing of his whole possessions. "It indicates," says our author, "that what passes from the testator to the heir was the Family; that is, the aggregate of rights and duties contained in the *Patria potestas*," &c. It indicates, as it expresses, nothing of the kind. Was not this, beside, what passed by the long anterior Testament? and why then reassert it at all in the Tables? or how should mere reassertion have wrought the changes known from history?

The correct cause of the change and turmoil has been above suggested, in the epochal nascence of the second species of Succession; and which had been, I said, foreshadowed in the Military type of Testament. This accordingly is literally what is expressed by the passage. The *tutelage* of his family, or rather his substance as the term here is, and not the family itself, which is not even at all mentioned, is simply that which devolved by the old Testament of the Comitia; and so, though far the most important part, is ranked posteriorly, as for mere memory. The *pecunia* or Personalty is ranged the foremost as the special purport; and is now set apart for absolute disposition, not mere tutelage. The tutelage too, moreover, is an object of Personalty.\* As thus an aggregate and bearing some analogy to the State, the voluntary disposition seemed a sort of personal *legislation*; whence the *legassit* to describe the Act, and the name of Legacy for the Succession. *Quod LEGIS MODO, testamento relinquatur*, says Ulpian.

VIII. The two succeeding chapters deal respectively with the like origins of what the author designates by the names Property and Contracts. They are subjects, it is seen, which would

named; and, in short, everybody else "who were proper to be named." Although what they were all named for, moreover, does not appear. And this is but a fair sample of this version of Gaius, from the University of Oxford, and its "Clarendon Press."

But how consorts the general results with my own alleged discovery. Why, that the *libripens* and *antestatus* were both descriptive of the mortgager; the one in quality of weighmaster of the price he was receiving, and the other as owner of the farm he was conveying, and thus the analogue of the primitive testator, who made his will *before the time*. Even the passage on the subject in Justinian's *Institutes* is quite in consonance. It describes it as an affair in which *imaginarium quandam venditionem agebatur, quinque testibus, et libripende, . . . et eo qui famula emptor decebatur*. If this *emptor*, as the heir, could have been meant by the *antestatus*, Justinian must have given him in this conjuncture the proper title. But if he does not at all mention it, it is because the party had been already named by the appellation of *libripens*, which was the quality distinctive of him as the vendor of the family.

demand each an entire article; and more especially, as the treatment here has scarce a sentence that I can approve. In this plight, I will confine myself to throwing out some generalities, which may now serve the studious reader to criticise them for himself.

With Mr. Maine, as with his Law and Countrymen, Property is made a genus, although we chance to have in this case the excellent term *Ownership*; and at the same time, it is made, moreover, its own sub-species of the supreme form! In short, it is the all in all, as was but normal with a Personal race. For property is the second or personal sort of ownership; while dominion is the highest, and possession is the first or lowest. This last is consequently almost ignored or absorbed by the Feudal system; while the dominion also has been effectually usurped by it. Of the effects of these monstrosities on Mr. Maine, take a few examples.

Thus, he cannot, he owns, conceive how prime-occupancy should give title. How natural! This is the title of the Past and of Possession; and Mr. Maine's race and purview are of the Present and of Property. Its prerequisite he mistakes for the *res nullius* of the Roman law; and which locution he moreover misapprehends as utterly. The *Res nullius* did not denote merely a thing belonging to no one, which was equally the predicament of *Res communes* and *Res sacrae*; but what was fit to have an owner, and was not actually occupied. Then again, we have the occupancy jumbled with capture, the *jus gentium* in general, and the practices thereto appurtenant; but which are all too nauseous for any serious notice. One of them alone may be of value in this place.

The author carries the confusion to taking occupancy for *discovery*, and thereupon descants upon conquest and colonization. But the fact is that "discovery" is the normal contrary of the prime-occupancy. It goes actively to find or to explore things by human labour; not accepts them passively from nature, as do Prime-occupancy and possession. It is thus the source and title of property, trade, commerce; and may rightfully extort them from the occupants of all countries. But so, to make it a warrant also for conquest and occupancy, were a patent absurdity or contradiction in the very terms. We may now conceive, however, how Mr. Maine adopts the notion, and believes with his race that all ownership is gained through space. The Scandinavian branch, like ducklings, with the shell of savagedom still upon them, roved throughout the seas of Europe, as they expressed it, to "gather property." The English, at the summit of their civilization, can acquire even science or knowledge but through the flurry of itinerant congresses. They would be prouder of the leg discovery of the source of the Nile, or of the altar stone of Solomon's Temple,

than they were of Newton's gravitation—which, however, by the way, was too a conquest through space. The monied “tramps” of Britain and America who traverse Europe, instead of studying the institutions or manners of the inhabitants, can only “speculate” on routes of travel, corner lots and commercial depots. And in short, the name *tramp* itself, as well as merchant (*marchant*) means the traveller.

It is no marvel, therefore, that this go-ahead title of discovery should have usurped, with Mr. Maine, the parts of occupancy and possession. He must, however, as a “University man,” have heard of Aristotle's categories. One of these, called *Ubi* or Whereness, declares the Universal principle, that all the objects in nature, men included, have their special places; and must be *presumed* to have those they actually are found to occupy, from nature. Well, this simple and sound presumption is the right of occupancy in jurisprudence.

As to the cognate possession, Mr. Maine never mentions it, except to cite us what he calls the “Aphorisms” of Savigny and Niebuhr. For even these worthies were, as Gothic, unable to conceive, how possession came to be the dominant ownership of Roman law. Niebuhr was not a jurist, and his account of it was a mare's nest. As to Savigny (though of French extraction), I know of no sadder spectacle of mental labour and erudition than his famous book upon Possession. I will therefore merely note of it, that of some eighty writers, whom (*more Gothico*) he catalogues as the authorities for his doctrines, there is not a single Englishman, or writer in the English language; while the four or five principal treatises are French and Spanish.

Now for some examples on the subject of *Contracts*.

IX. Mr. Maine, it should be premised, has made, upon this subject, what appears to me at least, to be a sort of discovery; although he modestly declares the great truth to be long both “popular and professional,” to wit, that a “*Contract* is an incomplete *Conveyance*.” I confess I never heard of it, but am not “posted” fully in the books. I thought those two fields of Law to be even as opposite as the poles. Conveyance has to do with ownership, and its phase of alienation; while Contract, on the contrary, deals with engagement or obligation. In short, the contrast is stamped upon the very terms; as the former imports drawing *away from*, the latter drawing *together*; the Conveyance, the movement Real, and the Contract, a movement Personal.

Thus Mr. Maine himself speaks of testament as a conveyance; and he may, for aught I recollect, have called it also a contract. I cautioned at the outset, that his technicalities were not exquisite. In subject matters new and abstruse

it is scarce possible to be so, however learned might be the writer or large his means of consultation. The bulk of what is uttered publicly by politicians, lawyers, *savants*, is made enduring but by the still deeper ignorance of their audience. A man may perorate indefinitely upon "Social science" or jurisprudence, who could not talk two minutes on an exact science without exciting laughter. I would therefore feel indulgent to Mr. Maine's laxity; as precise language in these foreign Laws can come but of long study or of large science. But when he goes so far as to intervert those planes of law, and describe Contract as an imperfect conveyance, there is no mercy. For so far as at all related, the case is palpably the reverse, and it is Conveyance, as anterior and lower, that is the imperfect Contract.

Then the Contracts, our author sets *per contra* in opposition, like the scales of a balance to "imperative law." As if there could be any law more "imperative" than legal Contract. The gain of this upon legislation is to him a mark of progress, not alone in jurisprudence, but also in morality. His best of proof is what he calls the "science" of political economy; and which he makes in turn a "branch of moral enquiry." Now political economy is again the contrary of morality. It is an art or empiricism based on personal utility; whereas morality is based on justice, and reflects the natural law in humanity. This is why morality is not progressive, as some writers complain; and the author would correct them by the "march of the law of Contracts." Morality is a thing of attributes, which may be improved, not augmented; not of ideas or of entities, which may be multiplied by science and nature.

This rivalry imagined between Contract and the Statute law is, once more, it will be understood, the author's Gothic purview. He describes it as the "march of political economy in the way of enlarging the province of Contract and curtailing that of imperative law, except so far as law is necessary to enforce the performance of Contracts." But how far is that? Is not the law to be deemed present with the Contract of the parties, except when there is need of taking one of them by the jole? Even the personal policeman, does he not exist "on duty," save when there is occasion to call him "to take in charge"? Thus Mr. Maine conceives the Contracts as running off from the law; or like the ancient dithyrambics of the poet, *legibus soluti*. And so *è contra* with Parliament, which lumbers after the fugitives, endeavouring to catch them by the lasso of its Private Bills; instead of using the reasoning faculty, which would be sure to circumvent them.

So intensely ethnical is this whole purview, that it has just been plied upon the vastest scale conceivable, by the two branches of our Anglo-Saxons. This dominance of Contract

law has had its climax in the Washington treaty; which is in truth a mere bargain, and scarce a Contract, not to say a treaty. A Contract is a pact whose tie conforms to the civil law; and a treaty is one whose *nexus* rests upon the International. But the concoction at Washington, by the choice pundits of these two big empires, and canvassed now for months or years back with the jural science of special attorneys, disclaims openly the least dependence upon either of those Laws. The simplest proof is to remind, that in the closing pleadings at the Conference, when it appears the English counsel attempted to enlarge the area, they were recalled to the tether, and reminded that the tribunal, which was itself a mere creation of the Washington pact, had moreover to do but with the law prescribed to them in its three Rules. Thus the parties both confessed that the law and the tribunal were mere and hired creations of their own for this conjuncture; and yet they fancied themselves opening a new era in the Law of Nations!

For it is hard to think of this affair with an honest Englishman, who described it to me as a "trade tussle between two Houndsditch Jews." I did not know what variety of Jew the epithet may designate. But knowing something of the genus, I was inclined to assent, at least so far as intellect or general knowledge went, if not morality. However, I should rather liken them to Virgil's Arcadians: *Et CANT—are pares et respondere parati*. And the award of the quasi-court might also remind one of that of "Neighbour Palæmon," in another of the Eclogues; who begins by declining jurisdiction of the merits, and ends with deciding for both parties, and all others:

Non nostrum inter vos tantas componere lites:  
Et vitulâ tu dignus es, et hic, et quisquis errores  
Aut revocat *dulces*, aut experietur *avaros*.

I laboured long, with my obscure means, to divert this grand occasion from a paltry money scramble to the real advancement of the Law of Nations. But to try to give the Gothic intellect—and perhaps more especially in its American variety—a correct notion of this Social Law, is like lecturing a Chinese on the mysteries of the Trinity. However, though the *Times* once more assures us that all is settled, the *Alabama* question may be heard of again; and at all events the business here with it was to supply a signal instance of the origin and tendency of our author's theory of Contract.

Now, a word upon his notion of the practice in the Roman law. This practice, although ill developed, had its usual rudimental rectitude. It parted all Contracts into four classes, called the Real, the Verbal, the Literal, and the Consensual. But the two intermediate terms are mere sub-

forms of a single member, to which they are but instruments, and which should be called Personal. And if the third be termed Social, as the Romans themselves described it, the terminology and series will be faultless and complete.

Mr. Maine has naturally seen but little of all this. He gives the verbal or foremost of the Personal sub-forms, which the Romans named Stipulation, the primordality of all the Contracts. "There can be no doubt," says he, "that the Verbal contract was the most ancient of the Four classes." This seems one of the most striking triumphs of the personal purview over plain reflexion. The slightest thought should have suggested, that the reliance of savages upon a verbal promise must be of slow and late development. An Englishman, though civilized, should recall his own Statute of Frauds. These reflexions would be confirmed by the formula of the Roman law, which was, by question and answer, beginning crosswise with the promisee; and also by the larger labour which Justinian's Institutes gave still to fixing it. For to suppose that this could have preceded the Real class—such as deposit, barter, and loan, which deal with things, would imply utter thoughtlessness, on any other than the theory mentioned. In point of fact, too, the Contracts called Real arose in the Family epoch, when kindred and affection were the guarantees of faith. But with the rise of the Personal races and their House communities and civil compacts, of course the members must seek cohesion by means of Words—with stones to back them. It is our author's "moral progress by political economy."

He is equally at large on the Consensual or Social contracts. He accepts, indeed, the Roman tradition that they were the latest, and also had their origin from the *jus gentium*. But having hooked them on this crane, he swings them back to the Natural law! The derivation of this class of Contracts, as supreme or social, from the *jus gentium*, was an illusion precisely similar to that I have rectified in case of Equity. From their local supremacy in the bulk of cultivated States, they came, like Equity, in contact with the common law of those States, the *jus gentium*. But so far were they from being *derived* from it, that the procession must seem just the contrary. And so the author fancies that they threw off all the formulas, which had encumbered the extreme classes, except the mere consent; and this by an act of reason and an effect of progress! He does not observe that the enormously more complex nature of the Social contracts is compensated for those formulas by a network of rational circumstances, which reverse the guarantee, and leave the consent but a mere exponent. And thence the importance of the substitution which I propose, in the name of Social.

But Mr. Maine has much excuse in the English state of this branch of law; which for the very reason of the predominance that he exults in, as a sort of personal self-legislation, transcends proportionably in disorder. On looking lately to our classic Chitty, for the first time since my days of "practice," the image which the book obtruded on me was the savage husbandry of the American Indians, or a devious scraping of the soil with the charred end of a tree-branch. And even Jones, who knew something of the Roman law, is not much better.

X. Mr. Maine, in his closing essay, treats the antiquities of *Crime and Delict*. It is at once the most important and intricate of all his topics. But for those reasons, and that I really feel quite tired of constant fault-finding, with slight admixture of approval, I must be brief upon this subject. I am glad, however, to begin at last with a decent pretext for commendation; for Mr. Maine is, after all, a writer of respectability; if not for learning or ability, at least for honesty and aspiration.

The view alluded to relates to the wehr-gild tariffs of the Barbarians. After laying down dogmatically the preposterous position that "the more archaic the code, the fuller and the minuter is its penal legislation,"—a position founded evidently, like the rest, upon the Gothic type—he proceeds in a page or two to qualify as thus: "I have spoken of primitive jurisprudence as giving to Criminal law a priority unknown in a later age. The expression has been for *convenience*' sake (!); but in fact the inspection of ancient codes shows that the law which they exhibit in unusual quantities is not true criminal law." This is in the main true, and as far as I have observed, new; but what this law then is, the writer tells us but very clumsily. The term "criminal law" itself he does not define, any more indeed than any other term in his book. It is another of the myriad contrasts between the English and the Roman race. The ages which gave Aquinas the title of The Definer, did but commemorate the Roman faculty, which gave its glory to the jurisprudence; while the English law has not, indigenously, perhaps one correct definition.

Excusing Mr. Maine, then, for not defining here or elsewhere, I must say for him that by Criminal law he means offences against the State; as opposed to "torts or wrongs," which complete his division. Now it is, he says, these wrongs that form the ground of the Barbarian tariffs; and thus invade the place which should be left to the civil law. This is true, I repeat, to a certain extent; but the entire truth would be somewhat as follows:—"The Barbarians, like their civilized issue, could regard things but through the Persons; and so must tend to amerse all sorts of detriment in ready money.

They live to the day, and each one for himself ; and could not leave their feuds to families in which each member must feel likewise. Their own body, limbs, nay life were computed nicely as things of price." For example, one would now think that the fore teeth and the grinders should be rated on a par, in case of damage done to either. But Blackstone tells us learnedly, that the former solely incurred a fine ; and for the reason that they were useful for biting in battle.

It reminds me of the maladroitness of a canny sychophant, Dr. Knox. Provoke an Englishman, says he in his Lectures, and he meets you with the bare fists ; whereas the Frenchman would fly to the sword or other weapon. And in fact, until some years ago, "the manly science of self-defence" remained among the national prerogatives of Britain. The Doctor's inference, which he leaves to a sympathetic public, was of course that the Frenchman is of a lower race. Yet no doubt this British servant would rank the monkey above the bear ; and because the first of animals to wield a weapon—a shillelah. The Saxon kept to the paw or claw, and it seems could fall back to the teeth ; like the bull-dog, which is his favourite emblem to this day.

On the other hand, the Gothic peoples paid no regard to the Criminal branch ; in Mr. Maine's sense of it as reserved to the State. Even their Kings, when they came to work it, did but mimic the Roman emperors, and put the fines, which were their fiscality, into their personal pockets. Mr. Maine still astonishes one by his innocent unconsciousness of the necessity of this late emergence of the notion of public law. "It is not," says he, "to be supposed that a conception so simple and elementary as wrong done to the State was wanting in any primitive society !" Thus he is full both of the Gothic principle, that the State is a simple person, and of the puerile postulate, that it was known—which was just the question. And this, moreover, is written by a Law professor of a country, which to this day can so imperfectly conceive of injuries to the State, as distinct from those affecting its personal and feudal sovereign, as to have left the latter both judge and prosecutor in his own courts ; while the real public have not an officer to even protect them against either !

Mr. Maine then expatiates upon the Roman Criminal Law ; but the space does not remain to me to even caution against his crudities. Thus he begins with announcing that it has "two singularities ;" "the multiplicity of the Roman criminal tribunals, and the capricious and anomalous classification of the crimes." The *Questiones*, which he does not understand, were not tribunals ; but Commissions of both exploration and execution in each class of crime ; thus supplying the double functions of our Grand Juries and Criminal Courts, and



thereby in a measure, also, what we lack, a public prosecutor.

Then, as to the anomaly of the classification, let us see: "Those crimes," the author says, "were classed together in the original statutes, because they happened to call for castigation at the moment of passing it." This again is Parliamentary legislation, not the Roman. The writer overlooks that the matter of those statutes had been gathered for ages before the final consolidation—made by the Dictator Sylla, and by the Emperor Augustus. But let me take the single instance which he ventures to adduce. It is the *Lex Cornelia de Sicariis*. This, he tells us, "classes perjury with cutting and wounding, and poisoning." As the author could not mean to be disingenuous in so grave a subject, he must resign himself to the alternative of being thought absolutely ignorant. The cutting and wounding were mere and natural incidents of the use of the chief instrument exhibited in the title; and were of course controlled by the object of the assault. Then there was no "perjury" at all in the case. There was only false testimony on a *capital* charge, and thus a *covert* attack upon the life of the accused. For the Roman Law was not administered by spies, policemen, and hireling judges.

In fact, this treachery was just the principle of the classification; the perjury being wholly alien to it, as a lawyer should have seen easily. And this circumstance accordingly will give the key to the class. It is known that the ordinance—for such the present, and all the others, really were, and not mere statutes—was directed against homicide. But why, then, not have given it this title, as *De Homicidiis*? Because the Romans classified rather differently from the English. There were a multitude of sorts of Homicide—excusable, justifiable, by accident, in self-defence, in discharge of public duty—which in that case must have been drawn out into a train of exceptions, and fixed by a logomachy of details and draughtsmanship; thus perplexing the Profession as well as the public, and frittering away the force and the authority of the main law. The Romans therefore, through their ethnical faculty of generality, joined, with the Personal subject, the Real or physical instrument; and even sometimes the *modality*, which is of all the most comprehensive. The sort of Homicide in question they characterized precisely by the weapon or weapons used; and these moreover by the *mode* of using them. The dagger was the typic weapon, as always national to the Romans, from the homicide of Remus down to those of Cæsar and of Count Rossi. But moreover it had the *lurking* characteristic, which marks the *mode*, and which connects it with the poisoning, the false swearing, and a score of other things. But this is not like English draughtsmanship,

and so our author could see nothing of it. And so, *Ex uno disce omnes*; and a kind adieu to Mr. Maine.

XI. In conclusion, the wonder is not that there is so much uncouth error (if I am at all right) in the work of Mr. Maine; and I have been unable to adduce a tithe of the portion noted; the real marvel seems to be that all this crudity should have for years back lain conspicuously and authoritatively before the British empire, throughout capital and country, and colonies, as in America, and should have reached a new edition without a syllable of reprehension. I defy language and evidence to say or show more thoroughly, the state of jurisprudence and its profession in the English language.

It was to make this exhibition that I chose the book of most distinction, with the hope of setting the English Bar to reflect broadly on their real condition; not for correction of the errors, which, however useful, was of minor consequence. For the most important knowledge to be given to an earnest people, is to show them their deficiencies, and try to set themselves to mend them. The greatest obstacle to all reform is that people do not comprehend their want of it; that they consider what exists to be naturally "all right," or at the least to "work well," until it ripens into some catastrophe. The observation could be made some twenty centuries ago by Cicero. "The vulgar" (says he, that is the ignorant of whatsoever class or calling), "the vulgar cannot see the abstract defalcations from perfection; and then so far as they do see, they think that nothing could be better." *Vulgus quod absit à perfecto ferè non intelligit; quatenus autem intelligit, nihil putant prætermissum.*

Having taken thus the liberty of submitting this unflattering knowledge, I cannot do much worse by drawing the consequences for amendment. The remedies might be reduced to three main requisites, which are: *Legal education, Honesty in law reform, and Honour as the animating principle of the Profession.* The Legal education is now in good, or at least potent, hands. It was first moved by the new Lord Chancellor, and he can now control its fate. So nothing need be said of it, until he has a fair trial; except to hint to him that he forms our passage to the dishonest law reformers.

But can I mean that the law reformers, not alone of the present Parliament, but also of the whole country since Bacon's day, have been all dishonest? That, undoubtedly, is my meaning; but let me define. By dishonesty in the premises, I mean the act of undertaking or of even encouraging great and costly public enterprises, which the parties have themselves the consciousness of lacking knowledge and skill to execute. If any one denies this consciousness, let him refer me to plan or report; and if I cannot evince that state of mind

from even their own words, I will be found quite ready to retract the imputation.

There are however various shades of it which are reflections from the main dishonesty ; such as the practice of a class in Parliament, who feeling likewise their own ignorance, take the course of denying that the reforms are at all needed, and of flattering the country on its misfortunes and deformities. Others protest that they would reform, but the people do not urge it ; and without this the Parliament and Government can do nothing. These are men who should be hooted in a legislative body presuming to conduct the government or legislation of a vast empire. A code of law, or even a digest, never has been, and never can be produced by urgency of a people or by execution of a Parliament. It is exclusively the part of Government ; of statesmen with their jurists ; subject after, if we will, to the acceptance of the country. And then, in fine, if the English people do not keep clamouring for a code, it is not merely that they share the state of their representatives upon the subject, but more especially that they are weary of seeing and paying for the comedy ; and have, besides this long experience, a sympathetic instinct of the mental resources of the country for the task. Indeed they seem to have resigned themselves to the prevailing commercial comity, which enjoins those reformers, in plucking the public goose, to pull directly at the feathers, without interfering with each other's fingers.

J. O'CONNELL.

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## V.—THE LATE MR. JUSTICE WILLES.

NO event in our time has caused so great a shock throughout the profession as the death of Mr. Justice Willes. Those who are familiar with the late Mr. Foss's "Judges of England," will recollect a few parallel instances; but since the death of Sir James Hales, a judge of the Common Pleas, early in the reign of Mary, who drowned himself in a river near Canterbury, we cannot recall at this moment a similar case in the long array of common law judges during more than three centuries. A suspicion had existed in the minds of many who had carefully observed the appearance and demeanour of Mr. Justice Willes during the last few years, that his brain had been overworked. It was obvious enough to all that his health was not vigorous, and that he was not a man of strong nerves; but whatever results might be feared, it was scarcely possible to anticipate that which has occurred. All the peculiar excellences which belonged to him, his breadth, force, and subtlety of mind, and his readiness in applying his varied and most extensive learning, were as conspicuous as ever. It was only natural to suppose that his retirement from the Bench, which was understood to be likely to take place in a short time, would permit him to recruit his health, and that he would thenceforward be enabled to render invaluable service to the country as an appellate judge and as a reformer of the law. *Dius aliter visum*, we may truly say, notwithstanding the nature of his end; but although reflection may enable us to contemplate his death without reference to the form in which it came, it is impossible not to feel the deepest regret at the great loss which the profession and the country have sustained.

Nor was the shock which the death of Mr. Justice Willes caused confined to the legal profession. A man who occupies the Common Law Bench for seventeen years becomes a conspicuous figure in this country; and when he is one who is eminently esteemed and respected, it is not to be wondered at that his death occurring under the most melancholy circumstances should powerfully affect the public mind. Throughout society, judging from what was heard in private circles, and from what appeared in the public press, the sad event was for

the time uppermost in the minds of men, and the unvarying sentiment expressed was that of deep regret for the public loss, and of pity for the fate of one whose honourable and distinguished career had ended in so sad a manner. Among the private friends of the deceased judge, the most profound sorrow was caused when the appalling news reached them, and that sorrow, though it may become less poignant as time passes on, is never likely to become extinct in the minds of any who were on terms of intimacy with the late Mr. Justice Willes. No man had a more attached circle of friends, and those who knew him best esteemed him most. They may well say of him, as Lord Brougham said of Sir Samuel Romilly, when he described him as "one whose premature end gave the first and only pang that had ever come from him."

Our recollection of Mr. Justice Willes extends to within a very few years of the time when he was called to the Bar. His position as one of the most able juniors was then established in Westminster Hall, and stories of his marvellous industry were current among law students. It was reported, we remember, among other instances of his unsparing labour, that he had committed to memory all the practical forms of writs occurring and used in common law proceedings. The common opinion was, that since the death of Mr. John W. Smith, Mr. Willes had a greater knowledge of case law than any man at the Bar; and it was said that he had read all the reports, from the first of the year books to the last number of Meeson and Welsby. Rumours were afloat of his spending the long vacation in mastering the languages and laws of foreign countries. There was but little or no exaggeration in this. It may be well questioned whether there was a more hard-working man at the Bar than Mr. Willes during the whole period of his practice. The cases in which he was engaged were generally such as required the closest attention and study; and when he came into court it was easy to see that the learning which his argument displayed was, as Gibbon said of the virtue of the Emperor Marcus Aurelius, "The well-earned harvest of many a learned conference, of many a patient lecture, and many a midnight lucubration." To the labour bestowed on the important cases in which his practice chiefly lay was added an immense amount of legal and general reading—and reading with him, whatever the subject might be, always implied the fullest activity of the mind. Whatever he did, he did thoroughly, and he never ceased from working. It was the same with him during all the years he was on the Bench. This propensity was no doubt the fatal cause of all that physical and mental disorganization which ended so sadly. Even when he returned from his last assize at Liverpool,

broken down by the labours he had undergone, seeking sleep and finding none, and depressed in mind no less than in body, it appears that he employed his time in reading German. He was one of those men who cannot allow their minds to lie fallow for a season. We are by no means inclined to consider this as a characteristic of the highest order of minds, and are rather disposed to ascribe it to some physical defect. Not to go beyond the profession of the law, Lord Brougham was a striking instance of the same tendency. In his case, clearly, if the work had been less the produce might have been more valuable, and the half might have proved more than the whole. But thanks to his strong northern constitution, he was able to struggle on to the very verge of fourscore years and ten, without much greater detriment to health than might have taken place under a more prudent mental regimen. With Mr. Justice Willes the physical system was too weak for the strain it had to bear, and hence the sad catastrophe which the profession and the public alike lament.

So much for the end of this able and excellent man, and the causes which led to that end. We now proceed to give a sketch of his life, and an estimate of his character as a lawyer and a judge. For our principal information respecting the facts of his history, we are indebted to an obituary memoir by a friend of the deceased, which appeared in the *Solicitors' Journal*, of October 12.

The Right Hon. Sir James Shaw Willes was born at Cork, in 1814, and was descended from an English family, who had for some generations been settled in Ireland. His father was a physician, and enjoyed an extensive practice in the town and neighbourhood of Cork. Like most men who have become distinguished in after life, J. S. Willes gave early tokens of ability, and devoted himself from his youth to reading and to the accumulation of knowledge. When sent to Trinity College, Dublin, he obtained honours in the college examinations, but his name does not appear in the list of scholars or classmates of his time. His studies were therefore probably of a somewhat desultory character, as is often the case with men of high intellectual power during their university career. After taking his B.A. degree in 1836, he entered, as a pupil, the chambers of Mr. Collins, a distinguished member of the Irish Bar, who had an extensive practice both in Chancery and at Nisi Prius. In the following year he came to London, apparently for the purpose of qualifying himself to be called to the Irish Bar, but having entered the chambers of Mr. Thomas Chitty, his unwearied industry and his extensive knowledge of law attracted the notice of some of the clients of that gentleman, and induced them to recommend him to come to the English Bar. He was accordingly called to the Bar

at the Inner Temple, in June, 1840, and shortly afterwards joined the Home Circuit.

Mr. Willes came to the Bar with a considerable reputation acquired in the chambers of Mr. Chitty. His practice increased rapidly, and his character as a sound and able lawyer was soon established. His *forte* lay in arguing demurrers and special cases, although his junior business at *Nisi Prius* was extensive. It was in Westminster Hall that he chiefly shone, and his circuit practice was confined to heavy cases. As he stated, when proposing, as a judge, the toast of "Prosperity to the Home Circuit," a few years ago, at the dinner given to the Bar at one of the assize towns, "he was a town mouse, rather than a country mouse, when a member of the circuit." He had a large number of pupils during the time he was at the bar, many of whom have since attained distinction. Amongst these were Mr. Charles Pollock, Q.C., and Mr. Vernon Harcourt, Q.C., M.P. Notwithstanding his extensive practice, Mr. Willes found time for a variety of studies, both legal and general. In 1849, in conjunction with Mr. Keating, he brought out the third edition of "Smith's Leading Cases." In the obituary notice we have already mentioned, the following is the account given of the origin of this undertaking. "It was his practice, after working up till a late hour at night, to take a walk in the Temple Gardens, a habit which was shared by the late Mr. J. W. Smith, the learned author of the 'Leading Cases.' It was in these midnight walks that these two distinguished lawyers first formed an acquaintance which soon ripened into intimacy, both being indeed kindred spirits; for the late Mr. Smith was a man of extraordinary wide and varied culture. These walks, which were frequently prolonged into the small hours of the morning, became a fixed custom, and possibly had a share in precipitating the disease which caused the untimely death of Mr. Smith. At his request, Mr. Willes consented to undertake the third edition of 'Smith's Leading Cases,' only stipulating that Mr. Keating, who was also Mr. Smith's intimate friend and executor, should be joined in the task."

In 1851, Mr. Willes was made *tubman* in the Court of Exchequer, a position which was then esteemed an honour. As a member of the Common Law Procedure Commission, his labours were invaluable; and it was understood that it was under his superintendence and that of Mr., now Baron, Bramwell, another of the commissioners, that the Common Law Procedure Acts were prepared. His reputation as an able and learned lawyer was now fully established, and no surprise, therefore, was felt by the profession when, on the retirement of Mr. Justice Maule from the Bench, in June,

1855, Mr. Willes, after having been at the Bar only fifteen years, and without having obtained a silk gown, was appointed his successor. In the following year the learned judge married Helen, daughter of T. Jennings, Esq., of Cork. .

Mr. Justice Willes still continued the same studies and pursuits to which he had been devoted when at the Bar. In the vacation following his appointment as a judge, he occupied himself in preparing another edition of "Smith's Leading Cases." Indeed, we may say that he never spent a vacation without undertaking something in the way of work, study, or travel, which last was no mere pastime, but comprehended generally the other two. He had paid one visit to America, one to India, and several to Spain, and had accompanied that indefatigable vacation traveller, Sir Henry Holland, in a tour in the Holy Land. He had intended, we are informed, to set out again for Spain on the Saturday following his lamented decease. He was appointed on all the commissions on legal subjects which were issued during the time he was on the Bench, and to each of them he devoted much time and labour. He was one of the judges under the Election Petitions Act, and as one of the first to sit he laid down rules which were followed by the other judges in almost every instance. On November 3, 1871, he was sworn of the Privy Council, with the view, it was understood, of his becoming a member of the Judicial Committee under the recent Act. In 1860, the degree of LL.D. had been conferred on him by his *alma mater*, *stipendiis condonatis*.

Of the private habits of Mr. Justice Willes during the latter portion of his life we have an interesting account in the obituary notice from which we have already quoted. "Some years ago, finding himself unequal to the fatigues of social intercourse in London, he withdrew to the neighbourhood of Watford. There, on summer evenings, he was to be found paddling in his boat on the stream which ran through his place at Otterspool, and feeding with his own hands the trout, which seemed to know him, and over whom he never suffered a fly on a hook to be thrown. It was his chief delight to take his visitors to the familiar corners where his favourites lay, and to point them out as they swam to receive the food which he flung to them. In private life he possessed the tenderness of a woman. He has been known to retire to his room and shed tears before passing sentence on a criminal; and the most serious shock to his constitution was the death of his favourite brother. The tone of his own mind was largely reflected in his favourite English poet, Wordsworth, of whose sonnets especially he was a great admirer. Childless himself, his manner with children was singularly winning; and three favourite dogs were always the companions of his walks.



In his quiet country place, among his family, his books, his pets, and his simple pastimes, it might have been hoped that his life of great and laborious usefulness might have been crowned by a period of usefulness, but of mitigated labour. Much remained to be done to complete the work of legal reform which he had initiated. He had himself pronounced in favour of the codification of the law, and no living man was so fit to have performed the task. The public who recognised his broad firm grasp, and calm, wide views, still hoped and expected much from him; but such was not to be."

It ought not to be forgotten that Mr. Justice Willes, with that strong feeling which he had for doing his duty on all occasions, joined the Inns of Court Volunteer Corps as a private, on its formation in 1859, and continued to serve in its ranks, we believe, till within a recent period, and to be a strong and liberal supporter of it till his decease. We ought also to mention that he was a member of the Cloth-Workers Company, and had been elected to the office of warden. We may add further, that he was fond of the society of literary men, and was on terms of intimacy with Thackeray, Dickens, and various other authors of repute.

It is not too much to say that Mr. Justice Willes was the most learned lawyer of our day. To a thorough knowledge of the history of our own law in all its branches, he added a wonderfully large acquaintance with foreign jurisprudence. He knew the principles of law not merely from the teaching of others, but from having worked them out for himself by the comparison of different systems and by the exercise of his own powers of analysis. With all the cases at his fingers' ends, he never rested on mere authority where a principle could be recognised. He was intimately acquainted with all the changes which our own common law had undergone, and with all the rules and forms of the ancient system of pleading. He knew by heart every old term of the law, every maxim of the law, every *cantilena* of the law. All these he could avail himself of with the greatest ease for the purpose of illustration or argument, if not with uniform success with reference to the point at which he aimed, yet with much interest to those whose studies had been similarly directed. He was not only a sound but a scholarly lawyer, knowing exactly the relations which the existing features of our legal system bore to those of earlier periods, and familiar with the older as well as the more modern literature of the law. It was not difficult to discover occasionally a tendency to over-refining, but this rather affected the fringes of his argument than its substantial texture, and in no respect attached to the conclusions he sought to establish, which were always marked by sound common sense. He was

too good and thorough a lawyer to allow him to substitute his own notions of justice in place of a clear rule of law; but he had no respect for mere technicalities, and had no difficulty in setting them aside when they stood in the way of an obvious principle.

On taking his seat in the Common Pleas, in Michaelmas Term, 1855, Mr. Justice Willes at once assumed the position he was destined to retain through all the changes the Bench of that Court underwent during seventeen years. He contributed from the first an important element to the strength which the Court possessed during all that period. At Nisi Prius he was patient and painstaking, and most careful in summing up. As a criminal judge the same qualities distinguished him, and he always seemed to feel deeply the responsibility which attached to him in any important trial when presiding in the Crown Court. Whether sitting in Banco, at Nisi Prius, in the Crown Court, or on Election Petitions, he never spared himself, and no one ever accused him of being influenced on any occasion by the slightest feeling of partiality or prejudice, or of turning from the straight path by a hair's-breadth either to the right hand or to the left. In no judge on the Bench had the mercantile community greater confidence. They knew that he was thoroughly acquainted with commercial law, and would apply it in a wise and liberal spirit, while the closest attention would be given to every part of the most complicated case. When sitting as an Election judge he commanded universal approval no less by the admirable judgments he delivered in the difficult cases which it fell to his lot to try, than by the rules he laid down, to which we have already referred.

However great the loss may be which the country has sustained in being deprived, by the death of Mr. Justice Willes, of the judicial services of one so well qualified to throw light on all the highest and most difficult legal questions, it is as a law reformer that, under present circumstances, the extinction of his valuable life is most to be deplored. He had seen during twenty years the working of those important amendments in common law procedure of which he had been one of the chief promoters, and he was prepared for a large extension of analogous amendments throughout our whole legal system. No man was more anxious to improve in every possible way the administration of justice, and to adapt the law to the real wants of the community; but he sought to do this solely by attacking practical evils. This was the great principle which pervaded the Common Law Procedure Acts, and is the only sound principle of law reform. On the important question of the reform of the judicature, which is now impending, the views of Mr. Justice Willes,

when a measure came to be prepared, would have carried much weight with the profession. They would have had every confidence in his practical experience in dealing with the most difficult questions of law amendment, and in the wise discernment which he had always displayed in proposing only such changes as the profession were ready to sanction. They would have felt that if in any instance he agreed to an alteration which was sweeping, it was only because he was perfectly convinced that the necessity of the case required it, and that a real grievance could not otherwise be remedied. Not only on the subject of the reform of the system of judicature, but on all the other questions which have been brought forward respecting either the substance or the form of our law, both the profession and the country would have trusted much in the sound judgment, the ripe learning, the practical sagacity and the great experience of him whose loss we now deplore.

## VI.—SIR ALEXANDER COCKBURN AT GENEVA.

THE Geneva Arbitration may be looked at in two points of view, either as an assembly summoned *ad hoc* for the solution of a political difficulty, or as a tribunal for determining after a method hitherto untried a grave question of public law. Regarded in the former of these aspects it is an experiment of but second-rate interest, involving no principle, and but little likely to fulfil the dreams of those who try to find in arbitration a method of settling the disputes of nations which will supersede recourse to arms. Viewed on the other hand as a judicial proceeding, the respect and confidence which might possibly have followed its verdict had the court been unanimous, and had due weight been given to principles of the law of nations hitherto of all but universal acceptance, can with difficulty be accorded to a tribunal, one of whose members—and he the most distinguished—openly dissented from his colleagues in the greater part of the conclusion to which they came, and the whole of the reasons which they gave; while another, M. de Staempfli, did not hesitate to put on one side all idea of international law as a working system, or as having any real influence in modifying, much less resisting, the rights of a belligerent State; rights which he did not conceal, were the only ones he cared much to preserve.

Passing, however, from the inexact and unscientific method of treatment, and the vague utterances which the majority of

the court were satisfied to adopt, we reach in the Lord Chief Justice's elaborate opinion, that higher ground of judicial investigation, in the light of positive law, which, notwithstanding that the zeal of the advocate, or as he styled himself "in some sense the Representative of Great Britain," may here and there distinctly be traced, Sir A. Cockburn has on the whole succeeded in maintaining throughout. His argument we would now propose to examine, though necessarily in outline, not so much in its controversial aspect as opposing the conclusions or the reasoning of the other members of the court, as in its probable influence upon the public law of nations, regarding that law as a system capable of being interpreted with something like judicial exactness, and containing definite principles which may be usefully employed for the adjustment of international disputes.

The treaty of Washington will be remembered mainly if not exclusively from these rules, which it was conceded by our Government should be accepted as containing, for the purposes of the arbitration, principles by which the neutral obligations of Great Britain were to be tested. These rules are well known. They enjoin on a neutral Government in the first place to "use *due diligence* to prevent the fitting out, arming, and equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise, or to carry on war, against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise, or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use. Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

Of these rules, it is in the first place to be observed, that they form no part of the public law of nations. They were assented to as articles of peace; in order, to use the language of the treaty, to "evince the desire of Her Majesty's Government to strengthen the friendly relations between the two countries," and for no other purpose whatever. The legal responsibility they impose on us is accepted now for the first time. Secondly, that they are only binding on the two countries who are the contracting parties. For, thirdly, it is assumed, that other nations do not assent to, and would decline to be bound by, them; for England and America enter into an agreement to bring the rules to the knowledge, and press

them upon the acceptance, of other States. And, fourthly, what new force and validity they have, is from the retro-active operation given to them by this treaty, according to which it is provided that the arbitrators should "assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules." Taking, therefore, the proceedings of the tribunal and the provisions of the treaty together, the conclusion we should be driven to, if the judgment of Sir A. Cockburn was out of the way, is just this, that for any particular purpose or benefit, international law has no real existence. It is, as one of the most active of the arbitrators hardly cared to conceal, a mere phantom. There are no fixed principles of public law, no common legal standard, by which in future we can guide our conduct; and all the effect which the tribunal would have—*ultra* its immediate political purpose—would be to show that the science which purposes to define, and if possible, as civilization advances, hopes to be in a position to enforce, the duties which one nation owes to another, is a mere paper system; all very well for the jurist and the professor, but for the statesman nothing. In short, in any position of real difficulty, of a conflict on any material point, in the view of the matter taken by the majority of Sir Alexander Cockburn's colleagues, all questions of law or principle are to be brushed aside, or made to occupy a position wholly subordinate to fact. And it is on this point that the opinion of the Chief Justice comes in to rescue, as it were, the science of international law from degradation, and restore it to the position from which more than one of the other members of the court would fain expel it. M. Staempfli, for instance, had openly maintained that on any point on which the principles of international law, or the enactments of the municipal law of any State, are in conflict with the three rules, it was the duty of the court, without "losing itself in long discussions and theoretical interpretations," to apply the rules to the best of its ability in all good conscience, dealing with each case, as he expresses it, orally, summarily, and on its merits.\* As Sir Alexander Cockburn interpreted this view, the argument is, that "because the practice of nations has at times undergone great

\* The original is as follows:—"M. Staempfli déclare qu'il ne trouve pas tres-opportun de se perdre pour les trois questions des dues diligences, de l'effet de commissions, et des approvisionnements de charbon, dans de longues discussions et interprétations théoriques. Il developpe oralement et sommairement ses vues y relatives, en se réservant de motiver de plus pres leur application dans chaque cas spécial, et se borne pour le moment à poser les seuls principes suivants, qui lui serviroient le direction générale." In short, this jurist, like a modern Gallio, in effect says, "If it be a matter of words and names and of your law, look ye to it, for I will be no judge of such matters."

changes, and the views of international jurists have often been and still are conflicting, therefore there is no such thing as international law, and that consequently we are to proceed independently of any such law according to some intuitive perception of right and wrong, or speculative notions of what the rules as to the duties of neutrals ought to be." It is here we find the first remarkable divergence of the views of Sir A. Cockburn from those of his colleagues. To him international law is something more than the shadow of a name. In his elaborate examination of the famous expression "due diligence," in the treaty, he expresses his "regret that the whole subject matter of this great contest, *in respect of law as well as of fact*, was not left open to us to be decided according to the true principles and rules of international law in force and binding among nations, and the duties and obligations arising out of them at the time when these alleged causes of complaint are said to have arisen." In other words, his wish was first, that the tribunal should be a real instead of a sham court; one having charge of the whole case, guiding its procedure, and framing its decisions, according to rules of law well known to jurists, and acknowledged, at least to a great extent, by civilized states; and, secondly, that the obligations which it should enforce should be treated as growing out of, to use his own language, "that prior existing law by which a right has been created on the one side, and a corresponding obligation on the other." This law, largely interpreted, and not merely measured by the then municipal enactments of the defaulting state, would, in the Chief Justice's opinion, have been sufficient to meet the equity of the case; and thus the anomaly would have been avoided of a tribunal called into existence *ad hoc*, to deal with obligations, assumed to have existed prior to the treaty, yet arising out of a supposed law created for the first time by the treaty; and which, he might have added, when the purposes of the treaty have been answered, will in all probability be suffered to drop into oblivion.

So far as to the effect of the constitution of the Geneva tribunal upon international law, and the anomalous position which it occupied from its having been called into existence for the purpose merely of ratifying, and investing with a quasi-judicial sanction, the foregone conclusion of a political convention, Sir Alexander Cockburn proceeds to deal with the effect of the decision upon the celebrated doctrine of the trade of a neutral merchant with a belligerent state.

This vexed question, and whether we used "due diligence" with respect to it, was of course the point on which the award turned, and to which all the arguments were addressed. What the doctrine is, at least in theory, we perfectly well know.

The sale to a belligerent of munitions, and even vessels of war, is a purely mercantile transaction, not in any wise prohibited to the citizens of a neutral state, and constituting no offence for which that State can be held responsible. This is the theory; and it may be added, the law as it is has been administered in our courts at a very recent period. Similarly it is well known that a contract between two subjects of a neutral state to export contraband of war to a belligerent is not unlawful; for, in view of the law of nations, the commerce of nations being perfectly free and unrestricted, if hostilities occur between two countries and they become belligerents, neither belligerent has any right to impose, nor to require a neutral government to impose, any restrictions on the commerce of its subjects. Still, however this might be in theory, there was scarcely a civilized state which had not acknowledged that it was wrong in a neutral to allow its ports to be made *de facto* the basis of hostile operations by permitting ships of war to be armed in and despatched from them. Foreign Enlistment Acts, therefore, formed part of the municipal legislation of most civilized states; but it still remained an unsettled question whether a neutral state could be justly accused of a breach of neutrality by a belligerent for suffering a domestic statute to be infringed to his disadvantage.

In examining this delicate question it is to be carefully borne in mind that domestic legislation by statute does not and cannot form the measure of international obligations. Acts of Parliament or of Congress may supply the machinery by which a state may be enabled to vindicate its own neutrality by process of law against its own subjects; but no statutes, however stringent, can limit the obligations of a neutral State, and the defective reach and grasp of municipal legislation may, it is conceivable, require to be supplemented by the higher equity of international law, in the light of which the domestic statute may, and ought, to be interpreted and applied. That so to enforce the law of a particular state involves, especially under a constitutional form of government, in many cases difficulty and delay, resulting in a defeat of justice, we know perfectly well, from what happened in the case of the *Alabama*. But a government is not on that account bound to alter its procedure, or its mode of administering the law, in order to gratify the susceptibilities, or minister to the advantage, of a belligerent state. And if a state with all necessary promptitude, "due diligence," does all that its municipal law in existence at the time empowers it to do, it may fairly be held to have discharged its duty towards a belligerent, and cannot be held responsible for any offences or omissions on the part of a subject, which, in spite of the utmost desire to administer the

law with vigilance and good faith, cannot but sometimes occur. This, indeed, was not the view of the Tribunal at Geneva. One main head of the complaint then was that the municipal law of Great Britain as contained in the Foreign Enlistment Acts was insufficient to enable the British Government to enforce the observance of the duties of neutrality by its subjects. But Sir Alexander Cockburn on the other hand argues that the existing law was not so essentially defective as that the British nation could be held liable by reason of its imperfections. "For," he observes, "law with all human institutions is in a constant state of progress and change. New events, new conjunctures, new combination of circumstances, the lessons of experience from time to time point out to the lawgiver the necessity of altering the work of the past so as to adapt it to the requirements of the present." And he asks, "Is every amendment of the law to carry with it the condemnation of the legislation which preceded it?" A very difficult question to answer; raising a point of which the American lawyers in their argument were not slow to avail themselves. For, in the first place, as the Chief Justice admits, since the American Foreign Enlistment Act of 1818 had passed, the working of the legal administration in the United States was in one respect superior to that of Great Britain—in the important circumstance that in each district of the United States there was a resident legal officer of the Federal Government whose duty it was, if the action of the Government was invoked, to proceed against a suspected vessel, ascertain the facts, collect the evidence, and report to Government. In England there is no such officer. And secondly, with ourselves, it is a fact that the deficiencies of the Foreign Enlistment Act of 1819 have been amended, by the more particular provisions and the larger view of international obligation to be found in the recent Act of 1870. It was, indeed it must be, admitted, therefore, that a neutral Government is bound to supply itself with a municipal law sufficiently stringent to enable it to punish breaches of neutrality; and when that law has not been sufficient to meet the equity of a given case, and direct injury has in consequence resulted, it seems to follow that it is bound to make such retribution as the nature of the case requires. It is true that Sir Alexander Cockburn does not go this length: and holds that we were bound to act in strict accordance with the law as it stood at the time, and not seize a vessel when the evidence at hand was insufficient to justify such seizure. Technically, no doubt this is so; but in fact it was felt even before the recent negotiations that our municipal law was defective to meet the obligations of a true neutrality; and hence arose first the amended Act of 1870,



under which the important concession is made of allowing "knowledge or reasonable ground of belief" of the illegal destination of a vessel to be sufficient to justify her arrest; and, later still, the three rules of the Washington Treaty made that "great and generous concession," as Sir A. Cockburn terms it, on the part of Great Britain, rather, however, in order to put an end to an existing cause of deep dissension between two great maritime Powers, than to make any radical change in those principles of the law of nations by which each professed to be bound.

Our space will not allow of our entering further in this difficult and interesting question. Possibly the true solution of the matter may be found to be in some such position as this: that it is the duty of a neutral state by every expedient of wise legislation to arm the Government with the machinery necessary for preventing and punishing any attempt on the part of private citizens to do such acts as would amount, or lead to, a violation of neutrality. And if—as was the case with the *Alabama*—the conduct of a Government in a past transaction is to be examined, and its past legislation tested in the light, so to speak, of a more advanced and rigid standard of conduct admitted to be the rule at the time of the inquiry, any injury arising from a defect in the municipal law at the time the alleged offence was committed should be met rather by the assessment of a given penalty as for such defect than by the artificial and anomalous expedient of giving to new rules of law, *invented ad hoc*, a retro-active operation, and thus investing with a constructive illegality acts which were admittedly not illegal at the time they took place. For, not to mention the uncertainty in which the principles guiding the conduct of nations are involved by such a procedure as this, and the discredit which such expedients casts upon international law, it must be recollected that it is entirely unknown what the future effect of such rules as those of the Washington Treaty will be, or how far they will make it difficult for any nation which has accepted them to maintain a neutral position; and this is a question which, as Sir Alexander Cockburn does not fail to point out, is of infinite importance to neutral states, especially those which are not of the first rank, who, as he puts it, "may be drawn within the vortex of wars in which they have no concern, if they are not only to be harassed and troubled by the demands and immunities of jealous and angry belligerents, but are in addition to be held responsible—to the interest perhaps of millions—for errors of judgment, accidental delay, judicial mistake, or misconduct of subordinate officers acting not only without their sanction, but possibly in direct contravention of their orders. If," he goes on to say, "it is to be established that these rules carry with them a liability so

extensive, I should very much doubt any invitation to other nations to adopt them would be attended with much success." And of course, it may be added, until such agreement has been arrived at, and incorporated into the common law of maritime powers, the rules remain without that general sanction which, as has been frequently observed, alone gives force and efficacy to what is known as international law; while the consent of other nations must of necessity depend on the practical interpretation which the rules may be made to bear.

On the whole, judging from the reception which the verdict of the arbitrators at Geneva has met with, it is impossible to affirm that its influence on the law of nations will be for good. Hitherto the respect paid to the decisions of those great magistrates who in this country and in America have expounded and illustrated public law has been undoubted. The opinions of Story, Marshall, and Washington in America, and of Lord Stowell in England, have commanded the assent and elicited the admiration of civilized communities. As contrasted with the exhaustive analysis of the various points of international law contained in the judgments of these eminent civilians, the verdict and opinions of the tribunal—the assessors rather—at Geneva cease to have any judicial value whatever. And we must remember, also, that although the operation of the three rules may be unequal according as the nation accepting them is, or is not, a maritime power, there can be but little doubt that their general scope must be regarded as tending to narrow the rights of neutrals against belligerents, while, on the other hand, they expand the rights of belligerents as against countries standing aloof from the contest. The acceptance of the rules therefore will probably have a distinct influence in obstructing the further development of maritime rights, even if they are not considered as marking a decidedly retrograde movement. However this may be, one fruit the Court of Arbitration at Geneva has borne, it has been the occasion of giving to the world the reasons of Sir Alexander Cockburn for dissenting from its award; a document which, whether regarded as an historical retrospect, or a judicial examination of the points involved, will equally be found of value and deep interest to the student of international law.

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## VII.—THE PERSONAL CHARACTER OF OBLIGATIONS IN ENGLISH LAW.

### IV. CONTRACTS WITH UNCERTAIN PERSONS (*continued*).

**B. THE** persons who are to be the debtor and creditor in an obligation are usually and regularly determined by some event in which a particular individual is immediately concerned, and by which he is ascertained as the party to whom the legal effects of the transaction attach. But the person may also become invested with the legal right or duty in another and more artificial manner, depending on some general attribute which may be found in completely different individuals.

Now this kind of artificial determination of the parties to an obligation takes place more especially in connection with some particular portion of property. Ownership, a real right, or possession, may be the attribute by which the creditor, or the debtor, or it may be both, is or are to be ascertained, although none of these things have in their own nature anything to do with obligations.\*

This class of exceptions is now to be considered, so far as contracts are concerned. It is of much importance, and presents in some respects considerable difficulties, which not being treated from any uniform point of view have of late years led to something very like a real conflict between common law and equity. Under this head come—

Mortgage debts.

Rent charges and other annual payments charged on land independently of tenancy or occupation.

Personal rights and duties *ex contractu* attached to the enjoyment of interests in property. These may subsist in the case of land between landlord and tenant, vendor and purchaser, or purchasers from a common vendor.

Of these in order.

1. It is clear that in equity, by the assignment of a mortgage security, the debt necessarily passes as incident to it; and that to constitute a valid assignment, as between the original creditor and the assignee, notice to the mortgagor is not

\* Savigny, *Obligationenrecht*, sec. 15 (i. 132).

necessary.\* But, in accordance with the principles that govern other equitable assignments, in the absence of notice the assignee is bound by the state of the accounts between the mortgagor and the mortgagee.†

2. Rents and personal services incident to tenure afford a striking instance of obligatory relations attached to estate or ownership, but the origin of these burdens cannot be considered as more than distantly analogous to contract. But rent-charges reserved in modern times on conveyances in fee simple, and personal annuities charged on land, must be regarded as having a distinctly contractual nature,‡ though this is obscured in the case of a rent-charge by its being classed with easements and the like as an incorporeal hereditament. A little reflection shows that this classification is quite arbitrary. An easement or real right is some portion of the aggregate of rights which makes up ownership—and of which rights the separate worth can be numerically represented only by estimation—taken out of the power of the owner and put in the hands of some other person. It is in truth an ownership limited in extent, and the term limited ownership might quite as well have been applied to it in common with interests limited principally by duration, as have been appropriated, as it now is, to the latter. Such a right, being in fact a right to the enjoyment of a thing *in specie*, the amount of which enjoyment, though in one sense defined by the limits imposed on its exercise, is yet within those limits incapable of being exactly measured, is very different from a right to receive a fixed payment, not involving any immediate relation to or power over the thing itself except as the means of ensuring the payment of the money, or an equivalent in case of default. From this point of view it is not easy to see why there should be any difference in legal effect between a grant of a rent-charge out of land and a covenant to pay it; but a difference exists; for it was laid down by Lord Holt, that “if the tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee, for it is a mere personal covenant, and cannot run with the land;”§ and notwithstanding some apparent discrepancies this has never been really contradicted by authority.¶ And conversely, the benefit of such a covenant cannot run with the rent.¶

\* *Jones v. Gibbons*, 9 Ves. 407, 411.

† *Matthews v. Wallwyn*, 4 Ves. 118, 126.

‡ An agreement to grant such an annuity implies an agreement to give a personal covenant for payment. *Bower v. Cooper*, 2 Ha. 408.

§ 1 *Ld. Raym.* 322.

|| 1 *Sm. L.C.* 65-71.

¶ 1 *Wms. Saund.*, p. 303. 1 *Sm. L.C.* 77.

3. Obligations attached to the enjoyment of land by the proprietor (whether owner or possessor for a limited interest)\* are of course not to be confounded with real rights in *re aliena*, yet they present so many affinities that the one cannot well be understood without the other. One may say that *jura in re aliena* on the one side and covenants real on the other mark the boundary line between the law of Ownership and the law of Contract. The ruling analogy is indeed not confined to any particular class of obligations, but it explains the parallelism in detail, and the occasional difficulty of drawing the line between real and personal rights,† which are found in these cases; it has been thus expressed:—

The essence of an obligation is the control of one person over a specific act or acts of another. The performance which is the object of the obligation is a fractional portion (for fractional it must be, so as not to be inconsistent with the character of a free legal agent) subtracted from the freedom of the person bound. Thus—

“Obligations limit the normal‡ freedom of individual action, as servitudes limit the normal freedom of ownership. Servitudes too are allowed only within closely-drawn bounds, in order that ownership may not be unduly limited by mere caprice. These bounds are fixed partly by the duration of the right, as in the case of personal servitudes; partly by its extent, which in the case of easements proper [praedial servitudes] is determined on the principle that they are recognised only when the enjoyment of them procures for the contiguous owner an advantage immediately connected with his tenement, and not merely personal.

“In both cases that which the reason of the law contemplates is that restrictions on normal freedom, whether of personal action or of ownership, are not to be recognised or enforced beyond what is already required by the convenience of intercourse.”§

\* Summaries of the law on this head: 3rd report of R. P. Commrs., Dav. Conv. 1, 116; Dart. V. & P. 2, 699; above all the notes to *Spencer's* case, 1 Sm. L.C. 51; see also notes to *Thursby v. Plant*, 1 Wms. Saund. pp. 278-281, 299, 305. For the doctrine of equity: judgment in *Keates v. Lyon*, L.R. 4 Ch. 222.

† Austin so far overleaps it as to classify a negative servitude as *jus in personam*.

‡ “Natural,” which is the word in the original, might be misunderstood as referring to some supposed natural rights antecedent to positive law; in that sense “natural freedom” is an exploded fiction, the freedom we now enjoy being in fact a recent product of civilized law. What is here meant is the full power of exercising without interference from others such rights as the law for the time being confers on owners or free agents generally.

§ Savigny, *Obligationenrecht*, sec. 2 (i. 7). Our common law doctrine is entirely in accordance with this. It is worth noting as a curious coincidence in detail, that in D. 8, 3, *de serv. praed. rust.* 5, sec.

The natural conclusion from these principles, so far as restrictions on the enjoyment of property are concerned, would be as follows:—

Certain well-known kinds of permanent burdens are imposed by law, or allowed to be imposed by the act of the owner, on the use of land generally, for the permanent benefit of the owner for the time being of some adjacent land. But “it is not competent for an owner of land to render it subject to a new species of burden at his fancy or caprice,”\* although “a grantor may bind himself by covenant to allow any right he pleases over his property;”† and such an obligation is perfectly valid as between the grantor and grantee of the right, that is, as a personal obligation only.

Again, certain kinds of obligations may be attached to ownership or interests in land so as to be transmissible in the same manner as real rights, and to partake to some extent of their nature. But this quality is foreign to the proper character of an obligation, and being in itself artificial, it should at farthest not be carried beyond the limits indicated by the analogous doctrine touching the creation of real rights. In other words, restrictions which cannot be effectually imposed in the form of direct limitations of ownership are not to be indirectly imposed in the form of obligations artificially annexed to ownership.

It is conceived that this is a fair statement of the principles on which our common law has steadily acted,‡ and on which the Court of Chancery would have acted if it had followed the direction clearly pointed out by Lord Brougham in a case which might have become the leading one on this matter, and has been fully recognised by the courts of law.§ But the spirit, if not the letter, of the judgment in that case was soon disposed of by the process euphemistically termed explanation,||

1, 6 *pr.*, we have an exact parallel to *Clayton v. Corby*, 5 Q. B. 415, which was decided without any reference to the Roman law.

\* Per Martin, B., *Nuttall v. Bracewell*, L.R. 2 Ex. 10.

† Per Pollock, C.B. *Hill v. Tupper*, 2 H. & C. 121, 127; Goddard on Easements, 18. Rights of this kind must be carefully distinguished from those created by grants in gross; which “convey an interest to the grantees, which grantees, if they wish to convey, must convey by the ordinary conveyances known to the law” (per Willes, J., 12 C.B. N.S. 111). A right in gross is a fraction of the rights of the grantor over his tenement, which instead of being annexed to a dominant tenement is made the subject of an independent quasi-ownership.

‡ *Ackroyd v. Smith*, 10 C.B., 164; *Bailey v. Stephens*, 12 C.B. N.S. 91; *cp. too Daniel v. Stepney*, L.R., 7 Ex. 327.

§ *Keppell v. Bailey*, 2 M. & K., 517, 527; expressly followed in *Hill v. Tupper*.

§ *Tulk v. Moxhay*, 2 Ph. 774. Lord Cottenham’s judgment evades the real question, which is not “whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into

and the tendency of modern decisions in equity is, as will presently be seen, very different.

We proceed to the actual state of the law with regard to the exceptional class of contracts now being considered: those points on which, in essentials at least, and with regard to our present purpose, there is no serious difficulty, will be mentioned as briefly as possible.

a. Relations between landlord and tenant on a demise.

By common law—

Covenants extending to a thing *in esse* parcel of the demise run with the land and bind assignees, though not expressly purporting to bind them.

Covenants relating to something to be newly made upon the thing demised will run with the land and bind assignees if expressly purporting to bind them, but not otherwise.\* By statute 32 Hen. VIII., c. 34, as interpreted in *Spencer's case*, covenants which touch and concern the thing demised,† and those only, run with the reversion.

But a limitation is here to be noticed, which is due to the whole relation of landlord and tenant having originally been regarded in the light not of a partial alienation but of a personal agreement. By the common law, a grant of the reversion itself was imperfect without attornment, which was "the act of the tenant putting one person in the place of another as his landlord," just as a debt could not be transferred without the debtor's concurrence.‡ And although the necessity for attornment is now done away with, the tenant is still safe in fulfilling his obligation to the apparent reversioner: the proviso of the statute of Anne,§ that no tenant shall be prejudiced by payment of rent to the grantor, or breach of any condition for nonpayment of rent before notice of the grant, is not so much a new enactment as a saving and declaration of the common law.||

Of course the lessee's covenants could not follow the reversion until the assignment of it was complete: so that in respect of these there was by reason of the attornment some-

by his vendor," but whether a vendor shall be allowed by a transaction in the form of a contract to create modifications of property unknown to the law. One cannot help thinking Lord Raymond would have called it "talking of agreements, intent of the party binding the lands, and I know not what" (1 Ld. Raym. 322).

\* As to the doubt lately thrown on this distinction, see 1 Sm. L.C. 57-60.

† As to what covenants do so: 1 Sm. L.C. 55, 56; Dart V. & P. 701, n.

‡ This analogy is used in argument in some of the old cases on the assignment of a chose in action.

§ 4 & 5 Anne, c. 3 [in Rev. Stat.: 16 in other ed.] s. 10.

See L.R. 5 C.P. 594.

thing analogous in substance if not in form to novation in purely personal contracts.

It is worth noting, too, that collateral obligations between landlord and tenant persist, notwithstanding a transfer of the principal obligation, to this extent, that "the liability of the lessee to be sued on his express covenants is not determined by his assigning over his term and the lessor's acceptance of his assignee," though he cannot be sued by the lessor in debt for the rent.\*

b. Obligatory relations, not being between landlord and tenant, annexed on one side or both to ownership of a particular object.

### 1. Goods.

A covenant or contract cannot be annexed to goods so as to be assignable with the property in the goods either at common law† or in equity. ‡

There is a statutory exception in the case of the contract contained in a bill of lading (18 & 19 Vict. c. 111). The law merchant imputes to a bill of lading the peculiar character of a symbol of property; and the effect of the Act is to make the right of suing upon the contract contained in a bill of lading "follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser." §

### 2. Land.

The benefit of covenants entered into with the owner of the land to which they relate runs with the land, or more accurately with the original covenantee's estate, to each successive transferee of it; || so that he can sue on the covenants at common law, and this whether the covenantor was the person who conveyed the land to the covenantee or a stranger. ¶

The ordinary vendors' covenants for title, which come under this head, are now treated almost as necessary inci-

\* 1 Sm. L.C. 60; 1 Wms. Saund. p. 298.

† *Spencer's ca.* 3rd resolution; *Splidt v. Bowles*, 10 East, 279. Leake on Cont. 624.

‡ With *Splidt v. Bowles*, cp. *De Mattos v. Gibson*, 4 De G. & J. 276, 295.

§ *The Freedom*, L.R. 3 P.C. 594, 599. Cp. *Meyerstein v. Barber*, L.R. 2 C.P. 38, 52.

|| 1 Sm. L.C. 62.

¶ *Contra* Sugd. V. & P. 584, 585: but see 1 Sm. L.C. 63, Dart, 713. *Horne's case* (M. 2 H. 4, 6, pl. 25), relied on by Lord St. Leonards on this point, does not seem really to show that it was supposed that the covenantor ought to have an interest in the land to make the covenant run with the land for the benefit of assignees. It does appear, however, both in this and in *Pakenham's case* (H. 42 E. 3, 3, pl. 14) that it was considered doubtful whether an assignee could sue without being also heir of the original covenantee.



dents to the acquisition of ownership in land by a purchaser for value.

The question whether the burden of covenants relating to land can be made binding on successive owners is much more complicated. "Of such covenants some have relation to interests possessed or acquired by the covenantee, independently of the covenant; such as a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it; others are not connected with any such interests in the land, as a covenant by the owner of a particular close that it shall never be built on, but always remain an open space."\*

It appears on the whole that in neither class of cases can the burden be made to run with the land at common law. †

The effect in equity of such covenants, especially with regard to the second class, which "impose restrictions upon the mode of enjoyment of land in favour of persons taking no property in such land," is now to be considered.

The whole subject was reviewed by Lord Brougham in *Keppell v. Bailey*, ‡ and the principles which he laid down are best given in his own words. The nature of the covenant which was actually in question sufficiently appears from the judgment:—

"Assuming for the present that the Kendalls covenanted for their assigns of the Beaufort works, could they, by such a covenant with parties who had no relation whatever to those works except that of having a lime quarry and a railway in the neighbourhood, bind all persons who should become owners of those works, either by purchase or descent, at all times to buy their lime at the quarry and carry their iron on the railway? . . . Consider the question first upon principle. There are certain known incidents to property and its enjoyment; among others, certain burdens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognised by the law. . . . All these kinds of property, however, all these holdings, are well known to the law and familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of law and to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands

\* 3rd Rep. of R. P. Commrs., 1 Dav. Conv. 137.

† 1 Sm. L.C. 65, 76; R.P. Commrs., 1 Dav. 141.

‡ 2 M. & K. 527, 534.

and tenements a peculiar character, which should follow them into all hands, however remote.

"The difference is obviously very great between such a case as this, and the case of covenants in a lease, whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. . . . Even he, the continuing owner, is confined within certain limits by the view which the law takes of the nature of property."

Then, after going through the authorities, and concluding that such a covenant as was then in question was plainly collateral at law (probably even if it had been with a reversioner), the judgment proceeds:—

"If such would be its construction at law, does the notice which the purchaser had of its existence alter the case in this court, upon an application for an injunction; or would it, upon the application, of a correlative and coextensive nature, for a specific performance? Certainly not. The knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorizes him to affect by his contracts—had attempted to create a real burden upon property, which is inconsistent with the nature of that property, and unknown to the principles of the law, cannot bind such assignee by affecting his conscience."

This certainly appears to be a very positive ruling that in this matter equity should regard the principles of the common law as just and reasonable, and refuse to depart from them; and it is strange that it should not have been decisive. But in fact it has not been so. *Keppell v. Bailey* was decided in 1834, and so soon afterwards as 1838 came *Whatman v. Gibson*, the first of a series of cases by which Lord Brougham's judgment has been practically set aside.

In *Whatman v. Gibson* (9 Sim. 196), a vendor sold building land in lots to several purchasers, and it was mutually covenanted between the vendor, certain of the purchasers, and the several persons who should at any time execute the deed, that the land should be built upon and used in a particular manner and with certain restrictions. It was held that subsequent purchasers of lots claiming through the original purchasers with notice of the restrictive stipulations were mutually bound by those stipulations, although they had not executed the deed of covenant. The Vice-Chancellor (Sir L. Shadwell) said: "I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice." *Keppell v. Bailey* is referred to in the argument but not mentioned in the judgment.

Then came *Mann v. Stephens* (15 Sim. 377), also before Sir L. Shadwell, in 1846. In this case the vendor of a house and

land entered into a restrictive covenant with the purchaser as to an adjoining piece of land which he retained; afterwards he sold this adjoining land to another purchaser, who in turn entered into a similar covenant with him. An assign of this second purchaser with notice of these covenants was restrained from building in violation of them at the suit of an owner of the house claiming through the first purchaser. That is, the burden and benefit of a restrictive covenant entered into by a vendor as to land retained, for the benefit of the purchaser in respect of the land sold, both run in equity with the land retained and sold respectively. But it does not follow, conversely, that the benefit of a restrictive covenant entered into by a purchaser in respect of the land purchased by him, for the vendor's benefit in respect of land retained, is to run in equity with the land retained, unless special circumstances show a clear intention to extend the benefit of it to subsequent purchasers of such land. This was lately decided in *Keates v. Lyon* (L.R. 4 Ch. 218). *Mann v. Stephens* was in principle affirmed by Lord Cottenham on appeal,\* and not long after this, in *Tulk v. Moxhay* (2 Ph. 774), which has been the leading case on the subject ever since, he very positively asserted the same view, disposing of *Keppell v. Bailey* with the summary remark:—

“With respect to the observations of Lord Brougham in *Keppell v. Bailey* he could never have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.”

The more recent cases have done little more than follow this ruling. The most important of these, *Keates v. Lyon* (L.R. 4 Ch. 218), in which the previous decisions are considered, established the distinction that covenants of this kind entered into by a purchaser do not enure for the benefit of purchasers of other parts of the vendor's property, except when they relate to “a particular and defined portion of land agreed to be laid out and dealt with according to a prescribed plan” (p. 225).

The judgment speaks also of the covenants being mutual; but in the still later case of *Harrison v. Good* (L.R. 11 Eq. 338), a vendor sold land in lots to purchasers, and took restrictive covenants from them severally in the same terms, but there was no covenant either by the vendor with the purchasers or by the purchasers with one another. This however was held not to affect the right of the owner of one lot

\* 15 Sim. 379, and see 2 Ph. 778.

to enforce the covenant against the owner of another lot in equity.

The general result may be summed up thus: Restrictions in the form of contract may be imposed—

(a) By a vendor on the use of land retained or simultaneously sold, for the benefit of the land purchased.

(b) By a purchaser on the use of the land purchased by him, for the benefit of land retained or simultaneously sold by the vendor.

The land subject to such a covenant may conveniently be called the quasi-servient, and the land for whose advantage it is the quasi-dominant tenement.

(a) As to vendors' agreements: The burden runs with the quasi-servient tenement.

The benefit also runs with the quasi-dominant tenement.

(b) As to purchasers' agreements: The burden runs with the quasi-servient tenement.

The benefit does not invariably run with the quasi-dominant tenement. But it may do so when such is the intention of the parties, and especially when a portion of land is divided into several tenements and dealt with according to a prescribed plan.

All these equitable rights and liabilities are subject to the general equitable doctrine that purchase for value without notice is an absolute defence.

Practically, as the doctrine of equity now stands, it appears that if J. S. sells a piece of land in several plots to A, B, C, and so on to Z, taking from each of them covenants for himself his heirs and assigns to use or not to use the land in a particular manner—

1. The successors in title of A may to all perpetuity restrain the successors in title of Z from any infringement of the original covenants, provided they have notice actual or constructive\* of their existence, as it is almost certain they will.

2. It does not matter for this purpose whether J. S. does or does not reserve any interest in any part of the land sold by him.

3. J. S. or his successors in title cannot effectually release the covenants to any purchaser without the consent of all the rest.

4. Therefore it is practically impossible that the plan laid out by the original vendor should be departed from for all time to come without the unanimous consent of all the successors in title of the original purchasers. If this be not creating a new species of tenure it is very difficult to say what is.

\* *Wilson v. Hart*, L.R. 1 Ch. 463.

It has already been observed that the tendency of the courts of common law in analogous matters has been steadily in accordance with *Keppell v. Bailey*, and in opposition to the direction taken by the Court of Chancery.

This conflict between law and equity has been lately remarked on by the Court of Exchequer Chamber;\* the main question in the case being whether the enforcement by the Court of Chancery of a restriction of this kind imposed by a covenant into which a lessor had entered with his vendor was a breach of the lessor's covenant with his lessee for quiet enjoyment.

"The foundation of this decree was that the Court of Chancery imputed to the tenant a constructive knowledge of the title of his landlord and the restraint upon him, upon the ground that he need not have become tenant without investigating the title, and that having done so he could claim no greater right than his landlord. Whether this extension of restrictions upon the use of property other than in leases be sound or not, it is not for us to determine. . . . We must take it, however, as established that the Court of Chancery has imposed this new burden upon the use of property."

The restriction here commented on did not go nearly so far as those which have been recognised in *Keates v. Lyon*† and *Harrison v. Good*.‡ On the other hand it was said in *Keates v. Lyon* (L.R. 4 Ch. at p. 223): "The questions which have arisen with respect to the devolution of the benefit of covenants of this kind have been decided . . . without reference to any technical distinctions depending upon the covenants running or not running with the land." As if all common law distinctions were merely technical; an assumption which, if not to be fairly implied from this passage, does so largely prevail in our equity jurisprudence as to produce grave mischief. Certainly no rational fusion or reconciliation of common law and equity will be possible until it is done away with.

FREDERICK POLLOCK.

(To be continued.)

\* *Dennett v. Atherton*, L.R. 7 Q.B. 325.

† L.R. 4 Ch. 218.

‡ L.R. 11 Eq. 338.—The reflection is obvious that, if such restrictions were not allowed even in equity to be imposed on conveyances in fee simple, the device would remain of substituting long leases at nominal rents: in which case the restrictive covenants would run at law: there would, indeed, be no remedy for one lessee against another except by suing in the name of the reversioner, which however could be easily provided for. On the whole one cannot well rest short of the conclusion that the dedication of land to be used in a particular way for an indefinite time is a matter which ought not to be left in the discretion of private persons at all,

## VIII.—THE CITY COURTS.

SINCE we wrote on the subject in the number of this Magazine for February, 1870, some changes have happened, and some improvements have been effected; but, as law reformers, we still see much scope for further amendment.

The important Judicature Commission, referred to in our former article, has made a report full of most important suggestions, affecting both the City courts, and large changes are therein recommended for both county courts and local municipal courts.

As to the continuance of local courts possessed by corporate bodies, very serious doubts are thrown out.

At page 15 we read—

“Provision being made for the small debt and other less important business, and the judges being thus at liberty to give their time to the more important class of causes, it will no longer be necessary to retain the existing local and inferior courts of civil jurisdiction.

“We are satisfied, that if the high court, and its branches or dependencies, the county courts, are properly constituted, with adequate machinery, and if increased facilities be given for the disposal by judges of the superior branch of the court of the more important causes in some of the larger centres of business, these exceptional and intermediate courts will no longer be required.

“It is possible that this recommendation may meet with opposition from some of the powerful corporations interested in their maintenance.

“It will perhaps be said that they are self-supporting, and that they supply a local want. But there is great reason to believe that these courts are frequented by a class of practitioners who get larger costs from them than they would from the county courts, and many experienced attorneys, the most competent judges of their value, have made great complaint of them. Further, it must not be overlooked, that although these courts may be self-supporting, yet they are so at the expense of the country in respect of the superior and county courts to which the suitors would otherwise have recourse, and which they would then help to support. The existence of different courts with similar jurisdiction competing for business by the offer of better costs is in the highest degree objectionable. Further, we are of opinion that the appointment of all judges should be vested in the Crown, and that no municipal or other body or person should derive profit from the right to hold courts of justice. We therefore recommend the abolition of all local and inferior courts of civil jurisdiction. If they did not exist no one would think of establishing them. No one now proposes to establish at

Birmingham, for example, such a court as the Lord Mayor's Court of London, the Court of Passage at Liverpool, or the Salford Hundred Court at Manchester."

Doubtless, there are many advantages in branches of one supreme court administering justice in the Queen's name throughout the kingdom, which local courts cannot possess, but still, all such theoretical benefits weigh but little against the practical advantages to suitors for small debts, of such courts as the Mayor's Court, London.

It is not entirely a question of the heavy fees of court, so unwisely exacted in the county courts, and not to any appreciable extent an attorney's question of mere costs. The hold municipal courts, like the Mayor's Court, have on creditor suitors arises from the facilities they afford for the prompt recovery of debts without personal trouble to the suitors.

The county courts were unfortunately established under the idea that suitors up to 20*l.*, or even larger debts, could be treated in the same way as the courts of requests; that is, made to do their own law work, and charged a per-centage in advance for the services of the officials, and in addition required to attend in court and establish their claims. An apparent success attended this course for some years, as many thousands of very petty debts were annually sued for, but although actions in the higher courts below 20*l.* were discouraged by the first County Court Act of 1846, nothing serious was done to stop writs for small sums until the last County Court Act, 1867. This, by removing all exceptions, deprived the London wholesale trader of his easy remedy against the provincial debtor, and as some boon to an important interest, trade debts were permitted to be sued for in the county court by a special summons, on which judgment by default could be obtained after the time appointed for hearing, unless the debtor gave previous notice of defence. Certainly a beneficial provision, but only useful to the London trader when he could make out a cause of action in London.

The effect of our legislation has largely enhanced the funds of the Mayor's Court, as wherever the least scintilla of ground exists for saying that the smallest part of the creditor's cause of action arose in the City of London, a summons can be served in any part of England, and a judgment and execution obtained on the ninth day after service, unless the debtor causes a regular appearance to be entered, a thing very rarely done, and even then the delay caused is inconsiderable. We here give the commissioners' recommendation against the municipal courts, and their estimate of the probable opposition is certainly not exaggerated.

We must now draw attention to an important little Act of last

session entitled, "An Act to amend the law relating to Borough and other Local Courts of Record." This is really a curiosity of legislation, and became law on the 10th August last, when the Judicature Commissioners' report was being printed for presentation to Parliament. The first portion of this Act is dependent on an Order in Council, but with that qualification, many facilities will be afforded to our city local or municipal court,—the third section being the most important, as it directs (after the usual publication of an Order in Council), "that any writ, order, summons, or process issuing out of, or made, or taken in any such court may be served in such part or parts of England and Wales as shall be specified in such order." There are several other very important additions to the powers of local courts, also contained in this Act, when sanctioned by the Order in Council, which our present space prevents discussing, and until publication of an Order in Council, there is also no practical object in discussing this part of the Act. Several very useful powers are, however, given by the Act itself, and therefore now in operation.

#### Section 4—

"Directs that two or more courts may be held at the same time either for the trial of issues or for the ordinary proceedings of the court."

#### By sec. 5—

"Affidavits made before any commissioner or other person appointed or authorized to take affidavits, either in England or elsewhere, by the Lord High Chancellor, or by any of the superior courts, or by the judges thereof, may be used in the court, and the signature of any person purporting to be such commissioner, or to be a person so appointed or authorized as aforesaid, need not be verified."

The most important section, however, is the 6th, by which—

"In all cases where final judgment shall have been obtained in any action brought in the court wherein the debt or damage does not exceed twenty pounds, exclusive of costs, and also in all cases where any rule or order shall be made by the judge for the payment of any sum of money, or any costs, charges, or expenses, not exceeding the sum of twenty pounds, such court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant may possess any goods or chattels; and the registrar of such county court shall stamp or seal the same, and thereupon the high bailiff of such county court shall execute the same in the same manner as if such writ or precept had been issued out of such county court, and such high bailiff shall take all the usual and proper fees thereupon, and shall or make a return of what he shall have done thereunder to the bailiff serjeant-at-mace of the court; and in all matters done under such writ



or precept, or in relation thereto, such high bailiff shall be under the direction and control of the judge of the county court of which he is high bailiff, as if such writ or precept had issued out of such county court; provided always that the costs of more than one writ, precept, or warrant shall not be allowed against the execution debtor unless by order of the judge of the said court."

This appears to remove the serious obstacle to the utility of the Mayor's Court against country debtors of small amount, pointed out in our former article. The cost to debtors in the Mayor's Court, including attorney's charges, rarely exceeds, in undefended actions, the court fees alone in the county courts, but as local courts could only enforce their judgments within their local jurisdiction, judgments had to be removed into one of the superior courts, and then execution issued, and sheriff's levy fees and poundage were incurred, generally in cases between 10*l.* and 20*l.* at a cost to debtors of between 4*l.* or 5*l.*, in addition to the judgment. This is remedied by sec. 6, so far as creditor's attorneys think proper to avail themselves of it. The former Act affecting removals not having been repealed, an option is clearly left to practitioners. It will be noticed that the court "is at liberty," &c. Now, unfortunately, when we write this two months after the Act passed, the authorities of the Mayor's Court have done nothing in the matter, and no writs of execution have been sent to the county courts. We believe it is thought best, first to obtain the necessary Order in Council, and so put the whole Act in force at the same time, but looking only at the beneficial nature of the alteration, we much regret such delay. One word as to the expression, "to be at liberty." Does it not mean "*may*?" and, if so, there is no doubt the latter word applied to a court of law as an Act of Parliament means "*shall*." The other City court, formerly the Sheriff's (Small Debt) Court, and since 1865 called the City of London Court, has all the essentials of a county court, and all orders for regulating the latter apply to this court. Still it remains a local court, and its receipts pass to the "City" exchequer.

Since we wrote on the subject two years back, two causes of discontent have been remedied; first, the troublesome question of larger fees than authorized by the Act of 1867, being taken in opposition to the judge's opinion and ruling, was set at rest in May last year by a local Act obtained by the Corporation, while a rule for a mandamus was pending at the suit of a solicitor against the registrar for refusing the issue of a summons in the manner considered right by the judge. As this Act, "The City of London Court Act, 1871," directs the same fees to be taken as in the county courts, of course this conflict ended. The other difficulty, the not having a qualified registrar for the trial of undefended causes,

was also cured by the appointment of a competent deputy, since elected to the office of registrar.

We consider it a misfortune for this court to be tied to the scale of fees taken in the county courts, the latter being so strongly condemned as excessive by the Judicature Commission and every one acquainted with the subject.

Is there still any possibility of effecting a fusion of these two City courts as suggested in our former article? The corporation are powerful, and almost invariably successful in Parliament; and so would probably find little difficulty in obtaining another local Act to carry out such an amalgamation. Were this done, a strong court would exist in the city; which must attract business from the whole metropolis; and if the City County Court which, prior to 1847, was a Court of Requests, became limited to cases under 5*l.*, triable by the registrar, with an appeal to the judge, even the high percentage of fees would be but little felt; and three judges being available for the higher division of such City court, to be similar to the present Mayor's Court, this latter could, if necessary, sit weekly, or even oftener, to dispose of the business before it. If nothing of the sort be done, there seems every probability that our City County Court must ere long merge into the general county court system, and our City be deprived of the pleasure of electing judge and officers, and also be saved the trouble of administering its assets.

G. M. W.

## LEGAL GOSSIP.

THE appointment of Sir Roundell Palmer to the Lord Chancellorship is, of course, the great legal event of the month. He takes the title of Lord Selborne. As everybody has been expecting the change, it surprised no one. The new Lord Chancellor is reputed to have relinquished a most lucrative practice, rumour usually putting the amount of his income at a sum at least double that which he will receive from the Crown. He has been employed of late years in nearly every appeal case before the House of Lords. He takes his seat on the woolsack with a very high reputation—a reputation indeed so high with the general public as possibly to lead to disappointment. The question which is being everywhere now asked is—What will he do? No one doubts his ability or his honesty; but coming into office during the last year of the life of the present Parliament, it may well be doubted

whether his colleagues will be able to bring forward any subject so dangerous as the reorganization of our courts, to which the new Lord Chancellor is *not* pledged, or the reform of legal education, to which he *is*. There is one reform, however, which if he would take in hand and could carry through, would not only confer an enormous advantage on the public, but would make the ministry exceedingly popular with the very class with whom the Conservative reaction is strongest—we mean the simplification of the law relating to the transfer of land. The Attorney-General declared at Plymouth, a few weeks ago, that he had long been convinced that Sir Robert Torrens's plan might be adopted. Probably all who have cared to examine what that plan is, agree with him; all, that is, excepting the conveyancers, who have a notion, unfounded we believe, that the change would greatly injure them.

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The retirement of Lord Hatherley is said to be owing mainly to a weakness of sight. He retires with the respect of all. Among the Bar he is deservedly popular for his high sense of honour and his personal kindliness. It is not forgotten that he has added important decisions to our body of case-law, and that he was, if not a brilliant, at least a sound lawyer. When he became Lord Chancellor, no one ever expected that his career would be one of intellectual surprises. But by sheer force of character he has always commanded the respect of the House of Lords and the country. He is not an orator, but he has a business-like way of saying what he means, and of leaving the impression that he will have his intention carried out. As a law reformer we must pronounce him a failure. His High Court of Justice Bill, though right in its main lines, never really had a chance; and the blunder, or it could hardly have been an intentional omission, of not consulting the judges, greatly strengthened the hands of the Opposition. The appointment of Sir Robert Collier, though a perfectly good one, was done in a like blundering fashion, and gave rise to much unfavourable comment. These blemishes, however, will not be remembered against Lord Hatherley, who, we trust, will long sit among the law Lords to give a character to them, which will add continually to the weight of their decisions.

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The appointment of the Hon. George Denman to the judgeship rendered vacant by the sad death of Mr. Justice Willes is one which will meet with the approval of the whole profession. Mr. Denman is a man whose courtesy has made him universally liked. On the Bench he will be as incapable of snubbing the members of the Bar as he was of quietly sub-

mitting to impertinence from the Bench. He has not the reputation of being a brilliant man, but he is a sound lawyer, and on some subjects he has always spoken with peculiar authority. Inheriting the name of his father he had, and kept, seisin of all questions connected with the law of evidence. The Further Evidence Amendment Act, which he introduced into the House of Commons, and successfully piloted through Parliament, brought about the completion of a series of changes commenced by Lords Brougham and Denman, for the purpose of bringing the law of evidence into harmony with the requirements of justice. Until these changes had been made, the theory of English law seems to have been that a person was exercising a privilege in being allowed to give evidence in a court of justice, rather than discharging a duty. Hence among the grounds of incompetency were infamy of character, interest in the success or discomfiture of one of the litigant parties, and refusal to guarantee by an oath the truth of the statements made. All these grounds of incompetency had been abolished by means of the efforts of successive law reformers, Lord Denman and Lord Brougham leading the way in 1843, by abolishing incompetency from infamy of character, or interest in the cause, except in certain cases. In 1852, 1854, 1861, and other years, other Acts were passed which abolished the remaining grounds of incompetency, with the exception of two. The two remaining grounds of incompetency which Mr. Denman's Bill removed, were first, those of parties in any action instituted in consequence of adultery, and the husbands and wives of such parties, and parties to any action for breach of promise of marriage; and second, those of persons who objected to take an oath on other than religious grounds. The Married Women's Property Bill—not the Act, which is a far inferior piece of legislative workmanship—received valuable support from Mr. Denman. In other respects he may claim to be considered as consistent and tenacious a law reformer as even his predecessor. Now that law reform seems to be about to receive attention from the Legislature, Mr. Denman will be missed in the House of Commons.

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On Wednesday, October 9, Mr. John Cutler, the Professor of Laws, delivered at King's College, London, a lecture on "The Principles and Practice of Arbitration, with especial reference to International Arbitration," which was well attended, in spite of the unfavourable weather. After discussing arbitration generally, and its application to the Albert and European Assurance Companies, the lecturer proceeded as follows:—

"I now come to international arbitration. It is obviously for the

interests of third countries, as well as consonant with humanity and good feeling, that any two countries having a dispute should settle that dispute without recourse to the sword. The mode of settlement that naturally suggests itself is arbitration. This method of settlement has just been adopted by ourselves and the United States, to settle what are known generally as the *Alabama* claims. Whatever may be the opinion as to the merits or demerits of the Treaty of Washington—even if holding as I do individually that that treaty is, as regards the treatment of the *Alabama* claims, based on unsound principles—no one can deny that the result of the proceedings has demonstrated not only the practicability of an international arbitration being constituted to solve and solving an international question, but how quickly and neatly it can do its work. But I must not be understood as arguing on the supposition of this being the first instance of an international arbitration. As long ago as 1655, we find in a treaty between England and France provisions for referring certain questions of damages to the decision of the Republic of Hamburg. I could give several intermediate precedents, but time will only allow of my alluding to the last of the series, the reference, in 1852, of the claims of the United States on Portugal, for the destruction of the privateer *General Armstrong*, to the then President of the French Republic. Arbitration has, in fact, done good service in the settlement of international disputes; but it has been by fits and starts. It is not, therefore, surprising to find that many persons have turned their attention to investigating whether the principle of arbitration could be made applicable to all international disputes, or at all events, if not to all, to certain classes of such disputes. In this investigation the Social Science Association has taken a prominent part. A committee was appointed, of which my colleague, Professor Leone Levi, was an active and energetic member; which committee, after going fully into the subject, and extracting, by means of a set of printed interrogations, the opinions of a large variety of persons, presented a report. This report recommends the establishment of a permanent congress of nations, consisting of deputies from each, with, as part of its system, a court of reference. This congress to have power to award the payment of pecuniary compensation, the making of apologies, the extradition or trial of offenders, the cession of territory, the demolition of fortresses, the specific performance of treaty obligations, and, indeed, everything which, according to the present usages of international law, may be imposed upon a defeated nation by the victors. Then, of course, comes the all-important question: How is the award to be enforced; by moral force, or by force of arms? On this point the committee appear to have been divided in opinion; and the report does not directly recommend either the one or the other, but the preponderance of its tone is in favour of moral force only being employed, in which respect I entirely endorse the report. The report terminates thus: 'The main conclusion which your committee have arrived at is the establishment by a general treaty of a permanent organization for the settlement of international disputes, having the character of a congress of nations, with a court of reference for the more

careful adjudication of claims and questions of detail. And they believe that such a congress would not only be of great help to the maintenance of peace among nations, but also facilitate the settlement of difficult questions of international law, and by its procedure and decisions eventually lead to the formation of a definite code.' It is somewhat presumptuous in me, perhaps, to differ from a report, the work of men of so much greater ability than myself, but I cannot help doubting the expediency of attempting to establish any such congress as that recommended by the report; at any rate, at present, when public opinion is not ripe for so momentous a change. Nor, again, do I believe that the establishment of any such congress would probably result in the total abolition of war, even as a redress for injuries, much less when undertaken in self-defence. It appears to me that there are certain international questions, such as boundary questions, and all claims for pecuniary damages, which are eminently fitted for decision by arbitration. In the first place, every State which refuses to refer such questions to arbitration should be as it were outlawed. This would pave the way for a general treaty or series of treaties, by which nations would bind themselves to refer all future questions of that character to arbitration, in manner provided by the treaty or series of treaties. This, in its turn, might—I do not say that it would—pave the way for such a congress as recommended by the report. But even then I fail to see how it could in practice settle all international disputes; nor do I think that it ought to have such extensive powers as recommended by the report. For one thing, I do not think that it ought to be able to award demolition of fortresses or cession of territory. Fortresses are for defence, not for attack; and every State ought to be allowed to take such defensive measures as it thinks fit, even if any limit were placed on its offensive preparations. I object to giving the power of awarding cession of territory, because I think it is indefensible to separate the inhabitants of entire districts from the State to which they have hitherto belonged, without their being consulted in the matter, to say nothing of when it is done against their expressed wishes, as has just been done in the case of Alsace and Lorraine. In short, I regard international arbitration as an excellent and eminently desirable thing in proper cases, but I fail to see in it an infallible panacea against the ills of war, or an appropriate solution of every possible international difficulty."

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The meeting of Metropolitan Police constables, although nominally held for the purpose of considering the best means of obtaining an advance of pay, was in fact a strong protest against the system by which a magnificent body of men is slowly but surely being thinned of its most valuable members, and the force is losing its prestige. The mere question of increased pay is one that will easily be solved, as manifestly the public must see the necessity of proving to the constables that if they do their work fairly they will be properly remunerated, and that if they show extra zeal the public will

reward them generously. But the point which is of most general interest is this, that beyond the question of wages there exists a growing dissatisfaction with the general management of the force. There is a feeling that too much power is placed in the hands of the district superintendents, who exercise their ideas of military discipline without much knowledge of the necessities and difficulties of police duty. This feeling may be well or ill founded, but, whether rightly or wrongly, it is an important fact that 9,000 men thus think. The district superintendent alone is the judge in all matters of minor discipline, and inflicts the penalty of several days' loss of pay virtually uncontrolled. It is said that the punishment inflicted of late years by these gentlemen has been heavier than that which was formerly adjudged by the Commissioner of Police. The absence of anything like the semblance of a judicial inquiry seems to be felt by men who daily come in contact with magisterial and similar investigations. This difficulty has been experienced in other places, we believe, and has been provided for by placing all cases of police misconduct either before a board of police or a police magistrate. Another grievance, which we should have supposed to have been more a matter of complaint for the public than the police, is that a purely civil is being transformed into a semi-military force. Those who can remember the days when the police were called "unboiled lobsters," and when it was thought necessary to clothe them in the most ridiculous uniforms rather than let them have the slightest appearance of soldiers, cannot help wondering what would have been thought thirty years since of our pet modern police inspector, with his sword-belt, tunic, moustache, and swagger.

So far back as 1868, "Custos," a well-informed writer on the Metropolitan Police, remarked on the readiness with which the men resigned their situations, and suggested as a remedy that they should be enrolled for a period of years, as under the military system. This suggestion did not find favour, and the men continue to resign. We believe that the new scale of superannuation made some few years since is greatly answerable for this. Formerly a constable could look forward to retiring after fifteen years' service at half-pay, while now he has to wait for half-pay until he has served thirty years, and then only gains a pension on his being medically incapacitated, or having attained sixty years of age. The pension is now so far distant that the men can scarcely see the future advantage, while the present good of increased wages and regular hours of day work are being offered on all sides to men of good character.

We offer these disconnected jottings on police matters to the consideration of our readers. We believe that police

discontent is at the present time by no means confined to the metropolis. The military direction of these bodies no doubt produces smart soldier-like men, criminal statistics, red-tape War-office pattern reports, *ad infinitum*, a strict semblance of obedience to an interminable code of orders; but we look in vain for the policeman of the past, intelligent and self-reliant, who was left to act upon general orders, and whose discretion justified the trust reposed in him. For our part, we would rather have a small force, able, intelligent, and zealous, because well paid and highly appreciated, than an army of raw country lads, who might by possibility be drilled into decent soldiers, but who, dissatisfied with their pay, seek the earliest opportunity of leaving the service.

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It is not often that our colonial Parliaments give us specimens of oratory worth quoting. But occasionally there is an "elegant extract" which is worth noting. Here, for example, is one from New Zealand. Mr. Fox, the Premier of New Zealand, is reported to have recently given the following sketch of Mr. Rolleston, the Superintendent of Canterbury: "It is a faculty of that honourable gentleman that he is always brooding over what is doleful and lamentable, even lugubrious, and filled with the gloomiest anticipations. I have no doubt that when the honourable gentleman was an infant in his cradle he laboured under the horrid hallucination that the milk-bottle would give out; that he foreboded that his little socks were damp and filled with rheumatics; that something was wrong with his pap; or that his nurse had not aired his pinafore. I have no doubt that these peculiarities are constitutional with the honourable gentleman; that he was born into the world a most unhappy creature; and I have no doubt he will continue his prognostications to the end of the chapter, and that his last moments will be harassed with apprehensions lest the rascally undertaker should make his coffin six inches too short." Mr. Rolleston need not be in dismay. There are many in this country to whom the description by Mr. Fox would apply.

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We stated in our opening number that we should not hold ourselves responsible for the opinions of our contributors when their names were attached. We feel bound to call attention to this caveat in view of the article on Sir Henry Maine's "Ancient Law," in the last number, and its conclusion in the present, by Mr. O'Connell. No one can read these articles without seeing that the writer is fully competent to deal with the subject, and probably no one would more gladly recognise the importance of free, even of hostile, if just, criticism than Sir Henry Maine himself. Mr. O'Connell has made



valuable suggestions, of which the one as to the meaning of *antestatus* is an example. He writes as a Celt with the most profound contempt for everything Teutonic, and especially for everything English, and is apparently of opinion that because we are English it is impossible for us really to understand the spirit of Roman law and Roman institutions. We are afraid he would consider the remark as coming from our brutal Teutonic nature, if we said it is amusing to watch how the old prejudice of race, the old hatred towards the English as being mere coarse, beef-eating barbarians, comes out almost as strongly in an educated man as in the class from which the Fenians recruited. Will Irishmen ever understand Englishmen?

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An oversight of the promoters of the Bastardy Act of last Session is now causing considerable anxiety in the minds of some who have "not loved wisely but well," and who, previously to the 10th of August, had not applied to the magistrate's court for the usual order for maintenance against the putative father. The 2nd section of 7 & 8 Vict. c. 101, is repealed by the 2nd section and the first schedule of 35 & 36 Vict. c. 65, "except so far as may be necessary for the purpose of supporting and continuing any proceeding taken before the passing of this Act." And by sec. 3 of 35 & 36 Vict. c. 65, the privilege of making an application for a summons upon the alleged father is given only to "any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act." The words in the former statute, "or who has been delivered of a bastard child within the period of six calendar months before the passing of this Act" have been omitted from the last Act. These words were accidentally omitted in debate in the House, and we are glad to hear from Mr. Charley, who introduced the Bill, that the inconvenience is purely temporary, and that he will immediately on the reassembling of Parliament introduce an Amendment Bill, and get it passed as quickly as possible, to relieve those who have been deprived of obtaining bastardy orders. But what a comment on the happy-go-lucky style of our legislation.

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In 1859 a Royal Commission was appointed to inquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey, under which were comprised the laws relating to the tenure of land; the constitution, practice, and procedure of the tribunals; the defects and abuses connected with them; the state of the prisons, and the administration of public charities. The Commission had the testimony of all the available legal learning in the island; and, in 1861, they

issued an elaborate report, with minutes of evidence, forming a bulky volume. The Commissioners believed that many of the institutions were well adapted to the peculiar circumstances of the island. The laws relating to property, for example, though requiring amendment, had a material influence in fostering a spirit of industry and self-dependence. Many important alterations were recommended in the machinery of the laws and institutions; alterations required principally to adapt them to altered circumstances, and a largely increased population. Since that report was issued, various attempts have been made in Parliament to legislate upon it, but in every case the attempt has been a failure. The recommendations of the Commission were given under sixteen different heads, and embraced collectively the whole subject. The constitution and procedure of the Royal Court were one of the chief objects of reference, and embodied such admirable suggestions as would have done credit to the authorities of the island to have immediately adopted them. Nevertheless, a long lapse of time has been allowed to pass without anything being done. The Imperial Government dare not handle the subject, and no private member of the House of Commons could undertake with any hopes of success to carry a measure of legal reform for Jersey, which must necessarily affect the institutions of the island to which the inhabitants are naturally much attached, although unwavering in their loyalty to their Sovereign. We hope soon to be able to lay before our readers the state of the law and institutions of this and of the Channel Islands generally.

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A curious smuggling case came on at the Mansion House, before Sir Thomas Dakin, on the 9th ultimo. A Roman Catholic priest, named Jansen, had been charged with smuggling a large quantity of tobacco. On that day it was announced to the court that the prosecution had been withdrawn by order of the Commissioners of Customs, and the fact came out that the evidence was conclusive, but that the commissioners had themselves fined the reverend smuggler 50*l*. Now, one can well understand that a conviction for smuggling has a very awkward look, especially when it is for a large quantity of contraband goods; that a charge of this kind may bring down an unfair amount of obloquy or even ruin upon the offender; and that any one would be opposed to the harshness with which possibly our smuggling laws might press. All this is clear enough, but that the commissioners should take upon themselves to accept a compensation for a fine is about as unconstitutional an act as has been made public for some time. The commissioners may or may not have the

right to forego all prosecution whatever for an offence against the smuggling laws. We believe they are bound to prosecute wherever the evidence is sufficient to lead to a probability of conviction. But that they should constitute themselves a tribunal and inflict their own fines is just as illegal as it would be to re-establish the Court of Star Chamber. It is not merely setting up an utterly illegal court, but it is simply abrogating the criminal law. It is, in fact, the dispensing power over again. We trust that when Parliament meets some explanation will be given, or at least called for.

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The old adage of "Who is to decide when doctors disagree?" has just been exemplified by one of the last official acts of the late Lord Chancellor. When the administrators of justice cannot agree without using violent language towards each other, resulting in a personal conflict on the Bench, in the presence of their brother magistrates and the public attending the court, it is high time that some superior authority should place a *veto* upon the recurrence of such unseemly exhibitions. The affray to which we allude occurred at the last licensing meeting of the magistrates for the city of Norwich. On these occasions private interests often outweigh the conscientious discharge of judicial functions, particularly in provincial towns. When party spirit or personal feeling runs parallel with public duties, it is an acknowledged rule, whether the ayes or the noes "have it," that the minority should regard with respect and forbearance the decision of the majority which binds them. Fortunately, in this country the feelings of public men seldom get the better of their judgment in this way, and, in the instance referred to, the Lord Chancellor has very properly given his opinion that the parties to such a breach cannot continue usefully to fulfil the grave duties of their office, and has consequently ordered their removal from the commission of the peace.

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We understand that the following are about to be sworn in Queen's Counsel—J. F. Leith, Esq., and Alfred Wills, Esq.; J. B. Benjamin, Esq., Q.C., of the Northern Circuit, has obtained a patent of precedence.

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## BOOK NOTICES.

The Code of Civil Procedure of the State of California, adopted 11th March, 1872; to take effect 1st January, 1873. With References to the Decisions of the Supreme Court; and Notes showing the Changes made in the different Statutes consolidated in the Code since their original adoption. Compiled by Warren Olney, of the San Francisco Bar. San Francisco: Summer Whitney & Co. 1872.

THIS little book is one to make English barristers break the Tenth Commandment. It much resembles in size, appearance, and binding, a pocket Bible; so that if a man on circuit were pressed for time he might take it to church with him without fear of detection. It gives in this compact form the text of the code of civil procedure of California, together with references to the decisions of the Supreme Court, and notes showing the changes made in the different statutes consolidated in the code since their original adoption. Of the code itself we do not propose to say anything except that the fourth part, which deals with evidence, may furnish to Englishmen an illustration of how easily this branch of the law can be codified, and how advantageous such a codification must necessarily be. The work does credit to the legal learning, the enterprise, and the progress of the mechanical arts in California.

The Laws as to Licensing Inns, &c.; containing the Licensing Act 1872, and the other Acts in force as to Alehouses, Beerhouses, Wine and Refreshment Houses, Shops, &c., selling Intoxicating Liquors, and Billiard and occasional Licences, systematically arranged, with explanatory Notes, the authorized Forms of Licenses, Table of Offences, Index, &c. By GEORGE C. OKE, Chief Clerk to the Lord Mayor of London. London: Butterworths. 1872.

THE Licensing Act, 1872, had hardly passed, before we were deluged with treatises upon it. Some were little more than exact reproductions of the statute itself, while others had been produced in such haste to secure the first of the market, that the explanations not infrequently further mystified the reader; or utterly misled him. The inconsiderate haste with which the licensing laws were passed had only been too closely imitated by the commentators. The magistrates and others who were suddenly called upon to administer the new law were utterly bewildered with a statute which they had expected would at least be a consolidation of former legislation, or possess distinct characteristics of its own. They found, however, a mass of matter scarce digested; old and new provisions mixed up in apparently inextricable confusion; verbal omissions in one part, and absurd surplusage in another. To sum up all in one sentence, the Act is one of those fearful specimens of unrevised legislation, of which the Bastardy Act, 1872, had given us a foretaste. The announcement of a work on the licensing laws, by Mr. Oke, was therefore hailed with unusual pleasure by the legal profession, who are well aware of the pains and accuracy bestowed by that gentleman on every work

which leaves his hands. The book now before us is more than worthy of its author's reputation. It is a complete summary of all laws now in force relating to licensing; and the comments on the sections of the new Act prove how much the author has gained by the delay in its production. We might specially point out Mr. Oke's observations on sections 45 and 46, which, as our readers will remember, contain the vexed questions of the qualification for licences. There are many other equally valuable notes by the author, as well as cases and opinions cited; but it would be fairer to Mr. Oke to refer our readers to his book than to reproduce them in these pages. They will be found invaluable to the magistracy, and to all who are interested in the licensing laws, while they possess this advantage, of being so well arranged that a person entirely new to the subject might in a short time gain a fair knowledge of the law and practice.

But although Mr. Oke has done much, he is yet bound to admit that even he has found the Licensing Act of 1872 "intricate and perplexing." He expresses the hope "that if the magistrates, as they have done at the majority of benches, will, in carrying out its provisions, read them with a desire to apply to them fairly the usual principles of construing Acts of Parliament, a very great improvement upon the previously existing state of things will be effected." In this hope we cordially join, but with fear. The omission of the word "knowingly," in the 18th section, inflicting a penalty on a licensed person who permits drunkenness, will, we are afraid, be a sore temptation to those magistrates who look upon licensed victuallers with jealous eyes, and whose decisions as to granting licences will be marvels in the eyes of posterity. The penal clauses of the Act of 1872 we believe to be its great weakness. Take, for example, section 15, by which, if Mr. Oke's opinion be correct, any licensed victualler permitting on one occasion his house to be used for an immoral purpose, is liable not only to a penalty of twenty pounds, but to forfeiture of his licence, and disqualification from holding a licence "*for ever*."

Another offence is bribing, or attempting to bribe, any constable. This is an accusation easy to make: a great temptation to an unworthy constable to put forward, in order to gain credit with his superiors, and most difficult to disprove. We will not touch upon other points which occur to us: these we submit are sufficient to show how carefully the decisions on these points should be watched, in order to prevent the really useful provisions in the Act being swamped in the rush of popular indignation which would follow a few injudicious convictions. The licensed victuallers are as a body, however, sufficiently strong to protect their own interests; and this they will best do by securing the most competent legal advice upon all occasions when their conduct is called into question.

**The Lawyer's Companion for 1873; containing a Diary, London and Provincial Law Directory, Tables of Costs, Legal Time Tables, Cases affecting Attorneys, &c. Edited by John Thompson.**  
London: Stevens & Sons, Chancery Lane.

THIS book contains the usual amount of valuable matter which it is necessary that the lawyer should have handy. Its list of the

principal practical statutes is carefully done. Each page of the diary, which is about the size of the present, contains two days, so that a good space is left for each day. The list of the Bar is quite as convenient as that in the Law List, and the work is brought down to the latest date of our going to press. Lord Selborne figures as Lord Chancellor, and Mr. Denman as the new judge; though we think that in making him Sir George Denman the editor has been a little premature. Altogether it is the best book of the kind we have seen.

Outlines of Roman Law, consisting chiefly of an Analysis and Summary of the Institutes. For the use of Students. By T. Whitcombe Greene, B.C.L., of Lincoln's Inn, Barrister-at-law. New Edition. London: Stevens & Sons. 1872.

It is difficult to know what to say about this little book. It is written with very considerable care, and by one who in the main knows what he is talking about. But while it professes to be an elementary book, the introduction would certainly be quite unintelligible to one ignorant of Roman law. The tables, however, are very good, and the general summary of law. Probably, if the beginner would put off reading the introduction till he had got through the remainder of the book, he would find it intelligible. The notes are also good. Our own notion is, that the student of Roman law cannot begin better than by reading an introduction to the study, such as is furnished by Ortolan's "Generalization," which he may do either in the original or in Prichard and Nasmith's translation. After having mastered this, he should go at once to Justinian. We see no advantage in reading a bald translation of the Institutes in this fashion: "*Justitia* is the constant and perpetual wish to render to every one his right. *Jurisprudentia* is the knowledge of things divine and human; the science of right and wrong." The nonsense of such platitudes as these is concealed when they are in the original, or rather the sentences form part of a whole, which in its way is a very fine work of art. But just as it would be absurd to take a stone at random from Westminster Abbey, and present it as worthy of inspection, so equally absurd is it to take such sentences from the Institutes, except it be to show that they are either meaningless or misleading. The book before us however, while it would be a bad substitute for the Institutes, would be a good companion to read with it.

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Our Scotch and Irish Notes and several Book Notices must necessarily stand over till our next issue for want of room.

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## APPOINTMENTS.

The Hon. George Denman, Q.C., has been appointed a Justice of the Court of Common Pleas; Mr. H. W. Cole, Q.C., County Court Judge of Circuit No. 21; Mr. G. W. Hastings, Second Vice-Chairman of the Worcestershire Quarter Sessions; Mr. B. T. Williams, Recorder of Carmarthen; Mr. Thomas Speechley, Registrar of the City of London Court; Mr. Robert Swyer, Clerk to the Justices of the Shaftesbury Division; Mr. Edward Arnold, solicitor, Coroner for the Western Division of Sussex; Mr. George Toller, Town Clerk of Leicester; Mr. W. H. Mayo, Clerk to the Justices of the Hendon Division; Mr. Edward Coxwell, Clerk of the Peace for Southampton; Mr. James Button, Clerk to the Justices of Newmarket Division; Mr. Joseph Scott, Clerk to the Borough Magistrates of Sudbury.

SCOTLAND.—Mr. J. P. Coldstream, W.S., has been appointed Assistant Clerk of Session.

## OBITUARY.

*August.*

- 4th. HATHORN, John, Esq., Master of the Supreme Court of Natal, aged 61.

*September.*

- 6th. THOMPSON, Joseph G., Esq., Solicitor, aged 41.  
 17th. STONE, William, Esq., Solicitor, aged 65.  
 18th. KENDALL, Charles, Esq., Solicitor.  
 24th. JONES, Clement, Esq., Solicitor, aged 31.  
 26th. BRITTON, Charles, Esq., Solicitor, aged 67.  
 28th. FESENMEYER, J. F. W., Esq., Solicitor, aged 75.  
 29th. PORTER, J. Smith, Esq., Solicitor, aged 54.

*October.*

- 2nd. WILLES, Right Hon. Sir James Shaw, Judge of the Court of Common Pleas, aged 58.  
 5th. UPTON, R. Brotherson, Esq., Solicitor, aged 65.  
 9th. URQUHART, John, Esq., Solicitor, aged 45.  
 10th. HUNT, William, Esq., Solicitor, aged 59.  
 14th. JONES, Henry, Esq., Solicitor, aged 48.  
 16th. LEWIS, David, Esq., Barrister-at-Law, aged 75.  
 17th. CROSBY, Thomas, Esq., Solicitor, aged 71.  
 18th. BRUCE, Pryce John, Esq., formerly Stipendiary Magistrate of Merthyr Tydfil, aged 88.  
 21st. COLLIER, T. Bagnall, Esq., Solicitor, aged 68.

THE

# LAW MAGAZINE AND REVIEW

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No. XL.—DECEMBER, 1872.

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## I.—THE INFLUENCE ON THE MIND OF THE STUDY AND PRACTICE OF LAW.

By H. R. FINK, Author of the "Indian Evidence Act," 1872.

“**A** DIALECTICA Aristotelis libera nos Domine!” Such was the pathetic supplication of a certain class of students, who, it is said, prayed in the language of St. Ambrose, for deliverance from the study of the logic of Aristotle. The distaste for the Aristotelian dialectic was undoubtedly great; but scarcely can this aversion be said adequately to measure the horror in which the study of law has been held by many, even the most strong-minded of men. Instead of the logic of Aristotle, the student has at all times been willing to pray for deliverance from the subtilties of Coke upon Littleton. No study has evoked such implacable hatred. Such being the fact, what are the inducements to its cultivation? Apart from its value to the statesman and the publicist, and its necessity to the lawyer, there remains but one incentive to the pursuit, namely, its capacity for exercising and developing the higher mental faculties.

Chiefly as a mental discipline, therefore, does this study claim the respect of the student; and it is probably this view of it, which alone can encourage its extensive and, consequently, its intensive cultivation. Its capacity once recognized as a mental gymnastic, it will not fail to attract, outside the academy and the mere profession of the law, such minds as have recourse to the most laborious studies, for the sake only of self-improvement. Meanwhile it may be asked what the special influence of this study is on the mental habits. “The difference,” says Sir William Hamilton, “between different studies in their contracting influence is great. Some exercise and, consequently, develop, perhaps one faculty on a single phasis, and to a low degree; whilst others from a



variety of objects and relations which they present, calling into strong and unexclusive activity the whole circle of the higher powers, may also pretend to accomplish alone the work of catholic education." If the testimony of certain writers be accepted, the study of law may claim the highest rank among the sciences as a mental discipline. Dr. Johnson, for instance, says, "Law is the science in which the greatest powers of the understanding are applied to the greatest number of facts." Edmund Burke, again, terms it "the pride of the human intellect," and declares that "it does more to quicken and invigorate the understanding than all the sciences put together."\* Coming to our own day, we find, that to this study is assigned a capacity for giving employment to the whole range of the higher faculties:—"Now there are two subjects of thought," says the author of "Ancient Law,"—"the only two, perhaps, with the exception of physical science, which are able to give employment to all the capacities which the mind possesses: one of them is metaphysical inquiry, which knows no limits, so long as the mind is satisfied to work on itself; the other is law, which is as extensive as the concerns of mankind."† Opinions, such as these, which may be found scattered up and down the writings of the most competent judges, are however open to serious misapprehension. At the present day, when the law is cultivated, less liberally as a general science, more exclusively as a special practice, an indiscriminate application of such opinions is likely to mislead the student, and keep out of view the positive dangers which attend the study. Nothing at the same time ought to encourage its extensive and scientific cultivation more than a clear conception of the twofold and opposite influence which this study is likely to exercise on the mind; contracting and enfeebling it, as the study becomes shallow and practical, and stimulating its higher powers, as it becomes a scientific pursuit. But the history of legal study so prominently exhibits it, in its one practical tendency, that it is not surprising to find the opinions which exist regarding its incapacity as a mental exercise, formed almost exclusively with reference to its narrow, and partial cultivation. To some of these opinions I propose to refer in this paper.

Meanwhile, it may be remarked, that there is no science which affords a more striking resemblance to law in its influence on the mental habits, than the science of mathematics. Indeed, Dugald Stewart finds no subject bearing so close an analogy to mathematics itself, as a hypothetical science, as a

\* Burke's Speech on American Taxation: Works, vol. i., Bohn's ed., p. 407.

† Maine's Ancient Law, p. 360.

code of municipal jurisprudence. It has accordingly been asserted, that the one study affords a cultivation as one-sided and contracted as the other. Nor has the analogy been held good merely with reference to the general tendency of these studies, but also with reference to some particular habits of mind which, in an equal degree, they are said to exercise and encourage, to the exclusion and neglect of others. The first that may be noticed is that which Von Weiller ascribes to the mathematics:—"By the mathematics, the powers are less stirred up in their essence than drilled to outward order and severity; and consequently manifest their education more by a certain formal precision, than through their fertility and depth." To the same effect is the testimony of Hallam with regard to the study of law in its practical bearing:—"The application of general principles of justice to the infinitely various circumstances which may arise in the disputes of men with each other, is in itself" (says this writer) "an admirable discipline of the moral and intellectual faculties. Even where the primary rules of light and policy have been obscured in some measure by a technical and arbitrary system, which is apt to grow up perhaps inevitably in the course of civilization, the mind gains in precision and acuteness, though at the expense of some important qualities."\* Coleridge again, a competent judge on this subject, notices the one-sided development to which the study of law conduces, and recommends the study of metaphysics as likely to counteract this tendency. "I think," says Coleridge, "that upon the whole the advocate is placed in a position unfavourable to his moral being, and indeed to his intellect also, in its highest powers. Therefore I would recommend an advocate to devote a part of his leisure time to some study of the metaphysics of the mind, or metaphysics of theology; something, I mean, which shall call forth all his powers, and centre his wishes in the investigation of truth alone, without reference to a side to be supported. No studies give such a power of distinguishing as metaphysical; and in their natural and unperturbed tendency, they are ennobling and exalting. Some such studies are wanted to counteract the operation of legal studies and practice, which sharpen indeed, but, like a grinding-stone, narrow while they sharpen."† And A. J. St. John asserts, on the authority of Lord Bacon himself, that "a laborious study of law has a natural tendency to narrow and enfeeble the mind."‡ So much then for the contracting and enfeebling tendency of this study.

\* Hallam's *Literary History*, 7th ed., vol. i., p. 61.

† Coleridge's *Table Talk*, pp. 4-7.

‡ Milton's *Prose Works*, edited by A. J. St. John: Article, "Education."

It is admitted, however, without much controversy, that the study on the other hand sharpens, and renders the mind remarkably acute (special qualifications of the lawyer, which very probably the reader has already discovered on his own account, without the evidence of either Mr. Hallam or Mr. Coleridge). That the lawyer, of all men, is sharp, is proverbial; and to correct, what evidently is a vulgar error on this subject, it becomes necessary to state, once for all, that this sharpness has nothing akin to the handicraft skill of the practitioner who dips his fingers into a gentleman's pocket in a crowd. In what, then, does this sharpness consist? Chiefly, it may be said, in a certain mental dexterity and quickness of conception, and the ability (as Lord Brougham remarks) to produce suddenly the mind's resources at the call of the moment. Qualities such as these have placed the lawyer in the foremost rank of masters in the art of disputation. Burke accordingly remarks that the study of law "renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources."\* The tendency of the rudiments of mathematics to produce a similar effect has been noticed by Professor Klumpp, who says that a "legitimate progress in these, aids, sharpens, and delights the mind."

But the question arises, as one of grave importance, whether qualities, such as these, when cultivated to any considerable extent, are truly beneficial; and whether they can be regarded as indications of intellectual superiority. To this question Dugald Stewart furnishes a satisfactory reply. "For my own part," says the philosopher, "so little value does my individual experience lead me to place on argumentative address, when compared with some other endowments subservient to our intellectual improvement, that I have long been accustomed to consider that promptness of reply and dogmatism of decision, which mark the eager and practised disputant, as almost infallible symptoms of a limited capacity; a capacity, deficient in what Locke has called (in very significant but somewhat homely terms), large, sound, roundabout sense. In all the higher endowments of the understanding this intellectual quality (to which nature as well as education must liberally contribute) may be justly regarded as an essential ingredient. It is this which, when cultivated by study and directed to great objects, or pursuits, produces an unprejudiced, comprehensive, and efficient mind; and where it is wanting, though we may occasionally find a more than ordinary share of quickness and of information, a plausibility and brilliancy of discourse, and that passive susceptibility of polish from the commerce of the world, which is so often united with impos-

\* Burke's Works, Bohn's ed., vol. i., p. 468.

ing but secondary talents, we may rest assured that there exists a total incompetency for enlarged views and sagacious combinations, either in the researches of science or in the conduct of affairs.\* More to the point, however, is the testimony of Lord Brougham, who, in tracing the career of Sir William Scott (Lord Stowell), says:—"Confining himself to the comparatively narrow walks of the consistorial tribunals he had early been withdrawn from the contentions of the former, had lost the readiness with which his great natural acuteness must have furnished him, and had never acquired the habits which forensic strife is found to form,—the preternatural power of suddenly producing all the mind's resources at the call of the moment, and shifting their application nimbly from point to point, as that exigency varies in its purpose or its direction. But so also had he escaped the hardness, not to say the coarseness, which is inseparable from such rough and constant use of the faculties, and which while it sharpens their edge and their point, not seldom contaminates the taste, and withdraws the mind from all pure and generous and classical intercourse, to matters of a vulgar or technical order."†

It would appear that some of the prominent intellectual vices of the mere mathematician are attributable to the lawyer, owing in some measure probably to the analogy supposed to exist between mathematical and legal reasoning, and the identity of their effects on the mind. Among the most prominent of these vices is the proneness of the mathematician to the admission of data as the grounds of his reasoning, without questioning their validity. With the lawyer the same facility in the admission of his premises may be said to arise from the necessity imposed on him, of reasoning upon fixed principles and definitions, whether right or wrong. Dugald Stuart adduces this instance in his strictures on the Aristotelian logic, as a proof of the inutility of the mere syllogism in the discovery of truth, and as an exercise of reason in its highest sense. "It is an observation," says Dugald Stewart, "which has been often repeated since Bacon's time, and which it is astonishing was so long in forcing itself on the notice of philosophers, that in all our reasonings about the established order of the universe, experience is our sole guide, and knowledge is only to be acquired by ascending from particulars to generals, whereas the syllogism leads us invariably from universals to particulars, the truth of which, instead of being a consequence of the universal proposition, is implied and presupposed in the very terms of its enunciation. The syllogistic art, therefore, it has justly been concluded, can be of no use in extending our knowledge of nature. To this observation

\* Dugald Stewart's "Elements," vol. ii., p. 211.

† Brougham's *Statesmen*, ed. 1845, vol. i., p. 91, 2nd series.

it may be added, that if there are any parts of science in which the syllogism can be advantageously applied it must be those where our judgments are formed in consequence of an application to particular cases of certain maxims which we are not at liberty to dispute. An example of this occurs in the practice of the law. Here the particular conclusion must be regulated by the general principle, whether right or wrong.\*

Not only is the syllogistic art an inefficient organ for the discovery of truth, but, as affording an exercise of reason in its highest sense, its capacity is open to doubt. "To exercise with correctness the powers of deduction and of argumentation, or, in other words, to make a legitimate inference from the premises before us, would seem to be an intellectual process which requires but little assistance from rule. The strongest evidence of this is the facility with which men of the most moderate capacity learn in the course of a few months to comprehend the longest mathematical demonstrations; a facility which, when contrasted with the difficulty of enlightening their minds on questions of morals or politics, affords a sufficient proof that it is not from any inability to conduct a mere logical process that our speculative errors arise."†

A reverence for the authority of great names is also said to be a fruit of this species of culture, which, instead of encouraging that spirit of free inquiry which the study of philosophy cultivates, tends to lead the mind to the acceptance of established precedents as the guide and the rule. The study and practice of law is said by Lord Brougham to have instinctively this peculiar tendency. Speaking of that class of technical lawyers, among whom Sir Vicary Gibbs stands prominent, Lord Brougham says:—"They are even in some respects not to be termed mere lawyers. They are acquainted with the whole of the law, which they have studied accurately, and might also be admitted to have studied profoundly, if" (adds this celebrated writer), "depth can be predicated of those researches which, instinctively dreading to penetrate the more stubborn and more deeply lying vein of first principle, always carry the labourer to the shallower and softer bed that contains the relics of former workmen, and make him rest satisfied with these patterns as the guide and the rule. All that has been said or written by textmen or judges they know; and of it all much practice has given them great experience in the application."‡ The tendency of mathematical studies to produce a similar effect on the mind is observed by Dugald Stewart, himself an accomplished mathematician:—"I think I have observed," says this great philosopher, "a peculiar proneness in mathematicians on occasions of this sort to avail them-

\* Dugald Stewart's "Elements," vol. ii., p. 202. † *Ibid.*, p. 204.

‡ Brougham's *Statesmen*, ed. 1845, vol. i., p. 153, 1st series.

selves of principles sanctioned by some imposing names, and to avoid all discussion which might lead to an examination of ultimate truths, or involve a rigorous analysis of their ideas.”\*

Accustomed thus to one particular method of reasoning, from received and notorious principles, it would seem that the mind is peculiarly incapacitated for other modes of ratiocination. It has been observed of the mere lawyer, that his reasonings apart from his favourite science are marked by that imbecility which characterizes the mathematician when he attempts to travel beyond his legitimate province. Dugald Stewart and, following him, Lord Macaulay, while expressing just admiration for the remarkable specimens of logical argumentation which are to be found in the efforts of our greatest lawyers, exhibit a contempt for their performances outside the forum; and indeed, where the discussion turns even upon those problematical questions which arise out of the very postulates of their favourite study. “The habits of thought besides,” says Dugald Stewart, “which the long exercise of the profession has a tendency to form on its appropriate topics, seem unfavourable to the qualities on which the justness or correctness of our opinions depends. They accustom the mind to those partial views of things which are suggested by the separate interests of litigants, not to a calm, discriminating survey of details in all their bearings and relations. Hence the apparent inconsistencies which sometimes astonish us in the intellectual character of the most distinguished practitioners—a talent for acute and refined distinctions; powers of subtle, ingenious, and close argumentation; inexhaustible resources of invention, of wit, and of eloquence; combined not only with an infantine imbecility in the affairs of life, but with an incapacity for forming a sound decision even on those problematical questions which are the subject of their daily discussion. The great and enlightened minds whose judgments have been transmitted to posterity as oracles of legal wisdom, were formed, it may safely be presumed, not by the habits of their professional warfare, but by contending with those habits and shaking off their dominion.”† So very similar is the testimony of Lord Macaulay as to this intellectual defect of the mere lawyer, that I am tempted in this place to reproduce it, although it must already be familiar to the student. Referring to Dr. Johnson’s power of reasoning so ably upon premises foolishly assumed, he says, “The same inconsistency may be observed in the schoolmen of the middle ages. Those writers show so much acuteness and force of mind in arguing on their wretched data, that a modern reader

\* Dugald Stewart’s “Elements,” vol. iii., p. 217. † *Ibid.*, p. 208.

is perpetually at a loss to understand how such minds came by such data. Not a flaw in the superstructure of the theory they are rearing escapes their vigilance. Yet they are blind to the obvious unsoundness of the foundation. It is the same with some eminent lawyers: their legal arguments are intellectual prodigies, abounding with the happiest analogies and the most refined distinctions. The principles of their arbitrary science being once admitted, the statute-book and the reports being once assumed as the foundations of reasoning, these men must be allowed to be perfect masters of logic. But if a question arises as to the postulates on which their whole system rests, if they are called upon to vindicate the fundamental maxims of that system which they have passed their lives in studying, these very men often talk the language of savages or of children.”\*

Sir William Hamilton, in his now celebrated controversy with Dr. Whewell on the beneficial intellectual influence of mathematical studies, notices the fact (mentioned by his opponent) that an extraordinary number of persons who, after giving more than common attention to mathematical studies at the university, have afterwards become eminent as English lawyers. The fact of the consecution is not doubted by Sir William Hamilton, but he discovers in the argument a fallacy, technically called the “*Post hoc ergo propter hoc*.” “Because a great English lawyer,” says Sir William Hamilton, “has been a Cambridge wrangler, it is curious logic to maintain that mathematical study conduces to legal proficiency?† But that this precisely was Dr. Whewell’s meaning it is difficult to admit. Meanwhile, it is admitted by Sir William Hamilton himself, that success in the study and practice of law requires what elsewhere he apparently allows to be the sole legitimate effect produced on the mind by mathematical studies, namely, a strong memory, and a capacity of the most continuance and most irksome application—in other words, a strong memory, and the power of continuous attention. In this sense, therefore, the influence of mathematical study has really, to some extent, operated in conducing to legal proficiency. But whether this influence is wholly beneficial may be doubted. How far, and in what respect, have mathematical studies influenced the intellectual habits of the lawyer? is a question of considerable interest; and one which no writer has (so far as I am aware) sufficiently noticed. Lord Brougham, however, in his sketch of that class of inferior, though, able, lawyers, among whom he places Lord Chief Justice Gibbs, draws attention to this influence, as it manifested itself in their peculiar mental tendencies. “Their

\* Macaulay’s *Essays*, vol. i., p. 185.

† Hamilton’s *Discussions on Philosophy*, p. 337.

education," says Brougham, "has not been confined to mere matters of law. It has indeed been very far from an enlarged one; nor has it brought them into a familiar acquaintance with the scenes which expand the mind, make it conscious of new powers, and lead it to compare and expatiate and explore. Yet has this course of instruction not been without its value, for they are generally well versed in classical literature, and often acquainted with mathematical science? From the one, however, they derive little but the polish which it communicates and the taste which it refines; from the other, they only gain a love of strict and inflexible rules, with a disinclination towards the relaxation and allowances prescribed by the diversities of moral evidence. From both, they gather a profound deference for all that has been said or done before them, an exclusive veneration for antiquity, and a pretty unsparing contempt for the unlettered and unpolished class which form, and ever must form, the great bulk of mankind in all communities. A disrespect for all foreign nations and their institutions has long been another appointed fruit of the same tree; and it has been in proportion to the overweening fondness for everything in our own system, whether of polity or mere law. . . . But still, the precise dictates of English statutes, and the dicta of English judges and English text-writers, are with them the standard of justice; and in their vocabulary, English law is as much a synonym for the perfection of wisdom, as in that of Dean Swift's imaginary kingdom, Houynhm was for the 'perfection of nature.' . . . They often make high pretences to eloquence, and, without attaining its first rank, are frequently distinguished for great powers of speech, as well as extraordinary skill in the management of business. Their legal reputation, however, is the chief object of their care; and in their pursuit of oratory they aim far more at being eloquent lawyers than orators learned in the law. Hence their estimate of professional merit is all formed on the same principle and graduated by one scale. They undervalue the accomplishments of the rhetorician without despising them, and they are extremely suspicious of any enlarged or general views upon so serious a subject as the law. Change they with difficulty can bring their minds to believe possible, at least any change for the better; and speculation or theory on such matters is so much an object of distrust, or rather of mingled contempt and aversion, that when they would describe anything ridiculous or even anomalous in the profession, they cannot go beyond what they call 'a speculative lawyer.'"

The tendency of mathematical studies to inspire a love for

\* Brougham's *Statesmen*, vol. i., p. 154, first series.



strict and inflexible rules, and to create a disregard for any but the highest degree of evidence, is noticed by the logician, Kirwan, who observes that, "the habit of mathematical reasoning seems to unfit a person for reasoning justly on any other subject; for, accustomed to the highest degree of evidence, a mathematician frequently becomes insensible to any other." \* And Warburton, on the same subject, says, "In this science, whatever is not demonstration is nothing, or at least below the sublime inquirer's regard. Probability, through its infinite degrees, from simple ignorance up to absolute certainty, is the *terra incognita* of the geometrician. And yet here it is that the great business of the human mind is carried on—the search and discovery of all the important truths which concern us as reasonable creatures. And probability accompanying every varying degree of moral evidence requires the most enlarged and sovereign exercise of the reason. But the harder the use of anything, the more of habit is required to make us perfect in it. Is it then likely that the geometer, long confined to the routine of demonstration—the easiest exercise of reason where much less of the vigour than of the attention of mind is required to excel,—should form a right judgment on subjects whose truth or falsehood is to be rated by the probabilities of moral evidence?" †

Is then the study of mathematics of no avail as a preparation for the study and practice of law? It may be remarked that, towards the close of the last century, mathematical study was considered essential by several writers, who would have borrowed Plato's inscription for every modern school of law. But then these writers may be found advocating (in the words of Finch) "all the sciences in the world;" and accordingly we find the law-student of a century ago burdened with Greek philosophy and poetry, Roman oratory, the physical sciences, and a host of studies, all having a mysterious connection, and all, in some manner, conducing to proficiency in the law. The reader will remember in the pages of "Eunomus" a somewhat pleasing discussion on the merits of mathematical study, and its utility to the lawyer. There the algebraic or symbolical part of mathematics is advocated in preference to the geometric or ostensive, the writer waggishly remarking, by way of argument, that the poet was happy in his idea when he said—

"Full in the midst of Euclid dip at once,  
And petrify a genius to a dunce."

\* See Kirwan's Logic, Preface, p. iii.

† Julian, Preface, p. xix.; Works, vol. iv., p. 345.

Coming to our own day we find writers (Mr. Austin, for instance) disavowing the utility of mathematics altogether as preparation for legal study. "With regard to mathematics (except in as far as the methods of investigation and proof are concerned, and which would form a branch of a well-conceived course of logic), I cannot see why men intended for the law, or for public life, should study them; or why any men should study them who have not a peculiar vocation to them, or to some science or art in which they are extensively applicable. To all other men the advantages derivable from them as a gymnastic to the mind, might be derived (at least in a great measure) from a well-conceived course of logic, into which, indeed, so much of mathematics as would suffice to give those advantages would naturally enter."

But the reader may find reasons to differ somewhat from this opinion. There is perhaps after all great significance in the fact stated by Dr. Whewell, that an extraordinary number of persons who, after giving more than common attention to mathematical studies at the university, have afterwards become eminent as English lawyers. There is perhaps no fallacy here, of *Post hoc ergo propter hoc*. Sir William Hamilton, at least, supplies the force for dispelling any fallacy of that sort, that may be found lurking in the argument. "English law," he says, "has less of principle and more of detail than any other national jurisprudence. Its theory can be conquered not by force of intellect alone; and success in its practice requires, with a strong memory, a capacity of the most continuous, of the most irksome application. Now, mathematical study requires this likewise; it tests no doubt to this extent, 'the bottom' of the student."† If, then, mathematical study requires a strong memory, and the capacity of continuous attention, it must be admitted also to stimulate and develop these powers—powers which, when brought to the study and practice of law, conduce to proficiency and success. Nor do these powers rank low among the capacities of the mind. "If a man's wit be wandering," says Bacon, "let him study the mathematics; for in demonstration, if his wit be called away never so little, he must begin again."‡ But a fixed and continuous attention is a power apt to be estimated of little value, and yet it is certain that this power alone has been the distinguishing excellence of great and eminent minds. "Even in that branch of knowledge," says Coleridge, "on which the ideas, on the congruity of which with each other the reason is to decide, are all possessed

\* Austin's Lectures on Jurisprudence, vol. iii., p. 368.

† Hamilton's Discussions on Philosophy, p. 337.

‡ Bacon's Essays.

alike by all men, namely, in geometry (for all men in their senses possess all the component images, namely, simple curves and straight lines), yet the power of attention required for the perception of linked truths, even of such truths, is so very different in A and in B, that Sir Isaac Newton professed that it was in this power only that he was superior to ordinary men. . . . Was it an insignificant thing to weigh the planets, to determine all their courses, and prophesy every possible relation of the heavens a thousand years hence? Yet all this mighty chain of science is nothing but linking together of truths of the same kind, as the whole is greater than its parts; or if  $A \text{ and } B = C$ , then  $B = C$ , then  $A = B$ ; or  $3 + 4 = 7$ , therefore  $7 + 5 = 12$ , and so forth. X is to be found either in A or B, or C or D. It is not found in A B or C, therefore it is to be found in D. What can be simpler?"\*

For training the mind to think long and closely the capacity of mathematical studies has been admitted, even by those writers who deny to such studies any utility whatever. It is also remarked (as we have seen) of the study of law, that it requires the most continuous and irksome application; and hence it may be said, with equal justice, that the power of steady and concatenated thinking is strengthened as much by the one study as the other. It may be admitted, therefore, that the study of law, more than any other pursuit, demands an exclusive devotion and an intense mental application. Sir William Jones remarks, that success in the pursuit "depends on the exclusion of all other objects." And it is thus by fixing the attention that the study has held the merit of curing the vice of mental distraction. Much of the well-known aversion to this study lies in the severe discipline it imposes on the mind; and hence Sir William Jones tritely remarks: "I do not know why the study of law is called dry and unpleasant, and I very much suspect that it seems so to those only who would think any study unpleasant which required a great application of the mind and exertion of the memory."† For this reason it may justly be said that the study of law comes specially recommended to such minds as are most averse to it. It rectifies the vice of mental distraction which at the outset creates a distaste for the study itself.

The dependence of memory on the attention has been asserted by the highest authorities. "*Nec dubium est*," says Quintillian, speaking of memory, "*quin plurimum in hac parte valeat mentis intentio et velut acies luminum a prospectu verum quas intuitu non aversa*." In the same degree, therefore, as the study of law captivates the attention does it

\* "The Friend," Bohn's ed., p. 99. See also pp. 7 and 31.

† Roscoe's *Lives of Eminent Lawyers*, p. 310.

educate the memory, and hence it is that this study demands the exercise of both these capacities of mind. But to the student at the outset of his pursuit this exercise of memory becomes irksome, inasmuch as the study presents at first sight a mass of unconnected facts without apparent coherence or relation. To this circumstance does Dugald Stewart refer the aversion of most minds to this study, and especially of those who (like the famous antiquary, Spelman) after perseverance in the pursuit, have risen to eminence.\*

I have now in this paper merely brought together a few scattered opinions from the writings of well-known authors, bearing on the question of the influence which legal study and practice are likely to exercise on the mind. The importance of the subject is great, inasmuch as it recognises in the study a value apart from that which attaches to it, merely as a necessary means for the exercise of a particular profession. The evils pointed out by the several writers whom I have quoted, so far from depreciating the value of legal study as an exercise of mind, seem rather to expose the dangers to which a partial and merely practical study of it is likely to lead. And even here it would not be wrong to say, that the evils pointed out are to some extent exaggerated. In the application of law merely, the advocate, for instance, is not supposed to go through the same process exactly as the mathematician, when he is found linking one evident truth to another in a series of demonstrations. But here, even, whatever be the exercise of mind involved in such a process, the *rationale* of law is capable of affording such exercise. "With regard to lawyers in particular," says Austin, "it may be remarked, that the study of the *rationale* of law is as well, or nearly as well, fitted as that of mathematics to exercise the mind to the mere process of deduction from given hypotheses." This was the opinion of Leibnitz: no mean judge of the relative values of the two sciences in this respect. Speaking of the Roman lawyers, he says, "*Digestorum opus (vel potius auctorum unde excerpta sunt, labores) admiror; nec quidam vidi, sive rationum acumen, sive dicendi nervos spectes; quod magis accedat ad mathematicorum laudem. Mira est vis consequentiarum, certatque ponderi subtilitas.*"† But more than this; in the mere application of law, the process involves more than what mathematical exercises can afford; for mathematical truths admit of no exceptions, and the science knows nothing of arguments based upon analogy.

\* Dugald Stewart's "Elements," vol. ii., p. 208.

† Austin's Jurisprudence, vol. iii., p. 5. See also the extract: "*Dixi sæpius, post scripta Geometrarum, nihil extare, quod vi ac subtilitate cum Romanorum Jurisconsultorum scriptis comparari possit, tantum nervi inest tantum profunditatis,*" &c. Leibnitz, *Epist. ad Kestnerum*.

Austin, therefore, truly says, with regard to an accurate and ready perception of analogies, and the process of inference founded on analogy, '*argumentatio per analogiam*,' or '*analogica*'—the basis of all just inferences with regard to mere matter of fact and existence—the study of law, if rationally pursued, is, I should think, better than that of mathematics, or of any of the physical sciences in which mathematics are extensively applicable. For instance, the process of analogical inference in the application of law: the process of analogical consequence from existing law, by which much of law is built out; analogical inferences with reference to the question of expediency on which it is built; the principles of judicial evidence, with the judgments formed upon evidence in the course of practice; all these show that no study can so form the mind to reason justly and readily from analogy as that of law. And accordingly it is matter of common remark, that lawyers are the best judges of evidence with regard to matter of fact or existence."\*

A remedy for the intellectual defects of the mere lawyer may safely be sought in that liberal and scientific study of jurisprudence itself, which is so much wanting at the present day. For such a study involves not merely an investigation into the peculiarities of this or that one system of law, but of those necessary and general principles, which may be abstracted from all positive systems, and which form the permanent framework of all human laws in all ages and in all countries. Nor is the province of this science confined within these bounds. It leads us still higher to the domains of philosophy itself, where we may engage ourselves in investigating the very origin and nature of those conceptions, which are involved in, and form the foundations of, the science of law and of morals. The speculations of Liebnitz and Kant, and others, prove the wide extent of the field which lies open to the philosophic jurist. Nor is the intellect here confined to the mere process of deduction from fixed and admitted maxims and definitions, as is the case in the mere practice of law. Rather is the mind compelled to seek out and establish those principles upon which the science itself proceeds, and instead of departing from definitions already admitted, "with the definition we here usually end."

But to counteract the tendency of legal study and practice, Coleridge has recommended some such study as the metaphysics of the mind or metaphysics of theology. And probably no subject offers such an antithesis to law as the science of mind. The one is practical, exerting its influence on life and action; the other is speculative, dealing with ideas purely

\* Austin's Jurisprudence, vol. iii., p. 370.

The influence of the one study, therefore, may be presumed to be unlike the influence exerted by the other, on the mental habits. But whatever advantages attach to the speculative sciences, as a mental gymnastic, may be gained in the study of that department of jurisprudence which connects itself with metaphysics. Coleridge himself, who had wandered far and wide into the fields of German philosophy, had risen on the one hand to the transcendentalism of Kant, and, on the other, burrowed deep into the mysteries of the Teutonic theosophist, Jacob Behmen, must have known that in Germany, at least, metaphysics had already been evolved out of the stones and flints of such an unproductive science, even as that of law. Coleridge of all men would have been least surprised to have found there the most peculiar systems—systems of cookery say, or even ship-building—reared upon foundations more or less metaphysical. Meanwhile, it is a fact, not noticed by Coleridge, that about the close of the last century Immanuel Kant had already published his “*Metaphysische Anfangsgründe der Rechts Lehre*,” or the “*Metaphysical Principles of the Science of Law*.”\* At this time Germany possessed a juridical literature, which, in its purely philosophical cast and tendency, had no counterpart in the juridical literature of any country, even of France. The scholastic theologians and moralists of the age preceding the Reformation had discussed juridical questions in theology and in ethics. Leibnitz, towards the close of the seventeenth century, had contributed much towards the science of jurisprudence; and after him the names of Wolfius, Chancellor de Cocceii, Kant and Fichte were associated with a class of speculations known as the philosophy of law.

I know of no reason why there should not be a more extensive study of these speculations by the practical lawyer.

\* It is easy to understand why speculations, such as those of Kant and Fichte, should prove an aversion to minds preoccupied with the study of positive law, i.e. law as it is, and as it ought to be applied. Mr. Austin's estimate of Kant's work, while it shows this aversion, contains a just appreciation of the merits of a treatise, “darkened,” says Austin, “by a philosophy which, I own, is my aversion, but abounding, I must needs admit, with traces of rare sagacity. He (Kant) has seized a number of notions, complete and difficult in the extreme, with distinctness and precision which are marvellous, considering the scantiness of his means. For of positive systems of law he had scarcely the slightest tincture; and the knowledge of the principles of jurisprudence, which he borrowed from other writers, was drawn for the most part from the muddiest sources: from books about the fustian which is styled the Law of Nature.”—*Austin's Jurisprudence*, vol. iii., p. 167.

An interesting and just criticism of Mr. Austin's views has been given to the world by Mr. J. S. Mill. See his “*Dissertations and Discussions*,” vol. iii., p. 206.

If Coleridge desired a field for the advocate, where truth alone may be investigated, and an unfettered spirit of inquiry stimulated and encouraged the systems and theories of the Continental jurists, more than the metaphysics of mind, or the metaphysics of theology, while they may be said to open such a field, are at the same time calculated to restrain and counteract the thoroughly practical tendency of legal study at the present day.

The highest utility probably which may be ascribed to the study of law as an exercise of mind is its tendency to the formation of logical habits. There is scarcely any branch of human knowledge in which the rules and processes of logic are more extensively applied; and hence the art of reasoning (as the Queen of Arts), has long been venerated by the lawyer as it was worshipped by the schoolmen:—

“ Utque supra Etheros Sol aurens emicat ignes  
 Sic inter artes prominet hæc logica;  
 Quid? Logica superat Solem; Sol namque, diurno  
 Tempore, dat lucem, nocte sed hancce negat:  
 At Logicæ sidus nunquam occidit; istud in ipsis  
 Tam tenebris splendet, quam redeunte die.”

To a love of this art must be attributed the refined casuistry of law. At a time when the Aristotelian philosophy prevailed in Europe, the tendency to the introduction of the most subtle refinements in law owed its existence to this philosophy. It exerted its influence on life itself, and on the sciences more immediately connected with life. A door was opened by it to an intricate scholastic jurisprudence, to all the learned subtilty of processes, and the interminable logic of law.\* Its influence also may still be traced in the antiquated refinements which existed in early English jurisprudence; and especially in the law relating to real property. The endless subtilties, for instance, which load the doctrine of “contingent remainders,” and render Fearn’s treatise on the subject a severe exercise of the reasoning powers, are due mainly to the prevalence of this much-admired dialectic. The notorious distinction between a common and double possibility appears to have owed its origin to what Mr. Williams calls “the mischievous scholastic logic,” which was then rife in our courts of law.† This logic, so soon after demolished by Lord Bacon, appears to have left behind it many traces of its own existence in our law; and perhaps it would be found that some of those artificial and

\* See Schlegel’s *Philosophy of History*, p. 377.

† “The Casuistical subtilties,” says Hume, “are not perhaps greater than the subtilties of lawyers; but the latter are innocent, and even necessary.” See Hume’s *Essays*, vol. ii., p. 558.

technical rules, which have most annoyed the judges of modern times, owe their origin to this antiquated system of endless distinctions without solid differences.\*

On the other hand, the logician borrowed much from the law. It is not to be wondered at that the earliest writers on logic not only pointed to the practice of the law, as best illustrating the rules and processes of that science, but introduced into their treatises examples and illustrations borrowed almost exclusively from the pages of law-writers. Before Aldrich or Crackenthorpe had contributed towards the encouragement of the study of logic, the "Lawyer's Logicke" of Abraham Fraunce appeared, having the singular merit of doing service both for logic and for law. No mortal book was ever in such a predicament. It was claimed and referred to by the logician on the one hand, and by the lawyer on the other; and as to whom it belongs no final adjudication has as yet been ventured upon by Westminster Hall. Later still, the works of Kirwan are full of a large number of legal forms and processes which the writer employs to illustrate his meaning. Logic he deems to be an indispensable aid to the study and practice of law. "It is," he says, "of the highest importance in all controversies wherein reason alone presides, particularly in the commonest of all legal controversies. The science of special pleading in particular is founded on the strictest observation of its rules, so is also the art of taking just exceptions to answers, of detecting the fallacies of arguments, of briefly collecting and presenting them, in laying down and applying the rules of evidence according to the subject-matter, in assigning and applying the due interpretation of words or clauses in statutes, covenants, agreements, deeds, devises, &c." It is not surprising, therefore, that in assigning to law a rank among the sciences, Sir William Jones considers it to belong "partly to the history of man, partly to dialectics."

As training to close and logical reasoning, therefore, the study of law claims special advantages. Ritso, in speaking of the *Tenures of Littleton*, says, that it is a "better book than the *Analytics* and the *Categories* for exercising and disciplining the reasoning faculties, and I apprehend," he says, "it will readily be conceded by all parties that if we must necessarily be ignorant either of the one or of the other, it is far better that we should be strangers to the *Ethics* of Aristotle, than to that which Aristotle himself describes to be the principal and most useful branch of ethics, 'the laws and constitution of our country.'"<sup>†</sup> And if we were to turn to the exhibitions of logical reasoning in the ranks of our greatest lawyers, it can scarcely be doubted that the claims of the study

\* See Williams, on the Law of Real Property.

† Ritso's "Introduction to the Science of Law," p. 161.



in this particular respect are well established. "As admirable a display," says Brougham, "of logical acumen, in long and sustained chains of pure ratiocination, is frequently exhibited among their ranks as can be seen in the cultivators of any department of rhetoric, or the student of any branch of science."

But an admiration for the logic of law led to the most serious exaggerations. Several writers, for instance, attempted to transfer to law the certainty that belongs to mathematical truth alone. The law and mathematics were alike placed in the category of exact sciences. Ritso, one of the most extravagant writers on this subject, declares that a proposition in law is as capable of being resolved and demonstrated as a proposition in the mathematics; the theorem that by the extinction of a fee in a seignory, a particular estate for life in that seignory is also extinguished, is as certain as the theorem that the square of the subtending side is equal to the two squares of the containing sides of a right-angled triangle.\* Similarly, Locke and Dr. Clarke attempted to introduce into the science of morals the methods of mathematics. "I doubt not," says Locke, "but from self-evident propositions, by necessary consequences as incontestable as those in mathematics, the measures of right and wrong may be made out to any one that will apply himself with the same indifferency and attention to the one as he does to the other of these sciences." But the greater part of Locke's disciples, as Dr. Whewell points out, disregarded altogether those suggestions respecting a morality founded upon ideas and established by means of demonstration. The same fate awaited the suggestions and speculations of jurists, who treated mathematically the science of jurisprudence. Among these Wolfins, the disciple of Leibnitz, may be regarded as the leader. The Wolfian philosophy exercised a great influence, direct and indirect, over the jurists of Germany. The great defect of this system (as Reddie mentions), was that its author and supporters attempted to demonstrate many truths which must be derived from quite different sources by mere philosophical reasoning, and ultimately for the most part only from gratuitously or arbitrarily assumed positions, while to them it appeared sufficient for the foundation of a science, if a series of ideas and propositions were tied together in a sort of reciprocal dependence, and were wrapped up in the exterior garb of a so-called proof or demonstration. The causes which led to this class of speculations have been attributed to the habits of abstraction produced by the

\* Ritso's "Introduction to the Science of Law." Mr. Austin, under the head of *necessary truth*, includes mathematical truths, and the truth of certain legal consequences, following upon certain law cases, as such.—*Lectures*, vol. iii., p 259,

doctrines of the Aristotelian philosophy, previously so powerful among the learned, and partly to the opinion of the greater certainty which attends mathematical truth (which is mere abstract consistency), than what is produced by the evidence of physical fact; as Wolfins, indeed, thought he could make the rules of the *jus naturæ* more certain by dressing them up in the garb of quasi-mathematical definitions and demonstrations.\* The result of these speculations is well known.

Thus in the construction (if I may so speak) of the science of law itself, may be found the conditions of a logical exercise of the reason, and of all well known systems of law, in none more than in the Roman jurisprudence, which doubtless exhibits the greatest precision and elegance. It is a remark of Dugald Stewart, that the nearest approach to mathematics as a hypothetical science is to be found in a code of municipal jurisprudence, or rather may be conceived to exist in such a code, if systematically carried into execution, according to some general or fundamental principles. Whether these principles should or should not be founded in justice or expediency, it is evidently possible, by reasoning from them consequentially, to create an artificial or conventional body of knowledge, more systematical, and at the same time more complete in all its parts, than in the present state of our information any science can be rendered, which ultimately appeals to the eternal and immutable standards of truth and falsehood, of right and wrong. "This consideration," says Stewart, "seems to throw some light on the following very curious parallel which Leibnitz has drawn (with what justness I presume not to decide) between the works of the Roman civilians and those of the Greek geometers. Few writers certainly have been so fully qualified as he was to pronounce on the characteristical merits of both."

"I have often said that after the writings of the geometers there exists nothing which in point of force and subtilty can be compared to the works of the Roman lawyers. And as it would be scarcely possible from mere intrinsic evidence to distinguish a demonstration of Euclid from one of Archimedes or of Apollonius (the style of all of them appearing no less uniform than if reason herself was speaking through their organs), so also the Roman lawyers all resemble each other like twin brothers; insomuch that from the style alone of any particular opinion or argument hardly any conjecture could be formed with respect to the author. Nor are the traces of a refined and deeply meditated system of natural jurisprudence anywhere to be found more visible or in greater abundance. And even in those cases where its principles are

\* See Reddie's "Inquiries in the Science of Law."

departed from, either in compliance with the language consecrated by technical forms, or in consequence of new statutes or of ancient traditions, the conclusions which the assumed hypothesis renders it necessary to incorporate with the eternal dictates of right reason, are deduced with the soundest logic, and with an ingenuity which excites admiration."\*

## II.—SENTIMENTALISM AND THE CAT.

By EDWIN PEARS, Barrister-at-Law.

THE controversy which went on a few weeks ago in the columns of the *Daily News*, on the question of the employment of the cat as a means of corporal punishment, aroused considerable public attention, and has more than a passing interest. It is a question which makes us return to the first principles of penal science; makes us ask, Why is punishment inflicted at all? and why should we not, with a view to the suppression of crime, inflict death more commonly than we do, or try old methods of torture? The controversy was commenced by a letter from Mr. P. Taylor, the member for Leicester. That gentleman quoted a description, which had appeared in the *Daily Telegraph*, of the flogging of two offenders. This newspaper, after its

\* Leibnitz, tom. iv. p. 254.—But apart from the mere study of law, it is clear that the application of it in the course of practice, affords the conditions for the highest exercise of the reasoning powers. The common law, which has grown out and expanded in the course of the administration of justice, is spoken of as a body of reasoned truth rigidly and carefully evolved. As out of the contentions of the forum this body of reasoned truth has been evolved, it must be allowed that in those contentions alone the discipline of the lawyer is such, as no other pursuit or profession can afford. "After all the certainty," says Paley, "that can be given to points of law, either by the interposition of the Legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater of legal controversies may be resolved, will remain still, namely, 'the competition of opposite analogies.' When a point of law has once been adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute. But questions arise which resemble *that* only indirectly, and in part, and in certain views and circumstances, and which seem to bear an equal or a greater affinity to other adjudged cases: questions which can be brought within any fixed rule only by analogy, and which hold an analogy by relation to different rules. It is by the urging of the different analogies that the contention of the Bar is carried on." (See on this subject "Austin's Note on Interpretation," and the "Excursus on Analogy.")

fashion, had described the flogging pretty accurately. Mr. Taylor denounced the system which could make such descriptions possible. Upon this a shoal of letters appeared defending the cat, and attacking Mr. Taylor. The commonest charge brought against him, and those who take his view on this question, was that they are sentimentalists. Now, as sentimentalists are usually warm-hearted, weak-headed people, who are quite as often wrong as right, and in either case by chance, a charge of this kind as bearing on the support which the alleged sentimentalists give to any particular opinion is worth looking into. It seems to me that a little reflection must convince any one that it is precisely the sentimentalists who are the advocates of the cat. This does not, of course, afford a conclusive argument against its use, for, as I have implied, the sentimentalists are sometimes right; but it does afford ground of suspicion. The true sentimentalist is one who is guided by his emotions rather than by principle. Instead of reasoning, he feels. He usually acts in a hot-headed and impulsive manner. He has a large amount of heat, but little light; a warm heart, but no head. In religion he is the prey of the first fanatic or bigot with whom he meets. In politics, full of the most generous enthusiasm, he will regenerate the whole of society by the first patent method that comes under his notice, by which every wrong may be righted; or, if he is born in another circle, he will denounce everybody who wishes to change an iota of the constitution as a revolutionist. He is always liable to panics. He has a tendency to run from one extreme to another, in reliance on what he regards as his heaven-sent instincts. It is the sentimental portion of the mob which has usually caused its passing opinion to be fickle, and therefore worthless. The mob which to-day would lynch a man for committing a murder, will, a month hence, when the man is sentenced to be hanged, have forgotten all about the victim, and have transferred its sympathy to the murderer. Though it would be far from the truth to say that sentimentalism is confined to the ignorant, it no doubt prevails more among the uneducated than the educated, and therefore, also, for this reason, more among women than men. What we generally agree to regard as woman's emotional nature—witness Sydney Smith's ungallant definition of her as a hysterical, interjectional, parturient animal—also makes her more liable to sentimentalism than man; has made her in all ages more religious than man; more under priestly rule than man; and even to-day, makes radical reformers, like Goldwin Smith, fear to give her political power.

In truth, sentimentalism is always a dangerous guide. A generation ago it led to the monstrous exaggerations which were talked about prisoners and their reformation; about their innocence of heart, their seducers, and their certainty of return

to the paths of virtue under proper management. The great heart of the sentimentalist rushed to raise the fallen brother or sister, and boiled with indignation at the injury society had done them. Then, of course, a reaction set in : sensible people pointed out that the condition of the nine hundred and ninety-nine people who never go to prison was of more consequence than that of the prisoner ; and that though the hardworking labourer was not so interesting a mortal as a subject under prison treatment, it was not desirable to overlook him in favour of his erring brother. Let it be remarked, however, that it was the sensible people who had commenced the reform of our prison system ; the same people also who began and carried out the agitation for improved education and better houses for the working classes. Carlyle, in some respects the embodiment of common sense, as in others of the gospel of brute force, aided the reaction enormously by his latter-day pamphlet on "Model Prisons." Dickens followed with *Uriah Heep*. The great army of smaller cynics, men who belong to the class which invariably depreciates efforts to be made at a distance for the benefit of anybody, on the ground that we have enough poverty and distress at our own doors, and as invariably depreciates and refuses to aid any efforts made at home, followed these great leaders. The tide had turned, and now the great heart of the sentimentalist boils with indignation against the garroter and the wife-beater as much as before it yearned for him.

It was the province of sensible men to protest against the elimination of the notions of pain and punishment from prison discipline ; against the mere petting of the prisoner ; against the mere possibility of making his lot an enviable one. It is the province of sensible men now, as it seems to me, while the pendulum is running to the other extreme, to protest against returning to the evil state of things from which even the pampering of prisoners (which never existed) would be an improvement. It is especially necessary to call attention to this duty now, because, unfortunately, there has been of late years a luxuriant growth of sentimentalism. Even Dickens, whom we have seen aiding the reaction, and who, in his novels—though this is far from the case in *Household Words*—never introduces an organization, or for the matter a professedly religious man, except for the purpose of ridicule, is continually setting up some little sentimentalism as an object of worship. Since he led the way we have had sentimental novels by the score. Some of our newspapers have carefully cultivated the feelings of their readers. We have sentimental agitations carried on both by men and women ; and if there is some danger of our legislation becoming sentimental, it is probably because political power is thrown more into the hands of the ignorant portion of the community than before—a remark which does

not of course imply that it was otherwise than desirable or even necessary thus to shift the fulcrum of political power. The notion, indeed, has spread, that many of the most beneficial changes in the world's history have been brought about by sentiment. One continually hears Eliot and Prynne, and even Milton, spoken of as if they were leaders in a great sentimental party in the time of our civil war, and were themselves fully developed sentimentalists, instead of being, as they were, cool-headed men, who deliberately did what they had to do on principle, and not on emotion. No more fallacious reading of history could be conceived. Pym, Cromwell, and Hampden, were the toughest and most matter-of-fact of men. Persistent obstinacy, the obstinacy resulting from the most unsentimental natures, was their characteristic. Hampden, a wealthy man, a country gentleman, closely related to several aristocratic families, will not pay a few wretched shillings of ship-money, will risk and be ready to sacrifice a thousand times the value, rather than he will give up the abstract principle that the people ought not to be taxed at the king's pleasure. He and his party were men who were not led blindly by their instincts, but men who acted on their own deliberate and independent thought. That they excited enthusiasm—the enthusiasm which springs from conviction—is no doubt true; but the enthusiasm was not sentimental. By-and-bye, unfortunately, they got the sentimentalists among them, weak-headed, warm-hearted Vanes, and the like, from whom Cromwell and all of us have need at all times to be delivered; and then the popular party began to blunder. It is, to say the least, doubtful whether Cromwell and those of the original leaders who were living would have consented to the blunder of the execution of Charles, richly though he deserved death, if their influence had not been swamped in that of their great following. It was the sentimentalists who committed this mistake. The sight of Charles's blood (although his remark on going to the scaffold—"They would treat their officers so for a groat," shows that he estimated the hostility of a sentimental soldier at its just value), was, however, too much for them. From that time the reaction set in, and never ceased until long after the Restoration. Our fathers had grown wiser in 1688. They stuck to principles, and kept out the sentimentalists. As with our history, so with that of other countries. In the late American struggle the men who determined that slavery should cease to exist, were persevering, pertinacious, prosaic, dogged men, out of whom it would have been as impossible to get a compromise as the solution of the question, as it would have been for Attorney-General Heath to have compromised Hampden's case by remitting a portion of the tax; men who had convinced themselves that slavery was wrong, and were determined to

put an end to it, though, in doing justice, they should bring down the heavens; men who were neither to be laughed, sneered, nor frightened out of their convictions. They were, in short, men who acted from principle, and not from feeling. By-and-bye they created a public opinion in their favour, and the sentimentalists went over to their side. And sentimentalism being a power, like knowledge or ignorance, the leaders, like wise men, used it just as all wise statesmen, Cromwell and Gustavus two centuries ago, and Cavour and Bismarck to-day, have used it. If any one wishes to learn what sentimentalism is capable of, to see it in *excelsis*, they should look to the history of the great French Revolution: There, for the first time in modern history, sentiment had fair play. Every one knows what it accomplished. The sentimentalists, who began by objecting to all punishments, who would reconstruct society on humanitarian principles, whose gospel was that according to Jean Jacque, and who were about to create a world in which there should be nothing more unpleasant than rose-water, ended by wholesale slaughter and universal chaos and destruction. For our own part, our ideals of statesmen would be found, not among the Robespierres, the Rousseaus, and the Dantons, with their all-too gigantic sentimentalisms, but among the Pym, the Somerses, and the Washingtons of history.

Sentiment, then, we hold to be a very bad guide on all questions of legislation; and therefore, if it were true as it is alleged, that the opponents of corporal punishments like that of the cat were sentimentalists, they would come into court under suspicious circumstances. But what are the facts? The opponents of the cat urged that the punishment is not more deterrent than ordinary punishments; that it is brutalizing to the man who undergoes it, and to all connected with its infliction; and that its reflex influence on society is injurious. Surely these are arguments which may be satisfactorily answered if the punishment is capable of defence. Instead of being answered, they were met by impulsive, emotional, scolding letters, irrelevant and stupid taunts about sympathy with scoundrels, and even personal abuse of Mr. Taylor, instead of answers to his arguments. The cartoon in *Punch* fairly represented the popular sentiment, and held Mr. Taylor up to the ridicule of fools as the mere apologist of rascality. Looking at this cartoon and at the letters of the supporters of the cat—letters nearly every one of which bears traces of having been written under great excitement; some of them by persons who had so allowed their emotions to get the better of their reason as almost to believe that the opponents of the cat would empty Newgate if they could—we may well ask any impartial person on which side are the people who act on their emotions rather than on principle, and what is the indirect evidence of the letters themselves,

argumentative on one side, merely impulsive on the other; or, in other words, where are the sentimentalists?

So much for the charge of sentimentalism; not an unimportant one as we have seen, which the advocates of the cat have endeavoured to affix to their opponents, but which I beg to return to its original owners as one which entirely belongs to them.

It is worth while, however, to look at the question of corporal punishment by means of the cat purely on its own merits. The object of punishment is to deter from the commission of crime. There are a certain number of scoundrels in the world. For the protection of society, it is necessary to keep their number down. How is this to be done? It is a great question, and one to which society has at different ages given somewhat different answers, but to which all whose opinion is worth having now reply,—mainly by making the detection of crime as certain as possible; by making the punishment of the criminal equally certain; by making the punishment deterrent; also, and to a large extent, answer the noble men and women, who, like M. Demetz, Mr. Barwick Baker, Mr. Brace, and Miss Carpenter have devoted their lives to the successful carrying out of their convictions, by catching young criminals, and taking them away from surroundings where they would be likely to grow up into habitual criminals; and, lastly, by general education. But above all, as we have said, by making the detection of the criminal almost certain. By thus practically teaching a thief that theft is the most unprofitable employment he can undertake; a man of violent passion, that if he gives way to his passion punishment will certainly follow. Accepting these answers as satisfactory, we have, in considering the effect of any punishment, to ask three questions concerning it: first, is its infliction likely to be certain? second, is its deterrent effect on the offender and on the prisoner class generally greater than that of other punishments? and third, is its reflex action on society, if it has any, likely to be beneficial or otherwise? Let us apply these three tests to the examination of the effect of the cat. As to the first question, everybody knows that among a portion of the public, Mr. Taylor and his friends, there exists a strong prejudice against the use of this particular form of punishment. Such prejudiced persons last century refused, and even to some extent now, refuse to convict persons whose lives were clearly forfeited to the law, rather than have anything to do with their deaths. Even among the supporters of the cat, there will be many—including a very large number of the sentimentalists—who, when they are placed on juries, will hesitate about saying “guilty,” when the verdict will bring down the cat. Thus the infliction of the punishment will be rendered uncertain, as all such punishments invariably are.

To help us to a solution of the question, whether the cat deters



more than other punishments, the advocate of the cat would ask, what is *likely* to be the effect of such punishment? He himself, often a man of finely strung nerves, believes that the prospect of the cat would seem to him a horrible one. I have no doubt, moreover, that it does look horrible to the prisoner who has been sentenced to it. And if the sensational accounts given in some of our newspapers of the last infliction in Newgate could be put into the hands of a person just about to commit a crime which would with certainty subject him to corporal punishment, possibly the description might be more deterrent than a description of, say, penal servitude. But, unfortunately, criminals do not take a course of reading on this subject before committing their crimes. Moreover, as they never expect to be caught, it may well be questioned whether the punishment looks horrible to them, or whether one form of punishment deserving the name has a greater deterrent influence over them than another. Indeed, some of the wisest of our prison officials have expressed their doubts whether any form of punishment which is only penal is not merely gratuitous cruelty. At any rate, there is a pretty general concurrence among all who have given attention to the subject, that so-called deterrent punishments play only a secondary part in the diminution of crime. As Montesquieu long ago showed, certainty of detection is almost the only deterrent of value, and mere severity of punishment is of little if any avail. As offenders do not carefully weigh one form of punishment against another, and as they do not anticipate being caught, I should not expect the deterrent effect of corporal punishment by means of the cat to be greater than that of other kinds of punishment. So far the question what, *à priori*, should we expect to be the effect of this punishment? Fortunately, however, we are not left to mere conjecture on the subject; we have considerable experience to guide us. To some extent, I am afraid, the evidence of this experience may furnish another illustration to Mr. Herbert Spencer of the difficulties of getting at reliable data for the solution of social problems. In the recent controversy, Mr. Straight says the evidence points one way, Mr. Jacob Bright the opposite way. The Home Secretary is reported to have expressed his belief that garroting was not put down by the cat, a belief in which he certainly is not singular. But we have other and abundant evidence, stretching over a long time, and therefore not liable to the misconclusions which spring from isolated experiments. People sometimes talk about the cat as if it were a new invention; as if it had not been tried over and over again; tried, too, with a persistency and determination to be logical and thorough with it, which we in this degenerate and sentimental age have not the courage to imitate. They forget that we have flogged for centuries; that at one time we flogged for almost every

crime under the sun. We flogged men before hanging them. We flogged libellers regularly and mercilessly, as John Lilburn and better men found out. We even went so low down in the list of offenders as to flog beggars. The practice grew into one of the arts, and culminated about the reign of James I. The last half of the sixteenth century, and the first half of the seventeenth, deserves, I think, to be regarded as the golden age of flogging in England. During this period the cat was continually going. In prison and out of it, the warder always had his hand in. We flogged at the cart-tail, in the streets, almost as often as we flogged in prison. Our fathers were logical: the cat being the best deterrent against some crimes of brutality would in all probability be the best against others of the same class. The cat being the best deterrent, its infliction ought to be in public, so that the greatest number could be brought under its beneficial influence. Moreover, on the sound principle that what is sauce for the goose is sauce for the gander, they flogged women as well as men. They "warmed her shoulders" is the expression of one of our facetious judges. My admiration of the logic of our fathers, and of their determination to act upon it in spite of weak-minded sentiment, is unbounded. No one who knows the facts can deny that they gave flogging a long trial in England; and yet in spite of this trial, and of a fervent, instinctive, and, as to its origin, brutal and barbarous prejudice in its favour, with the firmest conviction that it was a heaven-appointed remedy, our fathers found that it did not answer. Crime did not diminish, brutality rather increased, and the same people were often obdurate enough to be "warmed" several times over without beneficial effect. Reluctantly, and with that sorrow with which men always part from long-cherished belief, clinging indeed to shreds and fragments of it, they diminished the use of the cat. Something else had to be tried; and not having yet hit on the right track for the diminution of crime, as we have done in more recent times, they substituted last century wholesale hanging for flogging. They very properly argued that hanging being a more dreadful punishment than flogging, would be a more powerful deterrent. It had too the additional advantage, no slight one, of not requiring a second application. Accordingly, they hanged for almost every offence. True, European nations pointed to our country as one behind others in civilization on account of the recklessness with which we sacrificed human life; and Sir William Blackstone, whose "Commentaries" are one long and, in the main, noble eulogy of the institutions of England, and who, as a Tory of the old school, hated innovations, declared that the list (he calls it the "dreadful list") of one hundred and sixty offences which the wisdom of Parliament had declared to be worthy of instant death, instead of diminishing had increased

the number of offenders; but our fathers tried the experiment to the end, and then they abandoned it because they found that it had failed just as flogging had failed before. As a deterrent, however, I believe as our fathers did, that hanging is superior to flogging. Besides and beyond which in importance, the effect on society is on the whole less brutalizing. If, therefore, we are to return to the ancient ways, I for one shall advocate hanging. Looking, then, to past experience, I see nothing whatever to indicate that flogging ever has been successful as a deterrent, or is ever likely to be; but this is not the question. What we wish to discover is, is the cat a more powerful deterrent than other forms of punishment? And to this question the answer must, I think, be distinctly in the negative.

Our third question, however, is the most important—What is the reflex effect of corporal punishment on society? It is for the protection of society that punishment is inflicted at all. The notion of mere revenge has, or ought to have, disappeared from the penal legislation of every civilized State. But any measures of severity are justifiable for the protection of society. Wholesale flogging, wholesale hanging, shooting men down by the tens of thousands, are preferable to return to savagedom. If the hanging of scoundrels, besides ridding us of their presence, deterred others from lapsing into scoundrelism, and had no ill effect on society, the best course to adopt would be to hang every offender. If the whipping of offenders diminished crime and benefited society, I should be an advocate of the cat. But my allegation is that of Blackstone, of Voltaire, of Beccaria, of all the great criminal jurists of the world, that cruelty in punishment by its reflex action on society brutalizes it, and actually increases the number of criminals. We have seen what Blackstone's testimony is. Beccaria, writing last century, says:—"The countries and the times most notorious for severity of punishments were always those in which the most blood, the most inhuman actions, and the most atrocious crimes were committed; for the hand of the legislator and the assassin were directed by the same spirit of ferocity." In proportion as the punishment became more cruel, the minds of men cared less for mere cruelty and brutality. The standard of morality in general was lowered, and that of the criminal fell with it. Turning to the experience of our own day, does any one believe that the warders who inflict or see punishment by the cat can be otherwise than hardened? If they do, let them get hold of any one who remembers the free use of the cat in New South Wales or Van Diemen's Land, where, until quite recently, it was continually going. Or does any one believe that the reading of such accounts as have appeared in our newspapers of the floggings in prison is other than brutalizing to the class who are in danger of being brutalized; nay, to all classes? It will be urged by

some that such accounts ought not to be published. If the theory on which flogging is justified be correct, they can only do good, and the advocates of the cat should be the more thankful the more the agony is piled on. But that such accounts are mischievous is evident from the controversy which has arisen. Some of the letters positively gloat over the sufferings of the wretches. They leave the impression that there is an unalloyed pleasure taken in the account of the punishment. Again, I would repeat that I have no objection to pain, except it is useless. I have no sympathy whatever with much that is said on behalf of the prisoner—the sort of stuff which one of our leading weekly reviews lately propounded—that a man is no more answerable for his crime than a consumptive for his consumption. It may be true, or it may be not; but it is not a principle on which society can frame its laws. It is on a par with the drivel which opposes hanging on the grounds of the wickedness of “launching a man into eternity without time for repentance.” I shall be an advocate for hanging or flogging wholesale as soon as I believe that crime can thereby be prevented and a beneficial effect on society produced. But what I now maintain is that while all the evidence in the case points to the conclusion that flogging is not more deterrent than other punishments, its effect on society generally is brutalizing. Mr. Ruskin is reported to have said that Carlyle was struck with the fact that in France and Italy there is much more courtesy and civility—civilization, in short—among the lower classes than in England. The “’e’s a stranger; ’eave ’alf a brick at him,” is peculiarly English. While I am writing, one of our newspaper correspondents, writing from Berlin, says: “Does a British working man throw his wife out of the window or brain her with a poker, out comes a true-blue organ with a diatribe respecting the ‘native ferocity of those brutal Britons, aggravated by their national drunkenness.’” I do not say that this brutal side of our national character, in so far as it exists, is the result of the Draconic codes of our ancestors, but I do say that the two facts must be read together. One acts and reacts upon the other, and so long as we inflict punishments which are brutal, we shall be in danger of lowering the moral tone of society.

To the question, Can we do without the cat? the answer of course must be somewhat different. Mr. Taylor affirms that the Prison Congress held in London, in July last, “has given a fatal blow to the system of prison torture. Perhaps nothing more,” he adds, “was wanted than the knowledge that in this matter we were left alone amongst civilized nations in our system of cruel punishments.” The evidence to which Mr. Taylor alludes was indeed remarkable. To understand its force, it must be remembered that the Congress was not a mere voluntary gathering of philanthropists, but one composed, in the

main, and as to its foreign element almost exclusively, of prison officials. There were present the director-generals of the prisons of France, Italy, Belgium, and Sweden, and nearly a hundred other foreign prison officials. I never saw an assembly in which there was more hard-headedness, or less mere sentiment. Our visitors were not doctrinaire prison reformers, but men who had spent years in practically dealing with prisoners. Severity rather than sympathy with scoundrels was the general impression which a visitor might have gathered. I, for one, was not in the least, therefore, prepared for what took place when the subject of corporal punishment came on for discussion. It was the first question which had aroused anything like strong conviction. One foreign speaker after another arose, and denounced flogging in the strongest terms. By a previous arrangement, no two speakers belonging to the same nation were allowed to speak before each nation had been represented. A Dutch representative expressed his opinion that a considerable diminution of crime had followed the abolition of corporal punishment in Holland. A French delegate, and one from Belgium, repudiated as ridiculous the notion that you could deter men from brutality by treating them as brutes. A member of the German Reichstag sneered at our hysterical legislation on the subject after the garroting panic, while a countryman of his, who gave one the impression that he had grit enough to fire that "whiff of grape-shot," which Carlyle has immortalized, told us that in Prussia every sensible man believed that corporal punishment would be a fruitful source of crime wherever it existed. The representatives of other countries expressed similar opinions. We found that England stood alone; that flogging had been abolished in every other civilized nation; and that the prison officials who had been deprived of its use (doubtless parting with their cats with many regrets), had everywhere come to the conclusion that to inflict it is a blunder. Other countries can do without it; why not we? Is English rascality of much deeper hue than that of France, or Germany, or Italy? But even English rascality is repressed in the United States, in Canada, and in Victoria, without the use of the cat. In spite of the laments of certain colonels of the old school, we have learned to do without it in the army. We have diminished its employment in prison. Its warmest advocates among practical men, men whose opinions are entitled to the utmost respect on all questions of prison management, such men, for example, as Sir Walter Crofton and Major Du Cane, wish to reduce its employment to the utmost, the former going so far as to say that he only wishes to retain the power to flog, in order that he may never have to exercise it. These men are not advocates of the extension of the punishment; nor, as far as I can gather, for its employment other than as the last resource for the maintenance of discipline in prison. We have seen its

use gradually diminish. We no longer allow the gaoler to use it as his pleasure or his whim dictates. We have limited it to a few offences. We did without it as a punishment for offences other than breaches of prison discipline; and when we have passed through the reaction from the mildly philanthropic period of the last generation, shall do without it again. I have purposely kept clear of the larger questions which bear on this of corporal punishment: What ought to be the object of punishment? What should be the conduct of society towards its scoundrels? Whether it is worth while, on economical or on moral grounds, or on those of justice to the criminal, to attempt to reform our convicts? And I have endeavoured only to show that corporal punishment is a mistake; that it is uncertain in its operation, because public opinion will never be sufficiently unanimous to allow it to be generally inflicted; that its deterrent effect on the prisoner-class is not likely to be greater than that of other punishments; that the experience of times past in this country, and the modern experience of other countries, show that it has always failed as a deterrent; and that it has failed most signally where tried most persistently; that it has, in consequence, been abandoned by all other civilized countries; and by universal consent its infliction greatly diminished in England; and that its reflex action on society is injurious. I conclude by expressing my belief that, just as even now society would cry out against any proposal greatly to extend the practice of flogging, and will only tolerate homœopathic treatment—on what principle I am at a loss to understand—so, before long, society will demand that the cat shall take its place in the Tower, side by side with the thumb-screw, the pincers, the rack, and the other instruments of legal or illegal punishment and torture in ages gone by.

### III.—CODIFICATION IN INDIA AND ENGLAND.

*Opening Address of the Session 1872-3 of the Law Amendment Society.\**

By JAMES FITZJAMES STEPHEN, Q.C.

**T**HE honour you have done me in asking me to address you on the present occasion is due, no doubt, to the fact that, as legal Member of Council in India, I had exceptional opportunities of forming an opinion upon some of the principal topics connected with the reform of the law in that country. I think, therefore, that the best return I can make will be by describing to you the state of the law in

\* We have been favoured by permission to print this valuable paper entire.—ED.

India, and by pointing out what appears to me to be the bearing of Indian experience as to codification upon the state of the law in England. No one would, upon a proper occasion, uphold more strenuously than I the substantial merits of the law of England, but I suppose I may assume that its form is in the highest degree cumbrous and intricate, and that consolidation and codification are the proper remedies for those defects. The only points which can be regarded as seriously debatable are two. Is codification possible? If possible, how shall it be carried out? There is a further question which has been less discussed than it ought to have been, and upon which, with your permission, I will say something, namely, What, specifically and apart from generalities, which teach very little, do you understand by a code? On all these points it appears to me that Indian experience throws very great light.

I wish that I had the time to give you a full account of the state of the law in India. It is a topic of the deepest possible general interest, and is connected with the great problems of the government of India. This would lead me too far, and would trespass too much on your patience, but I will try to draw a general sketch of Anglo-Indian law, and I may remark that interesting as the subject is, it is one which, so far as I know, has not been studied either in England or in India with anything like the attention which it deserves.

It has often been said, and with more truth and sincerity than many people suppose, that political power, and especially the responsibility of the direct government of India, was forced on the Company, and afterwards on the Crown, by the course of events, and to a great extent against their will. It is quite certain that the whole history of the Empire shows the greatest reluctance on the part of its rulers to interfere with the laws, the habits, and the daily life of their subjects in any case in which they could possibly help it. The battle of Plassy was fought in 1757; and what is called the grant of the Dewanny, by which the Company became the direct governors of Lower Bengal, took place on the 12th August, 1764. From that date till 1793, that is to say, throughout the whole of the periods of Clive and Warren Hastings, nothing that could be described as legislation took place. The country was governed through native agency and according to native principles. A different system was gradually and cautiously introduced by Warren Hastings, with all sorts of precautions, and under fictions which it would be tedious in these days to dwell upon. Some rules were required for the collection of the revenue and for the administration of justice, in so far as it was administered by the Company's officers; but these rules were rather instructions issued by men of busi-

ness for the guidance of their agents, than what we in these days should call laws. In many cases, I believe, they were not even printed. They were certainly never published, collected, or translated into the native languages. This was the origin of the body of law known as the Regulations.

As to the exact legal position of the regulations I need say nothing on the present occasion. Their character as laws has been recognised both by Parliament and otherwise, and cannot now be questioned; but it is by no means easy to specify with complete precision the authority under which they were enacted.

Be this as it may, Lord Cornwallis, in 1793, consolidated all the regulations then in force into one general code, and made at the same time extensive and memorable additions to them. His regulations fell under two great heads, which are still recognised as the leading division in all Indian official transactions. These were the Revenue and the Judicial Regulations. The great Revenue Regulation is Regulation I. of 1793, better known as the Permanent Settlement. This is one of the most important laws ever passed. It forms, for reasons which I will not stop to assign, the foundation of the real property law of the whole population of Lower Bengal, a country which is said to have been ascertained at the recent census to contain nearly 60,000,000 inhabitants, all of whom, with exceptions numerically trifling, are immediately dependent on the produce of the soil. I must, however, warn you, that without a knowledge of Indian law and administration, which it is impossible to get from any book with which I am acquainted, the Permanent Settlement, and the subsequent legislation which has been founded upon and connected with it, will give you very little information about Indian real property law. I will say a few words on that subject in its place; at present I am only treating historically the growth of the system; and I may observe generally, that the law relating to the assessment and collection of the land revenue, and other topics intimately connected with it, forms one great branch of the statute law of British India. So far as Bengal and the North-West Provinces are concerned, it is contained in the Regulations, and in Acts of the Legislature recognizing, consolidating, or altering them.

The other Regulations of 1793 were the foundation of the judicial system of Northern India, which has now reached nearly complete maturity. I need not trace out its history down to the present time, but I may observe in general, that as our knowledge and experience of the country increased, and as our territories extended, changes, experiments, modifications of all kinds became necessary. They were all made by Regulation from 1793 to 1834.



The result was, that the Regulations became an exceedingly voluminous and intricate body of law. I cannot precisely say what their extent was, but I believe they filled nine or ten large folio volumes, and I know that they presented all the unmistakable features of an English statute book.

The Regulations interfered very little with the daily life of the people, except in regard to land revenue, criminal procedure, and civil procedure; and there can be no question whatever that in these matters their interference was, on the whole, highly beneficial, though much less beneficial at first than it gradually became, as we came by degrees to understand our own position, and to appreciate the nature of the institutions and of the society in which we found ourselves.

The Regulations enact in general terms that in matters relating to "succession, inheritance, marriage, or caste, or any religious usage or institution," the native laws shall be followed; that in other cases, the judges shall proceed according to "justice, equity, and good conscience;" and they assume and recognize the Mohammedan law as the rule for criminal cases. They contain, however, a considerable number of modifications of its more glaring defects, which may be described as excessive cruelty, and a strange alternation of almost ridiculous minuteness, with a vagueness at least equally inconvenient.

Speaking generally, therefore, it may be said that the great subjects of the Bengal Regulations were four, namely, land revenue, criminal procedure, civil procedure, and the constitution of the civil and criminal courts.

Of the Madras Regulations it is unnecessary for me to speak at length. Their subject matter was much the same as that of the Bengal Regulations. The Bombay Regulations were the subject of a most remarkable experiment, of which I will say a few words in its place.

In 1834, the Charter of the East India Company was renewed. The legislative powers of the Governments of Madras and Bombay were taken away, and the Governor-General in Council was empowered to legislate for the whole of India. It was considered, too, that the time had come for making an effort to improve the quality of the legislation. The state of the law which I have attempted to sketch combined nearly every defect. It was exceedingly voluminous and intricate in regard to the matters for which it did provide. It left a vast number of matters of the utmost importance practically unprovided for. It dealt with others in the vaguest and most uncertain manner. Those who wish to see the weak side of the system set out in the most vigorous language, and with great authority and experience, should consult

Shore's "Notes on Indian Affairs," written in 1835 or 1836, by a distinguished civilian, the son of Lord Teignmouth. He writes, as reformers usually do, with an almost passionate sense of the evils which he attacks, and with little regard to the other side of the question. He had earned the right to do so by distinguished gallantry and long service. For my own part, I know just enough of the country to feel bound to say that no one who has not been in India can have the faintest conception of the enormous magnitude of the task which we have taken upon ourselves, or of the unspeakable difficulties by which it is encumbered. The wonder is, not that holes can be picked in the institutions and laws by which we have governed India, but that we have governed India at all; that there should be laws and institutions there to criticize. There is plenty of fault to be found, no doubt; and it is right that it should be found; but whatever else may be said of Indian law and government, it has done its work as effectively as Rome itself, and far more humanely.

No doubt, however, continual watchfulness and constant reforms are still more obvious necessities of our position in India than elsewhere; and there was in 1834, as there is now, ample room for improvements, and a pressing necessity for them. The Act of 1834 made provision for the appointment of an Indian Law Commission in India, and for the addition to the Council of a legal member, who, however, was to be entitled to be present at its legislative meetings only. The meetings for the purpose of legislation, as well as for other purposes, were at that time private, and long continued to be so. Lord Macaulay was appointed to be the first legal member of Council. On reaching India he was put at the head of the Indian Law Commission, the other members of which were Sir J. McLeod and Mr. Millett.

They published valuable reports, but their great contribution to Indian law reform was the first draft of what is now the Indian Penal Code. It did not become law till 1860, but the Act finally passed did not differ very materially from the draft. I will not trouble you with any criticism upon it at present.

Lord Macaulay left India in 1838, and not very long afterwards a period of storms set in which effectually diverted the attention of the Government of India from law reform. The alternate disasters and triumphs of the Afghan war, the struggle with the Sikhs under Lord Hardinge, the conquest of the Punjab, the annexations of Lord Dalhousie, and the mutinies of 1857, turned men's minds in other directions. There was a good deal of that miscellaneous legislation which is required in every community to provide for the multitude of practical wants which make themselves felt from time to time as

society goes on; but the important parts of the law were left in the state which I have described.

A case, however, occurred which put in the clearest possible light the immense practical importance of the sort of reforms which were subsequently made. I refer to the transactions which took place on the conquest of the Punjab in 1849. These events have been a good deal misrepresented and misunderstood, both in England and in India, and they have a curious bearing on the subject before us.

When the Punjab was conquered it became necessary to provide, at a moment's notice, a whole system of civil government for a country which, speaking roughly, may be said to be as large as Italy, and which had got into a state of utter anarchy. Lord Lawrence declared in the Legislative Council, in 1868, that when he first knew the Punjab there was nothing in it that deserved to be called property in land at all. Criminal justice was little more than organized and authorized massacre and extortion. What then was to be done? It was utterly impossible to extend the Regulations and Acts as a whole to the province. They were too cumbrous for busy men to work. Lord Dalhousie's view of the subject was that the Punjab should be regarded as a Crown colony, and that the Governor-General in Council, as agent for the Crown, might legislate for it independently of the Parliamentary powers by which he legislated for the rest of India. This view was strongly opposed by his principal legal advisers, but practically it was adopted in a curious and intricate fashion, which I will not detain you by explaining. The practical result was that Lord Lawrence, Sir Henry Lawrence, and Mr. Mansel, who formed the Board of Administration, and afterwards Lord Lawrence alone, first as Chief Commissioner and then as Lieutenant-Governor, exercised what for all practical purposes amounted to legislative as well as almost absolute executive authority throughout the province. The extraordinary success of their administration is or ought to be known to every one. When anything which deserves to be called a history of India is written, the most striking pages in it will be those which tell how peace and order were established from the foot of the Passes beyond the Indus to the great Indian Desert on one side, and the North West Provinces on the other; how property in land was established and protected; how the most furious religious animosities were held in check, and above all how only eight years after the conquest, a Sikh army, raised and led by the men who had conquered them, followed English officers with passionate devotion up the breach at Delhi, and into the Residency at Lucknow.

All this is familiar, and is frequently quoted both in Eng-

land and in India, as a proof of the superiority of personal energy over the dilatory proceedings of law and lawyers. These, it is constantly said, were the fruits of the non-Regulation system. The true secret of government is to give absolute power to a vigorous man and leave him to be a law to himself. Of course, we all ought to remember that all the laws of all the codes in the world cannot make a good ruler, but the best ruler cannot govern without law. The proof of this is that the very first use which Lord Lawrence and his associates made of the immense authority with which they were invested, was to produce a code of laws for the government of the Punjab. It would have been utterly impossible for busy men to work the cumbrous system which then prevailed in the North-West Provinces, and one of the very first tasks which Lord Lawrence undertook was the production of what were in fact, though not in name, a code of civil procedure, a code of criminal procedure, a penal code, and a work which was commonly called the Punjab civil code. These codes were no doubt very defective in many respects. It would have been a miracle if this had not been the case. Several of them were drawn up by very young men who had had no legal training, and who were pressed by other business. My friend and late colleague, Sir Richard Temple, drew up the Punjab civil code when he was considerably under thirty, and when I, his contemporary, was copying precedents in a conveyancer's chambers. Avowedly imperfect as these productions were, they were beyond all comparison superior to the laws which existed at that time in other parts of India, and they rendered it possible to reduce the Province to order. The experience of the Punjab (which was repeated some years afterwards in Oude) proves to demonstration, not that law can be dispensed with in government, but that clear, short, and simple laws are absolutely indispensable to a vigorous form of government which is to produce lasting effects. It is one of the most striking of all possible proofs of the value of any sort of Code, of any definite authoritative statement of the law, that when these avowedly crude productions were superseded by a set of laws which I shall mention immediately, and which extend to the whole of India, the change was opposed on the ordinary conservative grounds.

At all events it ought not to be forgotten that Lord Lawrence's celebrated administration of the Punjab is in reality one of the strongest precedents that can be quoted in favour of codification, though it is often represented in another light. He was not, however, the first Indian statesman who had set an example in this direction. Mountstuart Elphinstone, when Governor of Bombay, had done a great and important

work of the same kind. Under his administration the whole of the Bombay Regulations were formed into a code regularly arranged according to their subject-matter. This code consists of twenty-seven regulations, sub-divided into chapters and sections. It refers to the same subjects as the Bengal Regulations, but differs from them in the circumstance that it contains a body of substantive criminal law which remained in force till it was superseded by the penal code, and which had very considerable merits, though it would probably not have supported the test of strict professional criticism to which, indeed, it was not intended to be subjected.

Although the draft of a penal code had been prepared between 1834 and 1838, although the Indian Law Commissioners had collected a mass of information on the subject of Indian Law, and although the experience of the Punjab and some other recent acquisitions had shown the intricacy and cumbrousness of the Regulations, the principal things actually done in the way of legislation, down to the close of the Company's existence, were the repeal and re-enactment, in a more convenient form, of Acts and Regulations on the subjects which I have already mentioned, namely, procedure, including the constitution of the courts, and land revenue. There had also been a good deal of miscellaneous legislation; but the extreme, I will not venture to say the unwise, caution which naturally had characterized all their dealings with the vast interests under their charge had prevented the Company's servants from undertaking anything further.

When the government of India was transferred from the Company to the Crown, there was, as you will probably remember, a strong reaction against what was described as the traditional policy of the Company. The general opinion was that it had been too timid, and that this timidity had been shown by experience to be exceedingly dangerous. However this may have been, it was determined to make a vigorous effort in the direction of legislation, and arrangements were made for the purpose, both in England and in India.

On the expediency of this policy there are two opinions. My own opinion is strongly in favour of it, upon grounds with which I cannot now trouble you. But I will proceed to state what was actually done.

In the course of the thirteen years, between 1859 and 1872, the law of India may be said, without exaggeration, to have been all but completely codified. By this I mean that all the most important branches of law in daily use there are thrown into a distinct, systematic, written form; and that the miscellaneous laws, which may be described collectively as current legislation, are consolidated in such a manner that there is hardly any subject on which the whole law is not comprised in a

single Act, amended, where that is necessary, by Acts so drawn that the alterations can be noted as errata.

I hope you will pardon me if I detain you for a moment on the manner in which this result has been brought about. In a debate, which took place last Session, on law reform, my friend, Mr. Fawcett, referred to what I had been able to do, in a manner for which I heartily thank him, but which drew from Mr. Lowe the remark—a perfectly just remark—that the share of the Indian Law Commissioners in Indian Law Reform had hardly met with sufficient acknowledgment. The truth is that a very considerable work has been brought very near to completion by the united efforts of several persons, each of whom had their peculiar difficulties and facilities, and all of whom exerted themselves to the best of their ability. The facts are as follows:—

The draft of the Penal Code was prepared in India, by Lord Macaulay, Sir J. M'Leod, and Mr. Millett; but it remained a draft for twenty-two years, and the Indian Law Commission in India made no further contributions to codification beyond collecting materials.

A second Indian Law Commission, which sat in England, was appointed in 1853 to codify the law of procedure. It produced the first drafts of the Codes of Civil Procedure and Criminal Procedure in 1855.

A third Indian Law Commission was appointed in 1861, to prepare a code of substantive law for India. It produced the first drafts of the Succession Act, the Contract Law, and the Evidence Act. Besides these it produced three other drafts, which, for various reasons, have not been enacted in India. It resigned about two years ago, on the ground of the delay made by the Government of India in passing its drafts into law. I will say nothing upon this subject, except that the difficulties of discussing the details of intricate and important measures between a commission sitting in London and a legislature sitting in India, are very great, and that such an arrangement must produce great delay. A difference of opinion about three points in the Contract Law, the importance of which would be by no means apparent to a mere English reader, delayed the passing of the Bill for several years. Be this how it may, it is undoubtedly true that every one of the great laws which collectively form what may be called the Indian codes, was originated, and the first drafts of them were prepared, by the Indian Law Commissioners. It should also be noticed that this great service to India, which I hope may eventually prove to be a service to England also, was (except as to the Penal Code) rendered gratuitously by men of the highest eminence in the rare leisure left to them by other public duties of the first importance.

Legislation in India was conducted during the period in

question by the Viceroy's Council in its legislative capacity. The constitution of this body was materially different between 1854 and 1861 from what it has been since 1861; but upon this I need not speak. Speaking generally, I may say that the legislative business is under the management of the legal member of Council, who usually has charge of the more important measures. He is, however, assisted by committees which sit upon every measure introduced, minutely criticize its details, and frequently remodel it. The public debates, though occasionally very animated, are of far less practical importance than the deliberations of the committees.

Sir Barnes Peacock was the legal member of Council who made the first and the most important contribution to codification. During the last three years of his tenure of office, 1859, 1860, and 1861, there were passed the Code of Civil Procedure, Act VIII. of 1859; the Penal Code, Act XLV. of 1860; and the Code of Criminal Procedure, Act XXV. of 1861.

Sir Barnes Peacock was succeeded by Mr. Ritchie, who died a few months afterwards. The third Indian Law Commission was appointed at this time.

Mr. Ritchie was succeeded by Sir Henry Maine. It was his task to introduce the measures drafted by the last of the three Indian Law Commissions, and he introduced three of them accordingly, namely, the Succession Act, the Contract Law, and the Evidence Act. One only of those measures, namely, the Succession Act, was passed during his tenure of office. The reason of this was that controversies arose upon questions which have now lost their interest, but which connected themselves in curious, indirect ways with the question both of contract and civil procedure. It was also necessary to amend the procedure codes in various important respects; indeed, the Code of Civil Procedure was redrawn but not re-enacted. The current legislation too was very heavy. A system for the registration of assurances, and several Acts as to marriage and divorce, were required. Many English Acts, as for instance the Act relating to companies, had to be adapted to India; and a variety of half-legal, half-political questions, affecting the legal position of the European community in India and the interests of the landholders in the Punjab and Oudh, required legislation. Preparations too were made in the shape of indexes and repealing Acts for the consolidation of the existing miscellaneous Acts and Regulations. This most laborious task was performed mostly by Mr. Whitley Stokes as regarded the Acts, and by Mr. Cockerell as regarded the Regulations.

I succeeded Sir Henry Maine. On doing so I found everything prepared for the task of consolidation, and I also found

two of the Indian Law Commissioners' drafts, namely, the draft of the Contract Law and the draft of the Evidence Act under consideration. The Code of Criminal Procedure which had been originally ill-arranged, and had been repeatedly amended, seemed to require re-enactment. I was fortunate enough to be able to pass the Contract Law and the Evidence Act, and to re-enact the Code of Criminal Procedure. I was also able to pass nearly all the consolidation Acts, in number about twenty, required to realize the ideal of having only one Act on each subject. The credit of the consolidation Acts is due to a very great extent to Mr. Cockerell, Mr. Whitley Stokes, and Mr. Cunningham. Of course, this was hard work, as there was current legislation besides; but the preceding statement will show that circumstances enabled us to reap where others had sown. I will now say a few words on the Acts which form collectively the Indian codes, referring to them in the order of time.

The first, and in some respects the most important, of them is Act VIII., of 1859, better known as the Code of Civil Procedure. It was drawn by the second Indian Law Commission, and considerably modified in India, especially by Sir Barnes Peacock and Sir Henry Harrington. It has required some amendment, though not very much, and having been drawn with some looseness of expression, has given rise to a great number of judicial decisions. It would no doubt be a great convenience if it could be re-enacted with greater regard to technical precision of language. A draft for this purpose, as I have already observed, was prepared by Sir H. Maine and Sir H. Harrington. There are some questions of principle and policy connected with it which I will not stop to discuss. These, however, are matters of almost no importance at all in comparison with the more important results of the code. It swept away 147 Regulations and Acts, and it laid down a distinct, precise system of civil procedure, applicable to all courts (with exceptions, which I need not mention), and all descriptions of causes, and capable of being fully mastered by any one who will take the pains to study the Act without reference to any other authority. One of the enormous advantages of this Act is, that it has, I will not say abolished, but prevented by anticipation the growth of the distinction between law and equity. Whether the object is to recover damages for a libel, to obtain specific performance of a contract, to get a declaratory decree with consequential relief, or to compel a trustee to do his duty, the form of procedure is the same, and the competency of the court depends on the value of the suit, and the place of residence of the parties, and not on the nature of the question. There is room for much difference of opinion as to the provisions of the code in regard to



appeals, and I cannot commend its provisions as to the execution of decrees, but I never heard more than one opinion on the excellency, the perfect simplicity, and the complete success of the code as a whole.

The next measure to be noticed is Act XLV. of 1860, the Indian Penal Code. Though it was most carefully revised by Sir Barnes Peacock and his colleagues, and was modified by them in many important points, it remains substantially as Lord Macaulay and his colleagues drew it. It contains, with very few exceptions, the whole criminal law of the whole Indian Empire. It consists of 511 sections. It has been in constant use for eleven years by a large number of unprofessional judges, who understand it with perfect ease, and administer it with conspicuous success. It has required hardly any amendments, additions, or explanations; and the number of cases which have been decided upon it is surprisingly small. It has, I think, some considerable defects. It is often said in India that every act of human life may be brought within one or other of its clauses; and no doubt some of them, especially the sections relating to defamation, intimidation, and cheating are of most formidable extent, and might, I think, be curtailed with great advantage whenever the code is re-enacted. Some of its definitions again, such as the definitions of murder and criminal force, are intricate and rather obscure; and there is a tendency in parts of the code to the unnecessary multiplication of distinctions between offences. All these defects, however, might be easily remedied, and are of little practical importance. To compare the Indian Penal Code with English criminal law is like comparing cosmos with chaos. Any intelligent person interested in the subject could get a very distinct and correct notion of Indian criminal law in a few hours from the penal code. I appeal to you to imagine the state of mind of a man who should try to read straight through the very best of English books on criminal law. Say, for instance, Mr. Greaves's edition of "Russell on Crimes."

The penal code was followed by Act XXV. of 1861, the Code of Criminal Procedure. This Act. was originally drawn by the Indian Law Commissioners, and was by them, I believe, confined to Bengal. It had to be extended to the other presidencies, and owing to this and some other circumstances its arrangement became defective and obscure. It nevertheless consolidated 237 Regulations and Acts, and the work was done thoroughly, and with great care and accuracy. The Act, however, assumed so much knowledge on the part of those by whom it was to be studied and applied, that it could hardly be regarded as a code; that is to say,

as a complete statement of the whole of the law on the matters to which it related. Notwithstanding this defect, the advantage of having the whole written law upon the subject contained in a single enactment was so great that the Code of Criminal Procedure was an immense assistance to the administration of justice.

After being amended several times, the code was re-enacted, I hope in an improved shape, a few months ago, as Act X. of 1872, which will come into force on the 1st of next January. The importance of the subject of criminal procedure is much greater in India than it is in England. The Code of Criminal Procedure might indeed be described as the whole duty of magistrates, and every European Government official passes the greater part of his official career as a magistrate. Accordingly this Act is very much more than a mere Code of Criminal Procedure. It provides for the constitution of all the criminal courts in the country, the High Courts only excepted. It defines the relations to each other of the different classes of district magistrates. It disposes of numerous matters connected with the internal government of the country in which magistrates are concerned, such as the removal of nuisances, the provisional settlement of disputes about the possession of land, the making of orders for the maintenance of wives and families, the supervision of vagrants, and the employment of troops in cases of riot. These matters, besides every step of the procedure to be taken in relation to crime, from the discovery and arrest of the offender by the police, down to the execution of the final sentence of the court, is minutely provided for in the code. It contains 541 sections, and is the equivalent of the original code, and of thirty-two other Acts and Regulations which it repeals. It thus represents 270 separate enactments. The new edition of the code disposes also of perhaps 1500 or 2000 cases which had been decided on the old one. In most cases this was effected by very slight alterations of the language of the Act.

The passing of this Act was the first case of the re-enactment of a code, a process which I think they ought to undergo, say, once in every ten years. It is a very laborious business, but it is essential to the real utility of a code, and to the maintenance of the simplicity which it is intended to produce. To judge from the notes upon them, the Code Napoleon and the Code Pénal ought to have been re-enacted half a dozen times.

The next Act in the nature of a code, after the Code of Criminal Procedure, was Act X. of 1865, the Indian Succession Act. This Act was one of the very highest legal interest. Its immediate practical importance in the government of India was certainly not great, but it may as time goes on become

one of the most striking monuments of English rule in that country. It provides a body of territorial law for British India, regulating the great subjects of inheritance, the civil effects of marriage, and testamentary power. It is a curious circumstance, that the vast majority of British subjects in India are subject in these respects to personal laws. Thus all Hindoos are subject to the Hindoo law; all Mahomedans to Mahomedan law, and so of Buddhists and Parsees, and other native populations. Europeans, as a rule, are subject to the law of their domicile, whether it be English, Scotch, or Continental. This of course accounts for the vast mass of the existing population in India. There are, however, exceptions. The Armenians, for instance, of whom there are many in Calcutta, have no personal law, and till 1865 there was no *lex loci* by which their rights could be settled, and the same is the case with half-castes, with out-castes, and more or less with native Christians. The Succession Act provides, what by analogy to the Code Napoleon may be called a Civil Code, for all persons so situated. Their number is already important, and may be expected to increase as the cracks already perceptible in the native religions gradually widen. The Succession Act was one of the principal contributions to Indian law of the Indian Law Commission in England, and was of all their drafts least altered in India. I would recommend any one who doubts the possibility or the advantage of codification to compare the 332 sections of this Act, with a whole library of English law books, of which "Jarman on Wills" may be taken as a type.

I may, perhaps, mention in connection with this Act, an Act which was passed last spring, after a very animated discussion, of which some of you may perhaps have heard, providing a form of marriage for persons who did not profess any of the recognised religions. The Act was occasioned by the rise of the sect called the Brahmo Samaja. It applied to the whole population of India, except Hindoos, Mahomedans, and Christians. The issue of such marriages will fall under the Succession Act.

The next Act to be mentioned is the Indian contract law, which was also the work of the Indian Law Commissioners, though the first part of it was considerably modified in India before it became law, rather in form, however, than in substance. It became law early this year, and now stands in the Indian Statute Book as Act IX: of 1872. It was my duty to examine it closely with the authorities from which it was drawn, and to discuss it in minute detail with a committee, two of the members of which were Calcutta merchants of eminence. This enables me to bear witness not only to the care and labour which had been expended on it, but also to the important fact, that when law is divested of all technicalities,

stated in simple and natural language, and so arranged as to show the natural relation of different parts of the subject, it becomes not merely intelligible, but deeply interesting to educated men, practically conversant with the subject matter to which it relates. The Act in question deals successively with the general principles of contract, and with the contracts of the sale of goods, indemnity and guarantee, bailment, agency, and partnership. I do not think many lawyers in Westminster Hall could have taken a keener or more intelligent interest in these subjects, or have discussed every enactment relating to them with more acuteness or with a greater disposition to put every sort of case upon them than my two colleagues, and I am very much mistaken if that Act is not carefully studied by a large proportion of merchants of the Presidency towns with a definite reference to their daily affairs.

Two other Acts may be mentioned as being of the nature of codee, though they are branches of procedure. These are Act IX. of 1871, the Indian Limitation Act; and Act I. of 1872, the Indian Evidence Act. The credit of the first of these Acts is due mainly to Mr. Whitley Stokes, the Secretary to the Legislative Department. It gives in a very small compass the result of about 1200 decisions which had been given in the course of about twelve years, on Act XIV. of 1859, which it re-enacts, supplements, and supersedes. The Evidence Act, for which in its present shape I am in a great measure responsible, is founded on a draft prepared by the Indian Law Commissioners. It includes, I think, everything which was contained in that draft, but is considerably longer, and is arranged on a different principle.

Besides these Acts the constitution of the civil courts in different parts of India has been provided for by eight or nine civil courts Acts, which have been passed in the course of the last five or six years, one for every province of the Empire except Madras. I think that, with a little management, the whole of these Acts might be consolidated with the next edition of the Code of Civil Procedure; but as they are, they supersede an amount of obscurity and confusion of which I may give a single example. The civil courts of Bengal derived their jurisdiction from parts of no less than thirteen Regulations and Acts amending and referring to one another, relating to all sorts of different subjects, and passed at different periods between 1793 and 1870. All these are now replaced by an Act of thirty-eight short sections (Act VI. of 1871), which any one can master in an hour.

This concludes what I have to say on codification in India; and I will now pass to the subject of consolidation. I do not think there is any essential difference between the two pro-

cesses, though when a code is spoken of the word generally implies that a large and important part of the subject codified is then for the first time reduced to writing in an authoritative manner; whereas consolidation is the process of throwing several statutes into one. Every code, however, will always include more or less consolidation, as upon every subject there is a greater or less amount of statute law. On the other hand, consolidation will be of very little use unless the person who consolidates feels himself at liberty to remodel and rearrange the statutes which he throws together, and to mould their language so as to give the effect of judicial decisions on their meaning. The essence of consolidation is that there should never be more than one statute upon one subject; and that if it is necessary to amend a statute in particulars too small to authorize its repeal and re-enactment, the amendment should be made by enacting that certain words should be erased from the amended Act and others inserted in their place. The result of this is, that the original Act can be reprinted as amended; and simple as this device may appear it saves an amount of trouble and confusion, which can scarcely be believed without practical experience.

The consolidation of Indian law, thus understood, is very nearly complete. When I left India, four Acts on miscellaneous subjects, and three Acts relating to the land revenue of the North-West Provinces, Oude, and the Central Provinces respectively, remained to be passed. Of these seven Acts five had been drawn and introduced into the Council, and of these one has since become law. Five or six additional consolidation Acts, most of which are already drawn, will thus put the statute law of India into a satisfactory condition. Every subject of which it treats will then be disposed of in a single Act, or in a single Act amended by other Acts, in such a manner that the two can be printed as one. When that is done there will remain about thirty Regulations, which for various reasons it is undesirable to touch. The total number of unrepealed Acts of the Government of India was, on the 31st December, 1871, 506, of which 295 were restricted in their operation to different provinces, and only 211 were general. Since that time eighteen Acts have been passed. The first fifteen repeal sixty-two existing enactments, and so reduce the number by forty-seven. The total number of Acts thus stands at from 450 to 460. The total number of general Acts is thus about 160.

To resume, that part of the law of India, for which the Viceroy's Council is responsible, at present stands thus. The subject matter of the judicial branch of the old Regulations is contained in the Penal Code, the Limitation Act, the Evidence Act, the codes of Civil and Criminal Procedure, and the Civil

Courts Acts, of which, as I said, there is one for each province. The revenue branch is represented by consolidated land revenue Acts and by tenancy Acts, which have been passed for the greater part of India, and are under consideration for the rest. The subjects of marriage, inheritance, wills, and the family relations generally, are regulated either by native laws which, for obvious reasons, it is undesirable to touch, or by the Succession Act. The principles of contract in general and the commoner contracts are regulated by the Contract Law, and miscellaneous topics of legislation are each disposed of by a single Act, or by Acts so drawn that they can be printed as a single Act. For the sake of simplicity I have said nothing of Acts of Parliament relating to India, or of the Acts of the local legislatures for Bengal, Madras, and Bombay.

My own opinion is, that if a law of torts were enacted, little more would be required, except current miscellaneous legislation, and the re-enactment from time to time of the existing laws, so as to embody in them the result of judicial decisions. It may strike you that this review leaves out the greatest subject of all, the law relating to land, and that as the whole population of India is immediately dependent on the produce of the land, this is to omit the part of *Hamlet* from the play. The answer to this is, that the laws relating to land in India are almost entirely of two kinds; either they are connected with and arise out of the system of land settlement, the law as to which is reduced to writing in the greater part of India; or else they are native customs as to inheritance and tenure, with which it would be undesirable to interfere, though they are carefully registered in the course of settlement proceedings throughout great part of northern India. A law of easements, and perhaps a law of mortgages, might, I think, be passed; but they would require very great consideration and local knowledge.

You will naturally ask how this process of codification has succeeded? To this question I can answer that it has succeeded to a degree which no one could have anticipated, and the proofs of this fact are to my mind quite conclusive. One is the avidity with which the whole subject is studied, both by the English and by the native students in the universities. The knowledge which every civilian you meet in India has of the Penal Code and the two Procedure Codes is perfectly surprising to an English lawyer. People who in England would have a slight indefinite rule-of-thumb knowledge of criminal law, a knowledge which would guide them to the right book in a library, know the Penal Code by heart, and talk about the minutest details of its provisions with keen interest. I have been repeatedly informed that law is the subject which native students delight in at the universities, and that the

influence, as a mere instrument of education of the codifying Acts, can hardly be exaggerated. I have read in native newspapers detailed criticisms, on the Evidence Act, for instance, which proved that the writer must have studied it as any other literary work of interest might be studied.

A proof of a different kind of the success of the codes is this. A few years ago an Act was passed enabling the Government of India to legislate in a summary way for the wilder parts of India. The Punjab Government were accordingly asked whether they had any proposal to make as to special laws for the government of as wild a frontier as any in the world, the districts between the Indus and the mountains. They replied that they could suggest nothing better than the Penal Code and the Code of Criminal Procedure, with one or two slight modifications and additions. It is a new experience to an English lawyer to see how easy these matters are when they are stripped of mystery. I once had occasion to consult a military officer upon certain matters connected with habitual criminals. He was a man whose life was passed in the saddle, and who hunted down Thugs and Dacoits as if they were game. Upon some remark which I made he pulled out of his pocket a little Code of Criminal Procedure, bound like a memorandum-book, turned up the precise section which related to the matter in hand, and pointed out the way in which it worked with perfect precision. It is one of the many odd sights of Calcutta to see native policemen learning by heart the parts of the Police Act which concern them. The sergeant shouts it out phrase by phrase, and his squad obediently repeat it after him till they know it by heart. The only thing which prevents English people from seeing that law is really one of the most interesting and instructive studies in the world, is that English lawyers have thrown it into a shape which can only be described as studiously repulsive.

Such being the condition of the law of India, I now pass to the question, What can be learnt from it as to codification in England? To this I would reply, that, in the first place, Indian experience shows pretty clearly what in practice is meant by codification. The minds of many persons who write upon the subject appear to me to be haunted by an impression that law is a science inherent in the nature of things, and quite distinct from actual laws, and that to codify the law is to draw out a connected system of propositions which would constitute such an exposition of the science as Euclid gives of the elements of geometry. Of course, if this view of the subject is taken, the codification of the law may well be regarded as a work almost, if not altogether, out of our reach. If, however, we take a truer and more practical view

of the matter—if we think about actual laws, and not about abstract law, and if we regard these laws as systems of rules drawn up for practical purposes by the light of common experience—it appears to me as absurd to doubt the possibility of expressing them in plain words, and arranging them in a perspicuous and systematic form, as to doubt the possibility of getting any other sort of skilled labour performed.

All experience, both English and Indian, shows that of the masses of law which are to be found in statutes and text books, the amount with which any one, even a lawyer, need practically concern himself is comparatively small. Turn over “Chitty’s Statutes,” for instance, and consider of how many of the Acts which it contains any lawyer can wish to know more than the fact of their existence. Who would wish to burden his memory with the contents, for instance, of Acts about sewers, ships and shipping, tithes, the improvement of towns, vestries, or a thousand other subjects which might be mentioned? On the other hand, there are branches of the law of which every lawyer who is really master of his profession ought to have a precise and systematic knowledge, embracing not merely their general principles, but their more important working details. My own opinion is, that every educated man might possess a very considerable amount of such knowledge, and I feel no doubt at all that the law both might and ought to be thrown into such a shape as to render the operation of getting it easy and interesting. If any one is sceptical as to this, I would invite his attention to some illustrations. The constitution of the United States is accurately and familiarly known to many millions of Americans; and for this simple reason: It is drawn up in a form which every one can read and understand, and is circulated through the whole country, as we circulate the Bible. The Catechism, the Ten Commandments, and the Creeds, are instances of the same thing. Here are documents which relate to the most important and mysterious subjects to which the human mind can address itself. They form an essential part of one of the most important Acts of Parliament ever passed—the Act of Uniformity. Every child in the land learns them by heart, and the highest courts of law in the country put from time to time a judicial construction upon them. The whole national character of Scotland is moulded by the Westminster Confession. Its system of divinity gives a complete account of all things, human and divine, and a large proportion of Scotchmen used, at all events, to be able to repeat it by heart from end to end, together with its Scripture proofs. What are these but cases of codification? and yet there are those who say that it is idle to attempt to popularize a knowledge of law.

It is not, I think, difficult to specify the particular branches



of law which might thus be dealt with. Suppose that we had statutes containing expositions of the whole law, whether derived from statutes, text writers, or decided cases on the following subjects :—1. Private relations of life (husband and wife, parent and child, guardian and ward); 2. Succession to property; 3. Landed property; 4. Contract; 5. Wrong; 6. Trust; 7. Crime; 8. Civil procedure; 9. Criminal procedure; 10. Evidence; 11. Limitation and prescription; we should then have not indeed a code in the—I had almost said transcendental—sense which some persons seem to attach to the word but we should have the working kernel of the law stated in such a shape that, with the necessary amount of sustained industry, any one might acquaint himself with it. If, in addition to this, the process of redrawing and re-enacting the statutes upon other subjects, in a consolidated form and in modern language, were steadily carried on, till on each subject that was only one Act, the law would be as simple as it could be made. Is there any insuperable difficulty in this undertaking? I can see none, if it is seriously taken in hand. It would no doubt be a great undertaking. It would occupy many years, and would cost a considerable amount of money; but the difficulties are by no means greater than those of many other great undertakings. They are not greater, for instance, than the difficulty of draining London, or building new Houses of Parliament, or new courts of law, or constructing a system of railroads. Of course, it is possible to suggest difficulties which may be made to look insurmountable, and I have no doubt that they really are in many instances great, but to suppose that they cannot be overcome by resolute and well-combined efforts, if only the nation is in earnest in the matter, seems to me mere idleness and faintness of heart. Can any one doubt that if the 4th and 17th sections of the Statute of Frauds had been redrawn, as they ought to have been half a dozen times since they were passed, the law would now be as simple as the nature of the case permits it to be? An Act on that matter might be drawn in a few weeks, which would enable every merchant in England to know where he was in regard to such matters without asking his lawyer.

Of the eleven subjects mentioned, several have been dealt with in the Indian Succession Act, and others in the contract law, the penal code, the two procedure codes, and the Evidence and Limitation Acts. Others are disposed of in the New York Civil Code; and, indeed, distinct precedents might be found for all, with the exception of the law of landed property, which, on account of its enormous importance and great difficulty, might well be left to the last; but I know of no reason why the subjects of crime, contracts, wrongs, and procedure, civil and

criminal, including evidence and the law of limitation and prescription, should not be undertaken at once, and completed in a few years. Indeed, a single draftsman, who had nothing else to do, might draw the Acts faster than Parliament would be prepared to discuss them. I do not know that the order in which the different Acts should be drawn is a question of very much importance. My own opinion would be in favour of beginning with a code of civil procedure, partly because the Judicature Commission have drawn up in their first report what would amount to instructions to the draftsman, but much more because such a code would at once effect a fusion of law and equity, and thus remove one of the principal causes of the intricacy of English law.

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I will state in a very few words how this is effected, for it is a typical instance of the advantages of codification. As you all know, murder came to be defined upwards of 200 years ago, as "killing with malice aforethought." From that time to this successive generations of judges have racked their ingenuity, first of all, in affixing strange, unnatural meanings to the two words "malice" and "aforethought;" and then, in reconciling each other's dicta on the subject, "Malice" may be expressed or implied. Its existence is presumed in some cases, and the presumption is rebutted by particular classes of circumstances. The intricacies arising from this are recorded in the text books, and most fully in "Russell on Crimes," to which I would refer you. After much reading it becomes clear that all of them may be dispensed with, and that the real gist of the law may be reduced to a perfectly plain, straightforward shape, if the unlucky words "malice aforethought" are rejected, and the crime is defined with reference to the intention with which the act which causes death is done. Once hit upon this clue to the labyrinth, and everything falls into its place, like a tangle of which you have found the knot. I cannot, of course, detain you by going into the

one of the most striking monuments of English rule in that country. It provides a body of territorial law for British India, regulating the great subjects of inheritance, the civil effects of marriage, and testamentary power. It is a curious circumstance, that the vast majority of British subjects in India are subject in these respects to personal laws. Thus all Hindoos are subject to the Hindoo law; all Mahomedans to Mahomedan law, and so of Buddhists and Parsees, and other native populations. Europeans, as a rule, are subject to the law of their domicile, whether it be English, Scotch, or Continental. This of course accounts for the vast mass of the existing population in India. There are, however, exceptions. The Armenians, for instance, of whom there are many in Calcutta, have no personal law, and till 1865 there was no *lex loci* by which their rights could be settled, and the same is the case with half-castes, with out-castes, and more or less with native Christians. The Succession Act provides, what by analogy to the Code Napoleon may be called a Civil Code, for all persons so situated. Their number is already important, and may be expected to increase as the cracks already perceptible in the native religions gradually widen. The Succession Act was one of the principal contributions to Indian law of the Indian Law Commission in England, and was of all their drafts least altered in India. I would recommend any one who doubts the possibility or the advantage of codification to compare the 332 sections of this Act, with a whole library of English law books, of which "Jarman on Wills" may be taken as a type.

I may, perhaps, mention in connection with this Act, an Act which was passed last spring, after a very animated discussion, of which some of you may perhaps have heard, providing a form of marriage for persons who did not profess any of the recognised religions. The Act was occasioned by the rise of the sect called the Brahmo Samaja. It applied to the whole population of India, except Hindoos, Mahomedans, and Christians. The issue of such marriages will fall under the Succession Act.

The next Act to be mentioned is the Indian contract law, which was also the work of the Indian Law Commissioners, though the first part of it was considerably modified in India before it became law, rather in form, however, than in substance. It became law early this year, and now stands in the Indian Statute Book as Act IX: of 1872. It was my duty to examine it closely with the authorities from which it was drawn, and to discuss it in minute detail with a committee, two of the members of which were Calcutta merchants of eminence. This enables me to bear witness not only to the care and labour which had been expended on it, but also to the important fact, that when law is divested of all technicalities,

stated in simple and natural language, and so arranged as to show the natural relation of different parts of the subject, it becomes not merely intelligible, but deeply interesting to educated men, practically conversant with the subject matter to which it relates. The Act in question deals successively with the general principles of contract, and with the contracts of the sale of goods, indemnity and guarantee, bailment, agency, and partnership. I do not think many lawyers in Westminster Hall could have taken a keener or more intelligent interest in these subjects, or have discussed every enactment relating to them with more acuteness or with a greater disposition to put every sort of case upon them than my two colleagues, and I am very much mistaken if that Act is not carefully studied by a large proportion of merchants of the Presidency towns with a definite reference to their daily affairs.

Two other Acts may be mentioned as being of the nature of codes, though they are branches of procedure. These are Act IX. of 1871, the Indian Limitation Act; and Act I. of 1872, the Indian Evidence Act. The credit of the first of these Acts is due mainly to Mr. Whitley Stokes, the Secretary to the Legislative Department. It gives in a very small compass the result of about 1200 decisions which had been given in the course of about twelve years, on Act XIV. of 1859, which it re-enacts, supplements, and supersedes. The Evidence Act, for which in its present shape I am in a great measure responsible, is founded on a draft prepared by the Indian Law Commissioners. It includes, I think, everything which was contained in that draft, but is considerably longer, and is arranged on a different principle.

Besides these Acts the constitution of the civil courts in different parts of India has been provided for by eight or nine civil courts Acts, which have been passed in the course of the last five or six years, one for every province of the Empire except Madras. I think that, with a little management, the whole of these Acts might be consolidated with the next edition of the Code of Civil Procedure; but as they are, they supersede an amount of obscurity and confusion of which I may give a single example. The civil courts of Bengal derived their jurisdiction from parts of no less than thirteen Regulations and Acts amending and referring to one another, relating to all sorts of different subjects, and passed at different periods between 1793 and 1870. All these are now replaced by an Act of thirty-eight short sections (Act VI. of 1871), which any one can master in an hour.

This concludes what I have to say on codification in India; and I will now pass to the subject of consolidation. I do not think there is any essential difference between the two pro-

cesses, though when a code is spoken of the word generally implies that a large and important part of the subject codified is then for the first time reduced to writing in an authoritative manner; whereas consolidation is the process of throwing several statutes into one. Every code, however, will always include more or less consolidation, as upon every subject there is a greater or less amount of statute law. On the other hand, consolidation will be of very little use unless the person who consolidates feels himself at liberty to remodel and rearrange the statutes which he throws together, and to mould their language so as to give the effect of judicial decisions on their meaning. The essence of consolidation is that there should never be more than one statute upon one subject; and that if it is necessary to amend a statute in particulars too small to authorize its repeal and re-enactment, the amendment should be made by enacting that certain words should be erased from the amended Act and others inserted in their place. The result of this is, that the original Act can be reprinted as amended; and simple as this device may appear it saves an amount of trouble and confusion, which can scarcely be believed without practical experience.

The consolidation of Indian law, thus understood, is very nearly complete. When I left India, four Acts on miscellaneous subjects, and three Acts relating to the land revenue of the North-West Provinces, Oude, and the Central Provinces respectively, remained to be passed. Of these seven Acts five had been drawn and introduced into the Council, and of these one has since become law. Five or six additional consolidation Acts, most of which are already drawn, will thus put the statute law of India into a satisfactory condition. Every subject of which it treats will then be disposed of in a single Act, or in a single Act amended by other Acts, in such a manner that the two can be printed as one. When that is done there will remain about thirty Regulations, which for various reasons it is undesirable to touch. The total number of unrepealed Acts of the Government of India was, on the 31st December, 1871, 506, of which 295 were restricted in their operation to different provinces, and only 211 were general. Since that time eighteen Acts have been passed. The first fifteen repeal sixty-two existing enactments, and so reduce the number by forty-seven. The total number of Acts thus stands at from 450 to 460. The total number of general Acts is thus about 160.

To resume, that part of the law of India, for which the Viceroy's Council is responsible, at present stands thus. The subject matter of the judicial branch of the old Regulations is contained in the Penal Code, the Limitation Act, the Evidence Act, the codes of Civil and Criminal Procedure, and the Civil

Courts Acts, of which, as I said, there is one for each province. The revenue branch is represented by consolidated land revenue Acts and by tenancy Acts, which have been passed for the greater part of India, and are under consideration for the rest. The subjects of marriage, inheritance, wills, and the family relations generally, are regulated either by native laws which, for obvious reasons, it is undesirable to touch, or by the Succession Act. The principles of contract in general and the commoner contracts are regulated by the Contract Law, and miscellaneous topics of legislation are each disposed of by a single Act, or by Acts so drawn that they can be printed as a single Act. For the sake of simplicity I have said nothing of Acts of Parliament relating to India, or of the Acts of the local legislatures for Bengal, Madras, and Bombay.

My own opinion is, that if a law of torts were enacted, little more would be required, except current miscellaneous legislation, and the re-enactment from time to time of the existing laws, so as to embody in them the result of judicial decisions. It may strike you that this review leaves out the greatest subject of all, the law relating to land, and that as the whole population of India is immediately dependent on the produce of the land, this is to omit the part of *Hamlet* from the play. The answer to this is, that the laws relating to land in India are almost entirely of two kinds; either they are connected with and arise out of the system of land settlement, the law as to which is reduced to writing in the greater part of India; or else they are native customs as to inheritance and tenure, with which it would be undesirable to interfere, though they are carefully registered in the course of settlement proceedings throughout great part of northern India. A law of easements, and perhaps a law of mortgages, might, I think, be passed; but they would require very great consideration and local knowledge.

You will naturally ask how this process of codification has succeeded? To this question I can answer that it has succeeded to a degree which no one could have anticipated, and the proofs of this fact are to my mind quite conclusive. One is the avidity with which the whole subject is studied, both by the English and by the native students in the universities. The knowledge which every civilian you meet in India has of the Penal Code and the two Procedure Codes is perfectly surprising to an English lawyer. People who in England would have a slight indefinite rule-of-thumb knowledge of criminal law, a knowledge which would guide them to the right book in a library, know the Penal Code by heart, and talk about the minutest details of its provisions with keen interest. I have been repeatedly informed that law is the subject which native students delight in at the universities, and that the



influence, as a mere instrument of education of the codifying Acts, can hardly be exaggerated. I have read in native newspapers detailed criticisms, on the Evidence Act, for instance, which proved that the writer must have studied it as any other literary work of interest might be studied.

A proof of a different kind of the success of the codes is this. A few years ago an Act was passed enabling the Government of India to legislate in a summary way for the wilder parts of India. The Punjab Government were accordingly asked whether they had any proposal to make as to special laws for the government of as wild a frontier as any in the world, the districts between the Indus and the mountains. They replied that they could suggest nothing better than the Penal Code and the Code of Criminal Procedure, with one or two slight modifications and additions. It is a new experience to an English lawyer to see how easy these matters are when they are stripped of mystery. I once had occasion to consult a military officer upon certain matters connected with habitual criminals. He was a man whose life was passed in the saddle, and who hunted down Thugs and Dacoits as if they were game. Upon some remark which I made he pulled out of his pocket a little Code of Criminal Procedure, bound like a memorandum-book, turned up the precise section which related to the matter in hand, and pointed out the way in which it worked with perfect precision. It is one of the many odd sights of Calcutta to see native policemen learning by heart the parts of the Police Act which concern them. The sergeant shouts it out phrase by phrase, and his squad obediently repeat it after him till they know it by heart. The only thing which prevents English people from seeing that law is really one of the most interesting and instructive studies in the world, is that English lawyers have thrown it into a shape which can only be described as studiously repulsive.

Such being the condition of the law of India, I now pass to the question, What can be learnt from it as to codification in England? To this I would reply, that, in the first place, Indian experience shows pretty clearly what in practice is meant by codification. The minds of many persons who write upon the subject appear to me to be haunted by an impression that law is a science inherent in the nature of things, and quite distinct from actual laws, and that to codify the law is to draw out a connected system of propositions which would constitute such an exposition of the science as Euclid gives of the elements of geometry. Of course, if this view of the subject is taken, the codification of the law may well be regarded as a work almost, if not altogether, out of our reach. If, however, we take a truer and more practical view

of the matter—if we think about actual laws, and not about abstract law, and if we regard these laws as systems of rules drawn up for practical purposes by the light of common experience—it appears to me as absurd to doubt the possibility of expressing them in plain words, and arranging them in a perspicuous and systematic form, as to doubt the possibility of getting any other sort of skilled labour performed.

All experience, both English and Indian, shows that of the masses of law which are to be found in statutes and text books, the amount with which any one, even a lawyer, need practically concern himself is comparatively small. Turn over “Chitty’s Statutes,” for instance, and consider of how many of the Acts which it contains any lawyer can wish to know more than the fact of their existence. Who would wish to burden his memory with the contents, for instance, of Acts about sewers, ships and shipping, tithes, the improvement of towns, vestries, or a thousand other subjects which might be mentioned? On the other hand, there are branches of the law of which every lawyer who is really master of his profession ought to have a precise and systematic knowledge, embracing not merely their general principles, but their more important working details. My own opinion is, that every educated man might possess a very considerable amount of such knowledge, and I feel no doubt at all that the law both might and ought to be thrown into such a shape as to render the operation of getting it easy and interesting. If any one is sceptical as to this, I would invite his attention to some illustrations. The constitution of the United States is accurately and familiarly known to many millions of Americans; and for this simple reason: It is drawn up in a form which every one can read and understand, and is circulated through the whole country, as we circulate the Bible. The Catechism, the Ten Commandments, and the Creeds, are instances of the same thing. Here are documents which relate to the most important and mysterious subjects to which the human mind can address itself. They form an essential part of one of the most important Acts of Parliament ever passed—the Act of Uniformity. Every child in the land learns them by heart, and the highest courts of law in the country put from time to time a judicial construction upon them. The whole national character of Scotland is moulded by the Westminster Confession. Its system of divinity gives a complete account of all things, human and divine, and a large proportion of Scotchmen used, at all events, to be able to repeat it by heart from end to end, together with its Scripture proofs. What are these but cases of codification? and yet there are those who say that it is idle to attempt to popularize a knowledge of law.

It is not, I think, difficult to specify the particular branches

of law which might thus be dealt with. Suppose that we had statutes containing expositions of the whole law, whether derived from statutes, text writers, or decided cases on the following subjects:—1. Private relations of life (husband and wife, parent and child, guardian and ward); 2. Succession to property; 3. Landed property; 4. Contract; 5. Wrong; 6. Trust; 7. Crime; 8. Civil procedure; 9. Criminal procedure; 10. Evidence; 11. Limitation and prescription; we should then have not indeed a code in the—I had almost said transcendental—sense which some persons seem to attach to the word but we should have the working kernel of the law stated in such a shape that, with the necessary amount of sustained industry, any one might acquaint himself with it. If, in addition to this, the process of redrawing and re-enacting the statutes upon other subjects, in a consolidated form and in modern language, were steadily carried on, till on each subject that was only one Act, the law would be as simple as it could be made. Is there any insuperable difficulty in this undertaking? I can see none, if it is seriously taken in hand. It would no doubt be a great undertaking. It would occupy many years, and would cost a considerable amount of money; but the difficulties are by no means greater than those of many other great undertakings. They are not greater, for instance, than the difficulty of draining London, or building new Houses of Parliament, or new courts of law, or constructing a system of railroads. Of course, it is possible to suggest difficulties which may be made to look insurmountable, and I have no doubt that they really are in many instances great, but to suppose that they cannot be overcome by resolute and well-combined efforts, if only the nation is in earnest in the matter, seems to me mere idleness and faintness of heart. Can any one doubt that if the 4th and 17th sections of the Statute of Frauds had been redrawn, as they ought to have been half a dozen times since they were passed, the law would now be as simple as the nature of the case permits it to be? An Act on that matter might be drawn in a few weeks, which would enable every merchant in England to know where he was in regard to such matters without asking his lawyer.

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The second matter which I have to mention is this. Shortly after my return to England, last May, the Recorder of London told me that Mr. Bright had asked him to draw a Bill defining the offence of murder. Mr. Bright's attention had no doubt been directed to the subject by the evidence given before the Capital Punishment Commission, some years ago, on the unsatisfactory state of the existing law on that subject. Mr. Russell Gurney's engagements prevented him from completing this task, though he had made some progress in it, and at his desire I undertook it. I accordingly drew, and we jointly settled a Bill, which I hold in my

hand, which codifies the whole law of homicide. It consists of twenty-four sections, and reduces to that length matter which, in Mr. Greaves's edition of "Russell on Crimes," is spread over no less than 232 royal 8vo pages. Nine of the sections, which define the cases in which homicide is not criminal, ought properly to be placed in the first chapter of a penal code, as most of them relate to other offences as well as homicide. Mr. Russell Gurney brought the Bill into Parliament, and it was read a first time on one of the last days of last session. I need hardly say that his name is in itself the best possible warrant that the Bill is not a fanciful or theoretical one, but is practically adapted to its purpose. I may also state that some weeks ago I went carefully through it with the Attorney-General, and that he also considered that the Bill substantially represented the existing law, and would constitute a great improvement to it, though he thought some points in it open to discussion. I very much wish that I had the opportunity of discussing this Bill, section by section, with those who doubt the possibility or the advantages of codification. I would undertake to show any person who is acquainted with the subject, that it includes the whole of the existing law, modifying it only in certain particulars, putting it into a form perfectly intelligible to any one who can read English, reducing it in length from 232 pages to seven or less, and settling a variety of moot points, which might at any moment produce great confusion if they should occur in practice.

I will state in a very few words how this is effected, for it is a typical instance of the advantages of codification. As you all know, murder came to be defined upwards of 200 years ago, as "killing with malice aforethought." From that time to this successive generations of judges have racked their ingenuity, first of all, in affixing strange, unnatural meanings to the two words "malice" and "aforethought;" and then, in reconciling each other's dicta on the subject, "Malice" may be expressed or implied. Its existence is presumed in some cases, and the presumption is rebutted by particular classes of circumstances. The intricacies arising from this are recorded in the text books, and most fully in "Russell on Crimes," to which I would refer you. After much reading it becomes clear that all of them may be dispensed with, and that the real gist of the law may be reduced to a perfectly plain, straightforward shape, if the unlucky words "malice aforethought" are rejected, and the crime is defined with reference to the intention with which the act which causes death is done. Once hit upon this clue to the labyrinth, and everything falls into its place, like a tangle of which you have found the knot. I cannot, of course, detain you by going into the

Bill, but I should like nothing better than to justify what I have said before anybody competent to judge of it.

Mr. Gurney's duties in America will probably detain him there till late in the next session. His object in introducing the Bill at the end of the last session was to bring the matter before the public, in the hope that the Government might take it up. If they should do so, and if the Attorney-General carries out his intention of introducing an Evidence Act, the public attention will be challenged on the subject of codification, and the possibility of preparing such a code as I have tried to sketch out will be clearly established.

The only remaining point on which I shall trouble you is the question, how it can be done? Upon this I have little to add to what I suggested in a letter to Mr. Fawcett, which was published last summer in the *Times*, and which some of you may have noticed. It would obviously be impossible to discuss such matters as I have referred to as ordinary Bills are discussed in Parliament, and a law officer immersed in private practice and in Parliamentary life would probably not be well qualified to draw them. A popular assembly might as well try to paint a picture as to discuss, section by section, a penal code or a law about contracts. On the other hand, it is impossible to ask Parliament to delegate its legislative power. Nothing on earth would or ought ever to induce them to do so. What then is to be done? I would suggest the following plan.

The history of a Bill includes the following stages:—1. The preparation of the draft. 2. The introduction of the Bill into Parliament. 3. Its discussion in Parliament.

For the preparation of the draft I would provide as follows: Appoint a small commission charged with the duty of drawing the Bills referred to, or whatever other Bills might be determined on. Each Bill ought to be drawn by a single person for the same reason for which a picture ought to be painted by a single person; for an Act worthy to be called a code is distinctly a work of art. The size of the commission would thus determine the rapidity with which the work would be done. If it were desired only to try the experiment, a single draftsman might be employed in the first instance, and a commission might be appointed to test his work when it was done. I will suppose, however, that a commission of three or four persons was appointed. In order to secure their industry, put them under strict conditions as to keeping a regular account of their proceedings. Let them allot the work to be done to particular members of the commission, and record minutes and resolutions, showing the reasons for what they propose. These proceedings might be of the greatest importance both as throwing light afterwards upon the object

and meaning of particular enactments, and as a check upon the employment of their time. When any one commissioner had prepared a draft, it ought to be considered by the whole body minutely; and when settled, it should not only be published in the *Gazette*, with a full statement of the objects and reasons, but should be forwarded for opinion and criticism to every person or body likely to give a valuable opinion upon it. The commission should carefully examine the draft and the criticisms, and mould it accordingly. In India, we had hardly any careful criticism of our work in the press, and as the Legislative Council consisted of only fifteen members, its public debates were of little value as an expression of opinion. We used, accordingly, to send copies of all Acts of any importance to each of the ten local governments, to be distributed by them and their officers to every one who was likely to be able to give us any information, and in this way we got masses of highly important criticisms, all of which were carefully considered by committees, which sat in private. When the Code of Criminal Procedure was under discussion, we had before us a folio volume of perhaps 300 pages of criticism on various points connected with it. We had also a digest of all the cases decided on the old code, which we obtained from a gentleman who had just prepared a new edition of the old code. We had a committee of nine, of whom five undertook the task of studying these criticisms. We used to sit five, six, or seven hours a day for months together. The secretary read out the whole Bill (541 sections); and as each section was read, the criticisms upon it were referred to by one or other of the members who took charge of them, and were discussed by the committee in private, and the wording of the Bill was settled accordingly. The number of points thus brought to our notice was surprising, and the value of the process could hardly be exaggerated. It is out of all comparison more searching and effective than a discussion by speeches in a popular assembly can possibly be.

When a Bill had been in this way drafted, criticized, and settled, it, together with the criticisms made upon it, and a statement of the alterations made in consequence, should be brought by the commission before the Chancellor and the law officers, who, if they approved of it, as they probably would, should introduce it into the House of Lords or Commons, as might be most convenient. If they did not choose to do so, they should record their reasons. The commission should record theirs, and the whole should be published for public information, together with the rest of their proceedings.

Up to this point observe what we should have gained. In the first place, we should have a permanent body engaged upon



the work, and we should thus avoid the rock on which so many schemes of law reform have split—change of ministry. Continuous and systematic law reform is impossible, so long as it is left entirely to Chancellors and law officers, who cannot be sure of their places for a single session, and whose time is occupied by other duties. In codification the object is not so much to alter the law as to give its equivalent in an improved shape. Hence, the draftsman is, to a very great extent indeed, the important person. So long as he is not recognised as such, so long as he is an unknown man with no authority, no responsibility, no position of his own, you will never get really good legislation upon subjects of this sort. No man who is fit to draw a code will do it merely as the unrecognised servant of some politician who is to get all the credit for it. Give to each his due. Let the author of the code be its author. Let the member of Parliament be what he really is, the advocate who pleads its cause; and if he refuses to plead it, let the public know the reason why, and judge who is right and who wrong.

In the second place, we should have a security for careful drafting, and for industry on the part of the draftsman far greater than we have or can have at present. I do not mean to say that the Government drafting of the present day is bad; it is, I think, admirably good; but that is due to the personal merits of individuals and not to the system.

Lastly, let us suppose the Bill to be introduced into whichever House of Parliament might be preferred. Let it be a standing order of each House that the Commissioners' Bills shall be referred to a Select Committee, and that the Select Committee shall be attended by the commissioner by whom the Bill was drawn; let the committee report to the House, and let the Bill take its course. Perhaps it might be thought right, with regard to Bills of such peculiar character and such importance, to permit them to run on from session to session, instead of being obliged to go through all their stages in one session. It would also be a very great advantage if, after the Bills had gone through committee, they were referred back to the commission to be considered, not from the legislative, but simply from the drafting point of view.

Now, why should not Parliament accept Bills thus prepared, vouched for and tested? Its legislative authority would not be trenched upon in the slightest degree. It would not be asked to delegate an atom of it. It would merely provide means for the specially careful preparation of Bills of special importance, and for the steady prosecution of a great national work independently of party changes.

I have a few remarks to make in conclusion. First. It is said

that we ought to wait for a general digest of the law before proceeding to a code. It appears to me that to do so would be equivalent to an indefinite postponement of the whole undertaking. The fact is, that we have already the best of all possible digests. I do not refer merely to the works which pass under that title—though I confess I think it would be very difficult to improve upon Mr. Fisher's "Common Law Digest"—I refer to the innumerable text books of every branch of the law. What better digest of criminal law could we possibly hope for than "Russell on Crimes," and the current Roscoe and Archbold, to say nothing of the title, "Criminal Law," in "Fisher's Digest." A digest of the law, made at the public expense, would take years to plan and execute, and it would be out of date by the time it was done. Whereas text books, which constitute complete and admirable digests, are continually called into being by supply and demand.

Secondly, I would protest against the supposition that the work of codification can ever be final. To suppose that any code will go on by itself for ever is like supposing that a railway can be built which will not want repairs. You must have an engineering staff to keep your works in order, when they are made, as well as to make them in the first instance. I believe that almost any code, any systematic exposition of the law, would be a great improvement on the present state of things, but constant re-enactment would be necessary to make them really complete, and no rational advocate of codification would say more than that codification is a step in advance.

This is the answer to the common criticism on codes, that they get overrun with commentaries. So would a garden be overrun with weeds if it was not carefully looked after, but the use of a gardener is to look after it. Redraw the codes so as to embody the comments, and you will keep them in shape. The criticism itself involves much exaggeration. I mentioned that we embodied the result of between 1000 and 2000 cases in the new Code of Criminal Procedure, but you would have been surprised to see how little they came to. Numbers of them turned upon the alteration of a word or two; numbers were merely superfluous illustrations; and numbers turned upon combinations of facts so peculiar that they were unlikely to recur, and carried the law no further. My experience of the three great Indian Codes is that the degree of real uncertainty as to their meaning is singularly small, and that, though a good many cases are decided on particular sections, the vast majority fully explain their own meaning. As an illustration of the kind of points which cases decide, I may observe that most of the 1200 cases which were disposed of in the Limitation Act arose upon the question at what point of time the right to sue accrued in particular instances. The period of

limitation ran from that point. We made a schedule with 169 items, which gave in twenty pages the result of several volumes of reports. A case containing many pages of argument was thus compressed into a very few lines. One item would often dispose of a whole class of cases.

Thirdly, I wish to observe that if such a commission as I have suggested were appointed, it could be made exceedingly useful for many other purposes connected with law reform, besides the principal one of drawing a code; but upon this large subject I will not enter.

Fourthly and lastly, it is often said that codification would deprive the law of its elasticity, which would be a bad thing. The only plain meaning I have ever been able to attach to this is that it is good that law should be uncertain, and the only sense in which this can possibly be true, is that there are subjects on which it is desirable that the judges should exercise a considerable degree of discretion. To this I entirely agree; but I must observe that nothing can be easier than to draw enactments in such a manner as to give any required amount of discretion to the judges. It is, indeed, very much easier to give too much than to give too little. A very famous document gave a very famous court more discretion than some of its members liked, by the use of the phrases "due diligence," and "damages growing out of" certain facts. What, again, can be more elastic than the language of the Extradition Act of 1870, which provides that a fugitive criminal shall not be surrendered if the offence is one "of a political character"? Take, again, such a question as the relation of madness to crime. Several views on the subject are possible; and if it were thought desirable not to settle various delicate questions on the subject which are still undetermined, nothing would be easier than to find language which would leave that task to the judges. On the other hand, if it was desired to decide them, that could be done too. In short the Legislature can make its laws as definite or indefinite upon any given point as it thinks proper. Codification enables it to choose between vagueness and precision in each particular case. When the law is uncoded, it must be vague in numberless cases in which precision is clearly desirable.

In conclusion, I have only to thank you for your patience in listening to me.

#### IV.—LAWS OF FOREIGN JOINT-STOCK COMPANIES, AND NECESSITY FOR AN INTERNATIONAL CODE. By HENRY D. JENCKEN, Barrister-at-Law, &c.

NO subject presents more difficulties, and at the same time possesses greater interest, than that of the international laws which regulate the relations of joint-stock companies. Year by year, as the network of railways spreads over Europe, our Colonies, and the American continent, dealings in the securities of foreign countries expand; debentures and shares pass from hand to hand, and the savings of whole communities may thus be found to be imperilled in the undertakings these investments represent. But not only are England and other European States large purchasers of the stocks of foreign and other countries, but foreign investments by British capitalists exceed scores of millions annually. Foreign railways, foreign companies, and works of every description, are undertaken and supported by British capital; and France, Germany, Russia, Italy, Spain, Holland, and Belgium, though in a minor degree, are following our example, until finally the European races are becoming united by one great bond of common interest into a vast trading community. Yet, great as at present are the amounts invested, in another twenty years they will be more than doubled. It may thus be justly urged, that an international Code regulating joint-stock enterprise has become a question of paramount interest.

To understand, however, the differences in the laws of various countries, it will be necessary to map out, though in barest outline, the historical ground covered by the past, and to explain how the different systems became evolved from customary rules; what course they pursued; and the study of their rise, progress, and development will greatly aid in the right comprehension of the task we have set before us.

The ancient Roman, with all his marvellous acumen, failed to evolve a system of laws adapted to joint-stock enterprise. The protective rule of the *peculium*, or the presence of a slave, in whose name the wealthy citizen traded, sufficed to shield him from the more dangerous consequences of a partnership (*societas*). Hence the Roman was never called upon to create laws, or legal rules, suited to joint ventures. It has been contended by some authors, that those associations known as the *societates vectigalium publicarum*, were joint-stock companies, constituted for the purpose of farming the State revenues. In confirmation of this view, Cicero is quoted in his address to

Vatinius. But such was not, strictly speaking, the case; the *socii*, who were all of the equestrian order, were bound in *solidum* to the fulfilment of the contract with the State; and hence their shares or *quota* were deemed *unalienable*.

Joint-stock enterprise is, in fact, as Renaud tells us, not of civil law origin, but it is the child of modern times, taking its origin in the Germanic races. Amongst these we can trace the first germs of the great principle of joint-stock ventures in those early mining undertakings which we have imitated in our Cost-book system; and in those *Gerwerschaften* of the twelfth century, which Troplong says resemble the associations known as the *partionarii*, or participators of Southern France, with their *bajuli* or managers, and annual distributions of gain.

The *partionarii* must not, however, be confounded with the commanditaires of a Commandite. This system came into use as early as the tenth and eleventh centuries; and five centuries later, the celebrated ordonnance of Louis XIV. (1673) "gave, so far as France extended, legislative sanction to those rules which traders had created for themselves."—*Law Magazine*, April, 1872, "Companies en Commandite." The notion of joint-stock associations once suggested was readily adopted by the quick-witted Italian; thus we find, as early as the year 1407, the Banco di St. Georgio of Genoa established as a joint-stock company. The constitution of this Banco di St. Georgio illustrates the advanced ideas entertained four centuries and a half ago by the Italians. Scaccia, in his *Tractatus de Commerci et Cambio*, informs us that the capital of this bank was divided into 20,400 *loca*, or portions of 25 *scutorum* each; that the sum paid upon these portions could not be reclaimed, and that a custom of selling the *loca* had arisen, as no personal liability attached to their holding. A century and half later on, we find that under the Pontificate of Paul VI. (A.D. 1555), a joint-stock company was constituted to farm the revenues of the Holy See. The statutes of this celebrated company became the model, or precedent for future Italian joint-stock associations. The keystone, however, to this system was placed by the judges of the high appellate tribunal of Genoa, the *Rota*, in the celebrated case of the Grimaldi and partners, whom one Saulus sued in *solidum* for debts incurred by this company, in which they and others were shareholders. This decision of the *Rota* of Genoa has played so mighty a part in the progress and civilization of Europe, that we may be excused for quoting the very words of the judgment in *extenso*: "*quoniam*," says the *decisio*, "*se invicem ignorabant et profecto insanum esse dicere Grimaldos, Farnesios, Montes, et alios participes in appaltu fuisse socios invicem, cum nunquam interse nec tacite, nec expresse*

*convenerint, et sic socii non sunt effecti.*" Relying on the rule thus laid down in this celebrated decision, Straccha, from whose works I have extracted the passage cited, further informs us, that Italy soon became covered with joint-stock ventures which adopted the rule of exemption of shareholders from personal liability, and framed their rules or statutes upon the model of the Genoese Bank. In France, the great impulse given to enterprise by the discovery of the Indies, forced capitalists to adopt the same principle of joint-stock venture to carry out their undertakings. In the year 1628, Cardinal Richelieu authorized the formation of *La Compagnie des Indes Occidentales*; and in the year 1664 another company, called *La Compagnie des Indes Orientales*, was established. These companies, like that which was formed in Holland, in 1602, to carry on the trade with the Indies, may be regarded as typical of the great system that has since been adopted in France, Holland, Italy, Spain, Portugal, Belgium, and, at a later period, in Germany, Switzerland, Hungary, and Russia. In these countries the German-Italian, or more properly speaking the Italian-French principle has prevailed. This system, which rests upon a sound scientific basis, upholds the rule, that the shareholders are not personally responsible for the debts of the company; that the legal relation between the shareholders *inter sese* does not partake of the character of a partnership; but, on the contrary, it goes no farther than to extend to the shareholders a right of succession to a portion or share in a common fund contributed by the subscribers; that the legal relation between the administration (management) and the shareholders partakes of the nature of an office, an executive *bureau*, like the office of a municipal body; and that hence the theory of principal and agent in no wise applies; that the office of the manager or director is at any moment revokable, subject to an action for wrongful dismissal. It follows from what has been said, that the interest in a share or *quota* might be transferred without disturbing the rights of parties *inter sese*; nay more, that shares might pass by delivery to bearer, and from this there arose a custom of dealing in these securities in France and Italy, and at a later period in Germany, Russia, and other European countries. Whilst all over Europe the Italian-French system became prevalent, the collapse of the South Sea Company provoked, in the year 1720 (6 Geo. I. c. 18), the celebrated Bubble Act. Under its crushing load, joint-stock enterprise in England languished for upwards of a century; and not until the year 1825 do we find this barrier to free trade removed. In lieu of aiding the community by a judicious scientific consideration of the question of liability in share companies, our Equity courts have upheld the narrowing decisions of our Common law courts, and treated all joint-stock ventures

as partnerships. Thus there emanated a host of judge-made and restrictive rules, which in the year 1844, the Act of 7 & 8 Vict. c. 110, endeavoured to systematize, by allowing joint-stock companies, without limited liability, to be established by letters patent, granted by the Crown. But the urgency of pressure from without, the ever increasing expansion of our trade, could no longer brook the trammels imposed by a narrow, and, I may be allowed to add, unscientific view of the legal relation of shareholders in a joint-stock company. In the year 1856, the 19 & 20 Vict. c. 47, came into force, amended by the 20 & 21 Vict. cc. 14, 49 & 80; and 21 & 22 Vict. cc. 90 & 91. In 1862 the great Companies Act, the 25 & 26 Vict. c. 89, was passed, amended by the 28 & 29 Vict. c. 86; and 30 & 31 Vict. c. 131; the latter permitting the issue of share warrants to bearer. In dealing with the important question of joint-stock ventures, both the legislature and our jurists have regarded these associations as a *societas*, in the signification given to partnerships by the civil law, according to which the *socii* were held to be *in solidum*, and personally liable for the debts of the joint undertaking. A glance at the rules of law I have ventured to draw attention to will explain the endless difficulties which have presented themselves in adapting this legal definition to the continental system.

In America, where the rules of the English law more or less still prevail, the same difficulty we have had to contend with presented itself; and we may trace in the constant amendments of the joint-stock company laws of the various States of North America the same struggle to overcome, by special legislative enactments, erroneous legal ideas. The *Commandite*, which has proved of such great value to the continental trading communities of Europe, has been introduced into America, and a study of the laws in respect of this system in the United States might serve as a useful guide through the labyrinth of difficulties which beset English law reformers in dealing with this important question.

It is now necessary to proceed to the consideration of those points which primarily present themselves as meriting our attention.

And first, I recommend that an international register of companies should be established.

I would further suggest, that each entry should be accompanied with the names and addresses, and an attested copy of authorization of the persons empowered to deal in the name of the company; and that until such registration has been made, no foreign company should be allowed to transact business. I would prohibit dealings in the shares or securities of all unregistered companies.

The importance of this suggestion will become evident on

considering the present state of law as applicable to foreign companies. By the laws of Germany, such, for instance, as those of Prussia and Austria, and nearly all the minor States, no foreign company can carry on business in its own name; but it is compelled to do so in the name of an agent, who is liable *in solidum* for the engagements entered into by the company. In France, again, the famous *Suisse* case reported by Gredy, *Cours de Cassation*, part i. (1862), p. 30, upheld the principle, that a foreign company could not sue a French citizen in France, and the court in giving judgment relied on Act 37 of the *Code de Commerce*, and Act 3 of the *Code Civil*. According to the laws of Geneva (August 27, 1849), no foreign company can carry on business without a special authorization from the Government; and any violation of this rule is punished by a progressive scale of fines. The codes of Spain and Portugal are equally prohibitory; and the Guild system of Russia, in addition to the restrictive rules of the commercial code, imposes an insuperable barrier to foreign companies functioning in that Empire.

A number of laws, ordinances, and decrees might be cited, passed by different countries to ameliorate this state of things. Thus the Imperial Decree of Napoleon III. (May 22, 1858), imposes a restriction on the dealings in the shares of foreign railways, until proof be furnished to the authorities, that such shares or securities are quoted in the Stock Exchange of the country where the company has been created, and that the company has been properly constituted in accordance with the laws of such country.

The next question to be considered is that of the liability of shareholders for debts incurred by the company in foreign countries. The limit of this liability is by no means clearly defined. Lindley, in his treatise on "Partnership," appears to think that the question is an entirely open one, and though the ruling cases of the *Bank of Australasia v. Nias*, 16 Q.B. p. 717, and same against *Harding*, 9 C.B., p. 661—tend to show that our courts incline to the rule, that the place of the making of the contract of partnership determines the liability of the shareholders, nevertheless the point is far from being settled. On this very important question I would wish to refer to Savigny ("Private International Law"); Story, on "Conflict of Laws," sec. 565; Kent's "Commentaries," 11th edition, p. 333, and Lindley on "Partnership," p. 28.

In the case of the Cavour Irrigation Canal Company we have an illustration of the working of defective international laws. In this case an English shareholder was, whilst travelling in Italy, arrested to answer the debts of that company. The case came before the High Court in Milan, and it was held that the shareholder was liable for the unpaid calls



to Italian creditors; that a foreign company could only rank as a special partnership; that shareholders were *socii*, and as such liable to creditors for the amount of their unpaid calls. To remedy this evil, conventions have been passed between some of the European States, extending to joint-stock companies the privileges they enjoy in their own country. Thus on the 30th April, 1862, the Emperor of France signed a convention with Great Britain, by which the joint-stock companies of both countries have all the privileges extended to them which they enjoy by virtue of the laws of the country where they have been constituted. A similar convention exists with Belgium (13th November, 1862). This convention provides, that full liberty shall be granted to all commercial, industrial, or financial companies, or corporations, constituted and authorized according to the laws in force in either of the countries. In 1867 (2nd October) Great Britain concluded a similar treaty with Italy.

In America, we find the judicial Bench endeavouring to accomplish what we have been striving to effect by special conventions. Mr. Justice Denis, in a well-known judgment, says as follows: "Corporations of foreign countries are allowed by the comity of nations to make contracts and to transact business in other states than those by virtue of whose laws they are created, and to enforce those contracts, if need be, in the courts of such other State."—(*See Westlake's "Private International Law,"* sec. 224.) Nevertheless, it seems, that notwithstanding the liberal view taken by this learned judge, a foreign company can sue only in the character of its members.—(*Kent's* vol. 2 "Commentaries," p. 333.)

To remedy the evil of uncertainty which weighs so heavily on the strength of international enterprise, I propose that a universal rule should be adopted, regulating, by convention between the different States of Europe and America, the limits of liability of shareholders; and further determining the mode of enforcing payments on calls. The mode of transfer of shares, whether such be by registration, as must be the case in nominative shares, or by delivery, as where shares are to bearer, or pass by endorsement, as is the case in Germany, Austria, Russia, and other countries, where transfer by endorsement of shares is a common practice, should also be settled by convention.

The next question to be considered is that of agency or representation. Whom does the law regard as the authorized representatives of a joint-stock company? And further, in what relation do the directors and managers stand to their shareholders? Here the two systems upholding different rules come into conflict.

According to the legal conception of foreign jurists, the

rights and privileges of the management, or representative organs (the executive of a company), do not partake of the character of a mandate, nor of that of a committee elected by the shareholders; but they bear the character of an *executive office*, and hence the power is vested in the manager to convene a general meeting of shareholders. The relation of principal and agent, in the strict sense of the word, does not arise. From this it follows, that in dealing with a foreign company the rules of an implied agency do not hold good; but that, on the contrary, a direct notice affixes to every transaction, by which the limit of the power is presumed to be known, as set forth by the statutes of each company, and further defined by the laws of the country that have authorized its constitution. The managers, who alone can contract in the name of the company, are required in Germany, Russia, France, and other continental States to register their signatures at the office of the registrar of the Tribunal of Commerce. Not until this formality has been observed, is any manager allowed to contract in the name of the company.

In England and America, on the contrary, a mandate is implied, a relation of principal and agent is supposed to exist; and our courts have, in their endeavour to escape the difficulties of this position, engrafted rules borrowed from the law of agency which really do not apply.

That very important consequences follow from the differences which distinguish the two systems is self-evident; hence the necessity of establishing a common rule becomes more and more imperative. It is, to say the least, most inconvenient that the extent of the powers possessed by the directors and managers to bind a company should not be clearly defined. It is therefore suggested, that an international register of directors, managers, and agents should be established; and that only those whose names are registered should be allowed to represent the company in foreign countries. At the same time it would be very desirable if the scope of the powers of the board of management could be defined, such limitations not being, however, in contradiction to the general rule of the implied powers the executive must necessarily possess to carry out the objects of the undertaking.

For the protection of the public, it is further suggested that no company should be allowed to register itself, so as to acquire international rights, until proof be furnished that at least one-tenth of the nominal capital has been paid up in cash, and that all the shares have been *bonâ fide* subscribed for or paid by money's worth. There are other questions, such as the right of creditors to petition the court for a winding-up order, and those that bear upon the rights of policy-holders of insurance companies having offices or branches in foreign

countries; questions of great importance, and which can only be settled by international rules regulating the relative position of the parties. These, however, must be now left for consideration on some future occasion.

## V.—THE PERSONAL CHARACTER OF OBLIGATIONS IN ENGLISH LAW.

### V. CONTRACTS WITH UNCERTAIN PERSONS (*concluded*).

C. THERE remains to be considered the third class of contracts with uncertain persons, in which the creditor for the time being is determined by transfer of the obligation associated with transfer of the instrument which is the evidence of it. The full development of this type is found in negotiable instruments payable to bearer. With these the ideal transfer of the obligation is effected by the material transfer of the instrument alone; the rights arising out of the contract expressed in it follow the right of ownership, and finally the instrument is made a complete and so to speak independent symbol of the obligation, by assuming the holder to be the owner, *i.e.* dispensing with any proof of ownership other than *bona fide* material possession. We have a result made up of these legal elements:

A contract—or it may be a succession of contracts—with an uncertain person.

That person ascertained by ownership of a symbol of the contract.

Ownership presumed from *bona fide* possession.

And thus in effect the contract is made with the *bona fide* possessor for the time being of the instrument.

Such instruments have acquired a peculiar legal character both as material subjects of ownership and as embodying (to use Savigny's expressive phrase) the obligations represented by them. "They are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes."\* The personal character of the original creditor's right has almost

\* Lord Mansfield, in *Miller v. Race*, 1 Sm. L.C. 474.

entirely disappeared; it is separated from the general mass of his rights and liabilities, and in a manner converted into a definite and freely transmissible portion of property.

To attain this result several steps are required, each involving a departure from the original conception of contract.

Without attempting to go into the details which are to be sought in special works, it may be useful to trace these steps so as to mark the main points of departure, and obtain a summary view of the nature of the contracts contained in negotiable instruments, the peculiar incidents attached to them, and the limits of this exceptional department of law.

According to the original notion of contract, which is still the prevailing one in the common law of England, the right of action on a contract cannot be transferred, and accordingly the transfer of an instrument which is evidence of a contract has no operation except to transfer the property in the instrument itself.\*

The first step beyond this strict rule is to admit the qualified kind of assignment familiar to our equity practice, by which the assignee takes the benefit of the claim subject to any defence which the debtor may have against the original creditor, or as it is generally expressed, is bound by the equities affecting the original right.

The debtor's position is in substance the same notwithstanding the transactions subsequent to the original contract; it is the mere name of his creditor that may be changed. An assignee of the debt must inquire into the title of the original creditor, and of every intermediate party if there have been intermediate transfers. And if he would again assign his right over, he must in turn submit to and be prepared to satisfy the same inquiries. A power of assignment thus restricted is for many purposes useful, but is clearly inadequate for extended commercial transactions.

The next step is to make the benefit of a contract assignable free from and unaffected by the equities subsisting between the original parties to the contract, so that the assignee is in the same position as if the debtor had entered into a distinct and independent contract with him. This advantage can be given to assignees only by the debtor's previous assent; and by giving such assent the debtor in fact enters once for all into a contract with every person who shall become the assignee of the debt. An intention that this shall be so may be expressed in the terms of the original contract or implied in its nature, and if its existence is ascertained it will be carried into effect by a court of equity.†

\* *Watson v. McLean*, E.B. & E. 75.

† *Re Agra & Masterman's Bank*, L.R. 2 Ch. 391, 397; but qu. how far consistent with *Dixon v. Bovill*, 3 Macq. 1.

But such an intention will not often be found apart from the special and well-established forms of contract, involving still further developments of the freedom of transfer, to which we now come.

The next step is to express the contract in an instrument of a certain form, and to make the unqualified transfer of the contract depend on a transfer of the instrument itself, effected so as to make the instrument the actual holder's document of title containing a record of the previous transfers through which the title is deduced. This is the case of instruments transferable by indorsement, or payable to order. Here we have the right to the benefit of a contract associated with the ownership of the instrument which is the symbol of contract, subject to the condition of such ownership being transferred in a particular manner, viz., by concurrent indorsement and delivery.

The last step is to remove this remaining condition, to attach the benefit of the obligation to the ownership for the time being of the symbol, and dispense with the necessity of tracing the ownership through the successive transfers. This last object is attained by treating the *bona fide* possessor as the true owner. The obligation is now completely embodied in the instrument, and the instrument is negotiable in the fullest sense of the term. This is the case with instruments transferable by delivery and payable to the bearer.

These exceptional forms of contract, introduced by general mercantile usage, and at first confined to mercantile transactions, are fully recognised in England as well as in all other civilized countries, and that indifferently by courts of common law and of equity, the law merchant having long been admitted as part of the law of England.

The contract of exchange, expressed by the "unconditional written order from A to B, directing B to pay C a sum certain of money therein named" called a bill of exchange, may conveniently be taken as the generic type, and the other forms may be regarded as varieties of it.\*

The distinctions between instruments payable to order and those payable to bearer are in themselves of importance, but minute in comparison with the difference, with which we are now chiefly concerned, between the contract of exchange and other contracts in general. Moreover, by the law of England the one kind of instrument may be converted into the other; a bill or note payable to order can be made payable to bearer

\* Smith, Merc. Law, 200; Byles on Bills, 9, 13, 10th ed. In German a bill of exchange is *Wechsel* simply, a promissory note *eigene Wechsel*: cp. the English doctrine as to a bill drawn as such by a man on himself (Byles, 90, 91).

by indorsement in blank, and one payable to bearer can be made payable to order by special indorsement.\*

It will be not out of place to give here the substance of recent authoritative statements as to the nature of the contracts involved in a bill of exchange.

"The contract which the drawer proposes is this: he says, Pay a certain sum at a certain date to my order; the acceptor makes this contract his own by putting his name as acceptor."

"The contract of the acceptor is made with the drawer to pay the bill at maturity to him or his payee or indorsee (as the case may be), or to the ultimate indorsee or bearer."

The contract of the drawer is to pay the person entitled to be paid by the acceptor if the acceptor make default.

"The original contract to pay passes by the law merchant by assignment. Superadded contracts may and do arise between the indorsers and those taking from them; but the original contract remains against the acceptor." †

The superadded contract implied in the ordinary relation of indorser to indorsee is to guarantee the payment to the indorsee or any succeeding holder if the acceptor makes default. ‡ Accordingly every indorser is "for some purposes, as against himself, in the nature of a new drawer." §

We have described the contracts contained in negotiable instruments as actually made with uncertain persons, not merely as made with certain and capable of transfer to uncertain persons: a distinction which at first sight is merely verbal, but which in fact involves another peculiarity of these contracts which has not yet been noticed. The transfer of an existing contract, though free from any collateral equities, can at most confer no greater right than the original creditor obtained under the contract itself. Consequently if any of the conditions of a valid contract were wanting in the principal transaction, the original creditor's assignment would be ineffectual for want of any valid or perfect right which could be assigned. But in the case of negotiable instruments the transferee who has in his own person satisfied the general conditions of acquiring rights *ex contractu*, or who claims

\* And so is the German law: Allgem. Deutsche Wechselordnung, Art. 12, 13. By the French law (Code de Commerce, 137, 138) an indorsement in blank is informal, and operates only as a procuration; as to the meaning of this see *Bradlaugh v. De Rin*, L.R. 5 C.P. 473.

† L.R. 3 Q.B. 84, 3 C.P. 544; Byles on Bills, 3.

‡ L.R. 5 Q.B. 477.

§ Byles, 151, expld. L.R. 3 Q.B. 83. Hence the indorser's incapacity to dispute prior signatures. By the German code the principle is carried so far that every party to a bill whose signature is genuine is liable to a *bona fide* holder notwithstanding intermediate fictitious or forged signatures: such seems to be the effect of the very general language of the sections relating to forged bills.—*Wechselordnung*, 75, 76.

through some one who has done so, is not affected by failure of former parties to fulfil them. He is in the same position as if he had entered into a new contract on his own account with the maker or acceptor. And thus it is said that a transferee for value and those taking from him have a new and independent title: his right "is under an independent contract with himself" (per Lord Cranworth, *Dixon v. Bovill*, 3 Macq. 14). Hence an acceptor is conclusively bound by his acceptance as between himself and every *bona fide* indorsee for value, and the circumstances which may exist between the drawer and the acceptor are not permitted to shake the title of the indorsee.\*

It is enough if either the original creditor or the actual or an intermediate holder has given value; and "an action between remote parties will not fail unless there be absence or failure of both these considerations."†

This principle is to be distinguished from the rule that a consideration is presumed in the case of contracts on bills or notes, which is a rule of evidence and does not touch the legal character or incidents of the contract itself, though it is practically of great importance and indeed indispensable for the purpose of giving full effect to the special rules of law on this head.

The privilege of *bona fide* holders has been over and over again asserted in positive terms by the highest judicial authorities.

"The holder of negotiable securities is to be assumed to be the owner, and third parties acting *bona fide* may treat with him as owner" (per Lord Campbell, *Branduo v. Barnett*, 12 Cl. & F. 787, 805).

"There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, takes the title unaffected by the facts and may recover thereon. . . . As little doubt is there that the *bona fide* holder of any negotiable paper before it is due is not bound to prove that he is a *bona fide* holder for a valuable consideration without notice; for the law will presume that in the absence of all rebutting proofs" (per Story, J., *Swift v. Tyson*, in Supreme Court of U.S., 16 Peters 1).

"The object of the law merchant as to bills or notes made or become payable to bearer is to secure their circulation as money; therefore honest acquisition confers title. To this

\* *Robinson v. Reynolds*, 2 Q.B. 196, followed as "part of the commercial law of England" in *Thiedemann v. Goldschmidt*, 1 D.F.J. 4, 11.

† Byles, 128.

despotic but necessary principle the ordinary rules of the common law are made to bend. Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stop short of fraud he has a title" (per Byles, J., *Swan v. North British Australasian Company*, in Ex. Ch. 2 H. & C. 184).

The contrary doctrine which for a time prevailed, requiring a certain measure of caution on the part of the holder, is now completely exploded (*Goodman v. Harvey*, 4 A. & E. 876; *Raphael v. Bank of England*, 17 C.B. 161, 175).

Moreover there is no discrepance between common law and equity in this matter. Equity has interfered in certain cases of forgery and fraud to restrain negotiation; but "the cases of fraud where a bill has been ordered to be given up are confined to those where the possession but for the fraud would be that of the plaintiff in equity" (*Jones v. Lane*, 3 Y. & C. Ex. in Eq. 281, 293); and at law no title to sue on the instrument can be made through a forgery.\* The rights of *bona fide* holders for value are as fully protected in equity as at common law, and against such a holder equity will not interfere (*Thiedemann v. Goldschmidt*, 1 D.F.J. 4).†

This peculiar quality of negotiable instruments is further illustrated by the contrast of bills of lading, which are not negotiable in the proper sense of the word, though the indorsement and delivery of them has always passed rights of property by the law merchant, and now passes contractual rights by statute (18 & 19 Vict. c. 111). For "All that the statute says is this, that if a person becomes indorsee of a bill of lading by which the property in the goods passes to him he shall take upon himself the contract of the shipper" (*Fox v. Nott*, 6 H. & N. 630, 636). And conversely, "when the right of property leaves the party, the rights and liabilities

\* Byles, 331. For the distinctions in cases of signatures fraudulently obtained or misapplied see *Foster v. Mackinnon*, L.R. 4 C.P. 704.

† *Jervis v. White* (7 Ves. 413) is quite consistent with this. The instrument there in question had been negotiated to the holder while the suit was pending, and after an injunction had been granted to restrain the original defendant from issuing securities in the name of the partnership into which he had fraudulently induced the plaintiff to enter (6 Ves. 738); and the holder's *bona fides* were very doubtful. The right of a holder in the event of the double insolvency of the drawer and the acceptor, established by *Waring's case* (19 Ves. 345), does not fail to be considered here, as it is not founded on contract, but springs out of the necessities connected with the administration of the two insolvent estates (*Banner v. Johnston*, L.R. 5 H.L. 174).



under the contract leave him also" (*Smurthwaite v. Wilkins*, 11 C.B. N.S. 842, 850).

Thus the obligation is attached not to the symbol, but to the property in the goods themselves: and apart from the statute "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." (*Gurney v. Behrend*, 3 E. & B. 622, 633.)

We now come to the limits of the peculiar doctrines of law respecting negotiable instruments.

1. An instrument which has been negotiable may cease to be so in various ways.

In the first place, "if a bill [or other negotiable instrument] be paid when due by the person ultimately liable upon it, it has done its work and is no longer a negotiable instrument;" the person so liable being in the case of a bill for value the acceptor, and in the case of an accommodation bill the drawer (*Lazarus v. Cowie*, 3 Q.B. 464).

And the negotiable quality of an instrument transferable by indorsement is partially limited after it becomes due and before payment: "the indorsee of an overdue bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due, as for instance the payment or satisfaction of the bill itself to such holder, or where the title of such holder was only to secure the balance of an account due . . . but the indorsee does not take it subject to claims arising out of collateral matters, as the statutory right of set-off."\*

Also the holder may put an end to the negotiability of an instrument by restrictive indorsement (Byles, 157).

2. Certain conditions must be satisfied to make an instrument negotiable.

It was formerly held that only merchants could be parties to the contract of exchange; but this restriction has long been abandoned,† and any one who can bind himself by

\* *Oulds v. Harrison*, 10 Ex. 572, 578, adopted *Ex parte Swan*, L.R. 6 Eq. 344, 359.

† In *Oaste v. Taylor*, Cro. Jac. 307, it was held necessary to aver that the acceptor was a merchant at the time of accepting. But in *Sarsfield*

contract generally can effectually contract in this particular manner.

The matter of the contract is however subject to limitations. In the case of bills and notes it must be for the actual payment of a certain sum of money *in specie* and unconditionally, and for nothing else (Byles, 91-93). It seems at least doubtful whether an instrument could in any case be considered negotiable at common law which did not satisfy these conditions, and at all events it is not competent to private persons to invent new kinds of negotiable instruments at their pleasure.

Thus it seems that shares in a company cannot be made transferable by delivery except in the case of fully paid-up shares or stock provided for by the Companies Act, 1867.\*

An "attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill" is not permitted by law (*Hibblewhite v. M<sup>r</sup> Morine*, 6 M. & W. 200, 216).

In an appeal case from Scotland in the House of Lords not very long ago (*Dixon v. Bovill*, 3 Macq. 1) there came in question a document known as an "Iron scrip note," being in form a promise to deliver a certain quantity of iron "to the party lodging this document with me." The Lord Chancellor said:—

"The effect of such a document if valid is to give a floating right of action to any person who may become possessed of it. Now I am prepared to say that this cannot be tolerated by the law either of Scotland or of England. . . . Bills of exchange have been made an exception [to the general rules of contract] for the convenience of trade, but it is an exception not to be extended. The drawer of the bill gives to the indorsee a better title than his own. . . . mercantile convenience has sanctioned it. No such necessity exists in the case of other contracts, and there is no authority to warrant it."

The Court of Session had treated the notes as valid, which is not surprising when we consider the fact that "blank bonds" transferable by mere delivery were formerly usual in Scotland, and were allowed by the common law until they were forbidden by statute in 1696 (Ersk. Inst. Bk. 3, Tit. 2, s. 6), which statute the court held not to apply to this case.

*v. Witherly* (2 Ventr. 292, 1 Wm. & Mary.) a plea denying in effect that the drawer was a merchant was held bad. And in *Cranlington v. Evans* (*ibid.* 307, in error), the custom was laid by the declaration—which set out the custom specially, as was then the form of pleading—as being amongst merchants and other persons, and this was not too general. In Germany there were restrictions of this kind till within quite modern times.

\* *Princess of Reuss v. Bos*, L.R. 5 H.L. 176, 203: *supra*, 749.

However there was no evidence of any general mercantile usage to treat these "iron scrip notes" as negotiable, and such evidence might possibly have led the House of Lords to a different conclusion, though it is a question not of fact but of law whether a bill or note [*i.e.* an instrument of a description already judicially known] be negotiable or not (*Grant v. Vaughan*, 3 Burr. 1524).

The English cases showing what kinds of instruments have been considered negotiable in the courts of this country are collected in Byles, 164, 165, and the notes to *Miller v. Race*, 1 Sm. L.C. 477. The chief exceptions to the rule that the legal effects of a contract are confined to the contracting parties have now been shortly reviewed. It has been seen that some are only apparent, and some doubtful, while those which are certainly real and substantial exceptions rest on special grounds, and at the same time that they are upheld are distinctly recognised as anomalous; and attempts to extend them by analogy are on the whole discouraged. The principle of the personal character of obligations, though seldom presented in a general or comprehensive form, is still an integral and vital part of our law.

FREDERICK POLLOCK.

NOTE.—*Addenda and Corrigenda in foregoing Articles of this Series.*—In the August number, p. 556, line 23, transpose *the* and *a*; p. 559, *ad fin.*, "for the relation of," read "in their relation to."

In the September number, p. 646, note §, add: "*Sed vide Touche v. Metropolitan Railway Warehousing Company*, L.R. 6 Ch. 671, 677." P. 647, the references § and ‡ should be transposed. P. 651, line 3, for "between C and D, or between A and B," read "between A and C, or between B and P." Add at end of par 3: So the right of the holder of bills of exchange, in the event of the double insolvency of the drawer and the acceptor, to the benefit of any security which may have passed between them, established in *Waring's case*, 19 Ves. 345, "does not spring out of the contract, but it springs out of the necessities connected with the administration of the two insolvent estates."—Per Lord Cairns, in *Banner v. Johnston*, L.R. 5 H.L. 174.

In the October number, add at end of note ‡: Similarly as to marine policies: The Policies of Marine Assurance Act, 1868, 31 & 32 Vict. c. 86. See also the Companies Act, 1862, s. 157.

## VI.—OUR JUDICIAL SYSTEM, AND ITS INFLUENCE ON THE FORMATION OF OUR LAW.\*

By W. F. FINLASON, Editor of the "Common Law Procedure Acts," of "Nisi Prius Reports," and of "Reeves's History of the English Law."

THE subject of judicial systems is one of great interest, especially on account of the powerful influence they exercise on the formation of law. Its chief interest, however, arises only when it is treated philosophically and historically, with reference to rational principles and practical experience. Above all, it requires that wide range of experience which is embodied in history, and results from a comparison of other systems with our own. It is thus taken out of the narrow range of mere professional questions, and is invested with general and enduring interest, an interest indeed so great, that Adam Smith contemplated a work upon the subject. It is at the same time put upon a broader and firmer basis than the shifting and uncertain grounds of individual opinion, and thus that which is the most *interesting* is also the most *satisfying* way of treating the subject, throws the clearest light upon it, and leads to the safest and most certain conclusions. By this method, a true and natural idea of a judicial system is first formed upon the solid basis of undoubted facts and elementary truths, derived from common knowledge and common observation. From these the necessary consequences and conclusions are drawn, and they are tested by the common experience of mankind. The conclusions thus arrived at ought to be found confirmed by universal experience, and this will be found to be the fact. Nor is this all. Our latest legislative measures have actually adopted and embodied all the principles thus arrived at; the opinions of the highest authorities, as far as they have agreed, are in accordance with them; they have only differed when departing from these principles; and it is thus demonstrated that they are sound, and all that remains is to carry them out.†

Upon this, as on all other subjects, there are some things which are self-evident, and apparent on the slightest reflection. Yet, for this very reason, they are habitually overlooked, because *not* reflected upon, but passed by as too apparent to *require* reflection. Though too plain, however, to require much reflection to *perceive* them, it requires some reflection to perceive all their *consequences*, which yet are manifest when

\* It is desirable to state that this Article was written for the last Number.

† The Reports of the Judicature Commission, 1872.

pointed out. The perception of these consequences, and their natural results, will guide us to the principles which lie at the root of the whole subject, and lead us to sound and certain conclusions.

It is manifest that a system must be considered with reference to the idea of its *objects*, and the objects of a judicial system must be to administer justice and to ascertain the law. Extreme theorists have, indeed, sought to supersede the latter function of a judicature by means of legislative action. But the experience of other nations has shown, that however a code may *assist*, it cannot *supercede* the exercise of this function. Even a code requires interpretation: the ablest advocates of codification admit that no code can provide in terms for all cases, and whatever the name or the form of the tribunal which is to provide for them, it must in reality be a judicial body, even if it is *also* legislative. Both the objects stated have therefore to be provided for in a judicial system. Paley long ago pointed out that they were different and distinct: and from this it would follow that the machinery for each must be different. In *all* cases the first object must be answered, and it *may*, in many cases, include the other, but in most cases, in point of fact, it does *not*. The first and fundamental fact of the subject is, that in the great majority of cases there is no real dispute between the parties at all,\* and that where there is any, it is generally upon the *fact* or on the *application* of the law, and not as to the *law*. Thus, therefore, in most cases it is the first object alone which is to be attained. This only concerns the just determination of individual cases, and chiefly concerns the suitors. As to these, it is self-evident that the facts should be ascertained as speedily as possible, and that the first and fundamental fact to be ascertained in each case is whether there is anything really in dispute, and if so, what it is. For this must, it has been seen, necessarily affect the course of procedure; and if the *facts* are in dispute, it is obvious that they cannot be ascertained too soon. For facts rest upon testimony, and testimony upon the memory of witnesses, which becomes weaker with the lapse of time, while their impressions may be tampered with, and documents may be lost or destroyed. On the other hand, when the facts are once ascertained, if any question of law arises, it requires deliberation, because the determination must govern future cases, and affects the community at large. And while the interests of the community require delay, the interest of the suitor will not be materially prejudiced by it. Hence in every case the first object must be to ascertain its nature, and the

\* Mr. Daniel, Q.C., in his interesting and valuable Paper read at the Social Science Congress, Plymouth, has supplied the latest and most striking illustrations of this truth.

next to ascertain the facts. And it is obvious that the first object requires an early and compulsory examination of the case, and the next as speedy a *trial* as possible. The majority of the cases will be cleared off by the first proceeding, and *all* will be cleared up by it. Most of the remainder will be decided by the second process, and the application of plain and undoubted law. The larger number of the cases being thus promptly disposed of, and so the first object answered, ample time will be allowed to the judicature to determine, with due deliberation, in the first instance, any questions of law arising in the comparatively small number of cases which will remain. Promptness being of the essence of the first two processes, it is manifest that this would be impracticable without the distribution of business in local courts for the institution of suits in first instance. The errors naturally arising in the ascertainment of the facts or the application of the law would require appellate tribunals with a somewhat superior judicature; these also, for a similar reason, so far diffused as to be conveniently accessible and reasonably speedy. While questions as to the law would certainly require the solemn determination of a supreme and central tribunal, with the highest attainable order of judicature. And thus, by the light of reason we aimed at, a judicial organization, by which both objects will be attained: the prompt administration of justice, and the deliberate ascertainment of the law.

The same conclusion will be reached by another process, beginning with an elementary *truth* instead of an undoubted *fact*. The truth is, that no man is a good judge in his own case. This means far more than that he cannot be trusted to *decide* it, for that would be rather a *truism* than a *truth*. It means that the suitor cannot be allowed to judge as to the proper judicature or course of procedure. Paley observed, that suitors would press any suits, whatever their merits, in which they perceived the slightest chance of success.\* This shows that *success*, and not *justice*, is their object; and if they have a choice of judicature or procedure, it will be governed by its supposed influence on the chance of success. Long ago Adam Smith observed that though men have a keen and quick sense of what is just in other men's cases, they are too often blind or unreasonable to it in their own. And Lord Macaulay only followed out the same truth when he showed that men pursue not their true interest, but their own idea of it, which is very different indeed. Hence suitors pursue not justice, but their own *idea* of it; and the sense of self-interest, even in the best, blinds them to what is just. The only difference in this respect between honest suitors and dishonest, is

\* Moral Philosophy.

that the former *believe* they are in the right, and the latter do not care whether they are so or not. All alike desire not justice, but success; and hence, as Paley says, will pursue any course open to them which affords the best chance of success. Now, delay itself, in the chapter of accidents, affords a chance of success; but if all cases went through the same course, there would necessarily be delay in all, and thus all unjust suitors could obstruct justice and get a chance of defeating it. From the premises, however, it must follow that in most cases there is nothing really in dispute between the parties; or, at all events, nothing really in doubt. And it has been already stated that this is an ascertained fact. Thus, an undoubted fact confirms the inference from an elementary truth, and the same conclusion follows from both. That conclusion was stated by Lord Brougham when he said that the best thing was to ascertain the truth; and that all suitors desired to conceal or withhold it, because they desired, not to get justice, but to defeat their opponents and obtain success. The same principles were laid down by Lord Denman, and by others of the most eminent men in the profession, and the practical conclusions which follow are manifest and inevitable. The first thing in every suit must be to get at the nature of the case, and the next to get at the truth of the facts. These objects are best ascertained by a prompt preliminary inquiry into the case, and especially by means of the examination of the parties. The truth, it is obvious, can only be got at from the suitors themselves, or their immediate attorneys, who alone will be acquainted with the facts of the case. If the inquiry takes place at a distance, through the medium of agents imperfectly instructed, it will easily be evaded. And if the business be accumulated in central courts, it will render such inquiries impracticable. To ensure a due distribution of business, and allow of these necessary inquiries, it is therefore obviously necessary that there should be local courts for the institution of all suits in the first instance. The same objects will also, it is obvious, require that the suit should in the first instance be ordinarily conducted throughout in the court in which it is instituted, and when the facts are ascertained, the law will have to be applied. It is equally obvious that there must be courts of appeal; and that there must be one supreme tribunal for pure questions of law. These conclusions appear to follow inevitably from one or two undoubted facts and elementary truths, and were stated half a century ago, by some of the most eminent men in the profession as evident and undoubted truths.

If these conclusions are sound, they will be found to be confirmed by the experience of nations; and such will be seen to be the case. The history of the subject abundantly attests the conclusions of reason; and here is the chief interest of

its history. They will be found, first, embodied in the Roman system, which has been the model and example of all others. Under the Roman system there was in each city or town a judicial magistrate, whose business it was in the first instance to examine all cases, and to dispose at once of such as admitted of no doubt. Such as raised any dispute, either as to the facts or the application of the law, were referred to sworn and selected judges, laymen or lawyers, as might be best fitted for the nature of the particular case, to be forthwith heard and determined in a simple natural way, on an oral examination of the parties and their witnesses, without formality or delay. Justice, in each case, was fully and completely administered, on one and the same system, the jurisdiction comprising the whole of legal justice. Single judges were intrusted with the decision of ordinary civil suits, but in the earlier and better age of the Republic the judgment of a popular tribunal was required to affect the life of a citizen. There is reason to believe that a tribunal composed of many judges\* sitting in different divisions determined cases of importance affecting public rights of citizens. Such cases as raised doubtful questions of law the principal judge decided with the aid of jurists, or referred to the superior authority, that of the provincial governor, who decided them with similar assistance. If in doubt, he remitted them in like manner to the emperor, to be determined on the opinions of the best jurists in the empire, constituting, in effect, the supreme judicial tribunal.

Thus the Roman system was substantially identical with the rational type, and all other systems have been good or bad as they approached or departed from that great model. The history of all other nations shows that these systems would have resembled it, but for disturbing causes; and one great object of legal history is to disclose what those causes were. For otherwise, it might be supposed that nations, from reason and judgment, and design, have departed widely from the rational type. This, if true, would have been a paradox, but nothing could be farther from the truth. Under the influence of disturbing causes, the Roman system itself, in the later ages of the empire, departed from its earlier and better type, especially in the disuse of popular tribunals in cases affecting the lives or liberties of citizens. Of judicial systems it is eminently true, as was said by Sir J. Mackintosh, of Governments in general, "that they have not been framed after a model, but that they have grown up with all their parts and powers out of occasional acts, prompted by some urgent expediency, or some private interest."† Thus it is that judicial systems in various countries have varied; having

\* The *Centumviri*.

† Hist. of England, vol. i. c. 1.



all departed more or less from the rational type, according to the strength or nature of the disturbing causes, and the sinister interests out of which they have arisen. And these it is necessary to trace, in order to explain the departure from the original natural type.

All European nations begun, as did the Roman, with the primitive element of popular *judicature*. This was the rude material of judicial institutions, and it had this great advantage, that it was everywhere. Hence popular tribunals have always been local, as the jury is still; and the primary tribunals in every country were originally local. The material, however, in its primitive form, as we still see it in the jury, is far too rude to construct by itself a good judicial tribunal; and the growth and character of all judicial system have depended upon the way in which this element has been used and applied. Where it has been improved, and united with regular elements, so as to form a regular judicature, local tribunals have been retained. And in every country but our own the county courts, as judicial tribunals, were thus improved, modified, and preserved; and that at so early a period that it has been doubted whether they ever existed in any other country. This, however, is an error, as the court exists at this moment, in a modified form, in Hungary.\* They were first modified and improved by the great Emperor Charlemagne, who, as Guizot observes, was the founder of modern society, and sought to renovate it by restoring the Roman institutions. He preserved the ancient local tribunals by applying the principle of the Roman system, *selection*; and, as Montesquieu says, his selected judicators were the precursors of the *prudhommes* of France, and the *meliores homines*, or jurors, of this country. They differed from our juries only in being more carefully selected, and in smaller numbers. Their number in each local court was not twelve, but five or seven; and they were chosen, not for each case, but to try all the cases at a sitting. Moreover, they sat with a judge, a superior person, to give them direction as to the law.† Thus there were formed regular local tribunals; and in the later Saxon age we see the influence of the example, for we find the head man of each hundred, with four of the *best men* selected to hear and determine the civil suits.‡ Still, this did not constitute a judicial system, for there was no judicial *organization*. The local courts, as Boulainvilliers observes,§ were isolated, and there was no regular appellate jurisdiction. This required a hierarchical organization, and for a long time this was wanting. The feudal system brought hierarchical organization and an appellate jurisdiction; but it

\* Paget's "Hungary."

† "Capitularies of Charlemagne."

‡ Laws of Henry I. c. vi.

§ Lettres sur les Parliaments de France. lett. vi.

brought other evils of its own, and its courts were too irregularly constituted to form good judicial tribunals. All were *casual*, and there was an utter absence of *selection* and *judicial constitution*. The number of judges might be small. Four were sufficient to form a tribunal,\* but there was no selection, they came *casually*, and the constitution of the tribunal was entirely uncertain. By degrees, in continental countries, more regular tribunals were formed, by a reference to the principle of selected judicature. These were eventually appointed permanently, and became regular official judges. Here, however, a disturbing cause arose, which originated in the feudal system, and which, though in different ways, prevented the formation of judicial systems in all European countries. Under the feudal system, as Montesquieu observes, the administration of justice was regarded rather as right or interest, than a duty of sovereignty, and principally as a source of profit. In continental countries the Crown multiplied the number of official judges as much as possible, in order to sell their offices; and thus, in those countries all the judges became official. Tribunals of first instance were formed in every place, composed of many members, and under a president. This president answered to the Prætor, or other judicial magistrate of a place, under the Roman system, and had the power of delegation of cases to particular judges. But all the judges were *official*, and all were more or less lawyers. In order to secure the proper qualification for the decision of questions of *law*, they were subject to legal examination; and the same judges had to determine the questions of *fact*. The co-operation of laymen was not obtained for the decision of matters of fact, which were decided by the same class or order of judges as the matters of law. Hence it followed that cases which turned on questions of fact were decided by lawyers in too technical a spirit, and too much with reference to questions of law, which really did not arise between the parties.

And again, as the matters of fact and matters of law were all mixed up together, they were necessarily mixed up in the appellate jurisdiction, whence it followed that the whole of the evidence had to be written. Thus two great evils followed, that, as Boulainvilliers observes, questions of fact were determined by tribunals at a distance,† and that, as Meyer observes, they were decided on writing, without the advantage of oral evidence. Thence it happened that, as Montesquieu observes, the art of procedure protracted the suit until the point was lost under volumes of writing.‡ Such were the evils arising in continental systems out of a departure, under the influence of disturbing causes, from the simple rational type.

\* La Fontaine.

† Lettres sur les Parl., lett. vi.

‡ De l'Esprit des Lois, liv. xxviii. c. 35.

The essential vice of the continental systems lay in having only official judges to decide matters of fact and matters of law; and this radical vice led to a long train of inevitable evils. As one consequence, it led to the loss of trial by jury, in cases which really required it; and though in most cases, as De Tocqueville points out, its value is less than in criminal cases, there are some classes of civil cases in which it is useful and valuable. In continental systems, however, it ceased to be available at all, and this is to be ascribed to their essential radical vice. The judges being all official, and the number of official judges being necessarily limited by financial considerations, it followed that as population and business increased, the number of judges became inadequate, and yet could not conveniently be augmented. It has been often observed that the number of continental judges is far greater than our own, but the comparison is fallacious, unless the number of our jurors is taken into account, for the continental judges do the work of juries. On the other hand, the number of continental judges was of less advantage than it would otherwise have been, because they had to decide matters of fact as well as of law. Numerous as are the continental judges, it would be impossible for them to get through their work were it not for the power of division into chambers, and of delegation to *individual* judges; and they become eventually inadequate. By reason of the number of the judges in continental systems, it was originally possible to have a plurality of judges for the trial of questions of fact. Thus, as Boulainvilliers mentions, the *chambres des enquêtes* was established in the French Parliament; and Lord Kaimes was of opinion that the plurality of judges was originally intended to enable the judges to act in the position of a jury in the trial of questions of first instance. But as the business increased, it was found impracticable, and as the matters of fact were mixed with the matters of law, the practice was to refer the whole case, ordinarily, in the first instance to individual judges, reserving questions of law, or cases of importance, for one of the chambers. Even, however, with this economy of judicial labour, the radical vice of the continental systems caused such delay as led to the establishment of commercial tribunals, composed solely or chiefly of laymen. But these tribunals were infected with the same radical vice; and as, in the regular tribunals, lawyers decided questions of fact, so in the commercial tribunals laymen had to deal with questions of law. These, therefore, were mere palliatives of the evil; and like all palliatives, only tended to perpetuate and aggravate it. Thus the continental systems, to some extent, failed effectively to carry out the first great object of a judicial system, the adminis-

tration of justice. They also, to some extent, failed in the other object, the ascertainment of the law. This was from the same cause, the mixing up of fact and law, even in the appellate jurisdiction. Still there was the central and supreme royal tribunal which only took cognizance of questions of pure law or of jurisdiction, and this tended to mitigate the evil. Moreover, there was after all a good judicial organization. There were local courts of first instance, provincial courts of appeal, and there was a supreme court or council for the final determination of questions of law. And, above all, there was only one system of law, comprising the whole of legal justice. There was therefore a good judicial system, which only required improvement, and easily admitted of it. All continental systems will be found to be framed upon the same plan, local courts of first instance, district or provincial courts of appeal, and one supreme tribunal for questions of pure law. Hence, in the seventeenth century, the French system was thus improved by a recurrence to rational principles. These principles were chiefly the use of oral procedure, reference of questions of fact to lay judges, and a limitation of the appellate jurisdiction as to facts. So effective were these improvements made in the celebrated *Ordonnance* of Louis XIV., that when, in the next century, Frederic the Great desired to improve the judicial system of Prussia, he could do no better than follow that great example.\*

And again, when at the commencement of the present century the French system was reconstructed, it was reconstructed substantially upon the same plan; and the *Code de Procedure* did little more than embody, with necessary alterations in form, and some improvements in details, the great improvements so long before effected. Moreover, in France as in Germany, the results of the judicial system in the development of laws had been to produce a body of law which afforded materials for codification; and the Prussian and Austrian codes embodied the jurisprudence developed by the Imperial Chamber—the supreme judicial tribunal of Germany; and the *Code de Napoleon* only embodied the body of jurisprudence which had been developed by the judicial decrees of French Parliaments. That the continental systems had been on the whole, as to *civil* justice, vastly superior to our own, seems to admit of no doubt. It seems implied in the questions suggested by Sir H. Maine in his latest work: † “How is it,” he asks, “that on the continent the law has made so much better progress than in this country, and that the people in continental countries are so much better acquainted with it?” He appears disposed to answer his inquiries by tracing these

\* See the Preface to his Code.

† “Village Communities.”

results to their possession of codes ; but he forgets that codes were the last, and comparatively recent, *fruits* of their judicial systems, and is evidently the *effect* and not the *cause*. The true answer to both questions, it is conceived is, that continental countries had judicial systems, which, with all their defects, had good judicial organization, and provided for the administration of justice and the ascertainment of law.

In this country, unfortunately, it was entirely otherwise, and the same cause from which arose the defects of the continental systems, operating here in a different way, utterly destroyed the efficiency of our own. The object of the Crown here, as in continental countries, was to make the administration of justice a source of profit, and its policy, after the Conquest, was to concentrate the judicial power in the hands of a few royal judges, so as to acquire as large a profit with as small an expenditure as possible. This policy was pursued craftily, for the people were in possession of popular judicature and local tribunals, and adhered to them so tenaciously, that they still exist as tribunals of *trial*, in the form of the jury. Bentham declared himself unable to account for the presence in our judicial system of the jury, as he could not see how a regular judicature allowed it to exist. He had not sufficiently studied its history to perceive how the jury grew out of the ancient popular judicature, which originally possessed the *whole* judicial power. And it is very necessary to understand how the jury arose, in order to see how the local tribunals came to be mere tribunals of *trial*, and how the jury came to be a part of our system in *civil* cases. It might otherwise be supposed that it was the result of reason, judgment, and design, whereas, on the contrary, it has arisen entirely from accidental and disturbing causes. At the time of the Conquest the county courts were the only courts of ordinary jurisdiction in civil cases,\* and still continued to be so.† Recourse to the royal jurisdiction was only allowed in cases of failure of justice, which was taken cognizance of as a kind of offence involving *liability to fine*. The sovereigns, as Mr. Hallam observes, took no interest in the administration of justice, except for the purpose of profit, and therefore took no cognizance of private suits, because they did not directly conduce, as criminal prosecutions did, to the profit of the Crown. Criminal prosecutions conducted directly to the profit by reason of the fines and forfeitures they involved, and, therefore, criminal jurisdiction was the primary object; and it was in this the popular, were first displaced by the royal, tribunals. Itinerant judges went into the counties, and under royal commission, as they do to this day, exercised criminal jurisdiction.

\* *Laws of Canute; Will. Conq.*

† *Hen. I.*

These commissions, however, at that time, were of a very dangerous and arbitrary character, including the enforcement of the arbitrary forest laws, and thus affording the widest scope for exaction and oppression. The only safeguard the people had lay in the jury, and to this, therefore, they clung with the utmost tenacity. The jury had grown up under the ancient system: it could not be got rid of. The royal courts were only established by retaining it, and this is the key to its perpetuation in our system. In the Saxon as in other northern nations, the number of the jury in criminal cases was twelve, although, as already seen, in civil cases a much smaller number was used. Under the Norman system the number was twelve, and the same number was used in the assizes, or real actions which determined men's rights to their freeholds. It was natural, therefore, that in criminal trials, which affected men's lives and liberties, the same number should be retained, and also in suits which concerned their estates. In those times the only civil suits of importance were such as concerned men's land, and criminal suits generally concerned their lives. The same judges exercised, under the royal commissions, civil and criminal jurisdiction, and, indeed, the primary jurisdiction was the criminal. The civil jurisdiction was auxiliary to the criminal, and only grew up gradually as it was found out how to make, by means of fees, a source of profit to the Crown. It might have been left to the county courts in the first instance, providing them with a regular judicature. Already the practice of selected judicators had been introduced from the continent, and all that was required was a regular judge. In particular cases, the sheriff, as Bracton says, was often, by writ, made the king's judge, *justiciarius regis*; and all that was necessary was to choose good men for the office, and attach to it the judicial function. This, however, would not have answered the object of the Crown; which was to monopolize all the profit capable of being made out of the administration of justice. Accordingly, the civil jurisdiction was then added to the criminal, and was exercised by the king's judges under the same commissions. The courts they held were ambulatory and temporary; but their duration in each county was long enough to admit of the institution and prosecution of suits. The procedure was simple and natural, just as it was under the Roman system. The parties appeared before the court, and orally stated their cases, subject to immediate interrogatory by the judges. If the case was clear, the court decided it at once; if there was a dispute as to the facts, an issue was settled, and forthwith tried by a jury; and if a question of law arose, it was either decided at once, or if one of doubt, it was reserved for the determination of superior judges in the royal court or council. By degrees

this royal court itself began to assume jurisdiction in private suits, but only in such as were of some weight and magnitude. For a long period the ordinary administration of justice was left to the provincial courts of the counties, but only so long as it answered the object of the Crown. It did so, while the commissions of the provincial judges continued to be of the same arbitrary and sweeping character, and afforded a wide scope for oppression and exaction. But by degrees the people so murmured at them that it was found necessary to withdraw them, and issue criminal commissions more limited by law, such as are now issued for the assizes. These ancient commissions, however, were for the *institution* and prosecution of suits, as we still see in *criminal* suits, which are instituted and prosecuted at the assizes. Provincial courts, however, if held at each place a sufficient time for the institution and prosecution of all suits, civil as well as criminal, required a large staff of judges. As many as twenty were necessary in the twelfth century, when the population was hardly a million, and more would be necessary as population increased. It was for the pecuniary interest of the Crown, therefore, especially when the scope of its judicial commissions was limited, to dispense as much as possible with the provincial courts, and concentrate the civil business in the superior court. This could only be done by degrees; and it was being attempted when the great Charter was obtained. Hence the Charter contained a clause providing that assizes, or "real" actions, the only civil suits then of importance, should be taken, *i.e.*, instituted and prosecuted, before the judges in the counties, reserving only points of doubt or difficulty for the determination of the superior court. But, as already mentioned, these provincial courts for the institution and prosecution of suits required a large number of judges, whose salaries would materially diminish the profits derived by the Crown. Hence, in the thirteenth century, the number was first reduced one half, and then they were got rid of altogether as a distinct order. The judges of the superior courts were sent to hold the circuit courts under commissions, which only authorized them to *try* other suits than those called the assizes, so as to evade the terms of the great Charter, which only *specified* assizes. Except in the Counties Palatine and Wales, the provincial courts were discontinued. Thus civil suits, except the assizes (which by degrees became obsolete) could then only be constituted and prosecuted in the superior courts, and could only be *tried* in the provincial courts. The ancient county courts meanwhile were left without a regular judicature, and therefore declined. By degrees all ordinary civil jurisdiction, except in trivial cases, became concentrated in the superior court. Thus the people of this country lost their local courts

of first instance, and there was a concentration of civil tribunals, as Mr. Bentham observed, utterly without a parallel in Europe. But although there was this concentration of *tribunals*, there was a division and separation of *jurisdictions*. This arose from the same cause; the corrupt and sinister object of increasing the profit to the Crown. Justice was sold; there was an *ad valorem* duty on the writs by which civil suits could be instituted, and the suitor was confined strictly, as Britton says, to "the points of the writs." By degrees the writs became at common law fixed in their form, and thus the remedies of the common law were of very limited operation. The consequence was, that if the suitor wanted a larger measure of justice than the narrow scope of these writs could afford, he had to have recourse to the sovereign for an extraordinary remedy. Hence arose equity as a separate jurisdiction, and from a similar cause arose the separate jurisdiction of the Admiralty. There was no difference between law and equity but *degree*; the one being simply a larger measure of justice or redress than the other. Some of the common law remedies were equitable, and all might have been so but for the ignorance of the judges and the rapacity of the Crown. This was admitted by the judges themselves,\* and as to the Crown, it was very plainly shown. In the Court of Exchequer it was found convenient for the Crown that in revenue cases the equity as well as the law should be determined by the same judicature in the same proceeding, and so care was taken that it should be so; and when doubts existed about it, statutes were passed to settle the doubt.† But as to private suits, even in that very court, although it was a court of equity as well as law, the equitable jurisdiction was administered separately from the legal, to the great injury and delay of the suitors. Moreover, the new jurisdiction, the equitable, grew up with a different procedure from the legal; and having been formed later, it was more rational and intelligent. The power of interrogatory, originally possessed by the courts of law, and *disused* there, passed to the court of equity, and, in nine cases out of ten, dispensed with further evidence. Cases were decided on evidence, and not necessarily, as at law, by a jury; while, on the other hand, all cases which required trial by jury were sent to a court of law for the purpose of such trial. In every case in equity the defendant was examined at once upon interrogatories, and originally his answers were taken orally; but from the increase of business, in the absence of any increase of the judicature, it was found necessary to dispense with this, and to take the answer in writing, there being only one court of equity in the country.

\* Year Book, Edward IV. 2 Wilson.

† See the Act of Henry VIII., and see *Ren v. Peto*, 1 Y. & J.



The consequences of this extreme concentration of tribunals, accompanied as it was by the separation of jurisdictions, were disastrous to our judicial system. They became aggravated as the population and wealth of the country advanced; and the business of the courts was augmented, because the number of the judges was not increased, though their work largely accumulated. From the fifteenth century, the common law judges had to assist the Chancellor in the exercise of his equitable jurisdiction, and all the earlier cases of equity were decided with their assistance. In the next century, when the population was four or fivefold what it had been, and the business was tenfold, the number of judges still remained the same. By reason of the increasing business, the private suits at law, which were originally confined to the Common Pleas, were entertained in the King's Bench and Exchequer, and hence many practical evils and anomalies arose. There were three courts for the institution of civil suits at law, and only one court of equity, though the business of equity now began to be far greater than that of law; and all these courts were in one place, in the metropolis. Again, each court, had to have a separate office for the business of private suits and hence three offices existed for the same kind of business instead of one, which was all that was necessary. Lastly, the three courts constantly differed in their views as to law and practice, and thus the suitors were involved in uncertainty. Business in the mean time increased also at the assizes; and to allow time for holding the circuits, the judges had to shorten their sittings in their courts. Those sittings originally lasted all through the year, with the exception of short vacations at the three principal seasons, and the courts of equity still sit during the greater part of the year. But on account of the circuits, which were held by the judges of the superior courts of law, the sittings of those courts were shortened by successive statutes, until at present these *sittings* are hardly longer than the *vacations* used to be. Another consequence of the concentration of business in the superior courts was, that the simple and natural examination of the case, on an oral discussion before the court, had to be discontinued, and the parties were left to wrangle it out between them in written pleadings, the result of which was, as Lord Hale and Lord Keeper North both observed, to introduce the evils of formality and technicality, prolixity, chicanery, and delay.\* Moreover, the whole "preparation" of the cause, as Lord Hale calls it, what the French would call its instruction, went on in London, at a long distance from the suitor and his attorney, who were well acquainted with the facts; and it was con-

\* Life of Lord Keeper North; Hale's "Hist. of Common Law."

ducted by agents on such imperfect instructions as could be conveyed to them in writing. The consequence was, that even if the judges had time for any judicial inquiries into the cases at their earlier stages, these inquiries could easily be evaded, on the plea of absence of instructions. Lord Hale's apology for the system was, that in country cases the trial took place in the country; but this was only an aggravation of the evil. For, from want of preliminary examination, nearly all cases went to trial, although in most cases there was nothing really to be tried. And, as Lord Hale himself observed, the expense of a trial was by far the heaviest head of the cost of litigation. Nor was this all; for, whether the case was tried in London or the country, it was tried in a *different court* from that in which the suit was conducted: hence, it could only be tried in the form or state in which it came from that court; and if any other view of it arose, it had to be sent back to the court from which it came. As the case was prepared at a distance from the suitor and his attorney, this was likely enough to happen; and from some new point or aspect of the case, arising at the trial, it was almost certain to go back. Lord Hale, indeed, urged, as an excuse for the conduct of suits by agents at a distance, that one agent could do the business of forty suitors with the same ease as one man would despatch his own; that is, the same ease to *himself*; and this no doubt is true enough; but not that the agent would despatch them as a man would do his own business. The agent would despatch them "with ease to himself," simply by going through the same routine in all of the cases, being unable to devote the proper degree of attention to all, and unqualified to form a sound judgment upon each. It is obvious how this must lead to delay, and what injury it must cause to the suitor, who, it may be added, had to pay two attorneys instead of one, and perhaps pays inadequately the one who really conducts the suit. That Lord Hale should have offered such apologies for such a system is a remarkable illustration of the force of professional prejudice; and if it could affect a mind like his, there are few who can expect to escape its influence. The practical result was, that all cases went on through the same routine to trial, whether a trial was really required or not; and that the trial was hardly ever final, as points were sure to be taken which might afford ground for an application for a *new* trial. The evil was all the greater when, by reason of the pressure of business, cases were allowed to be tried before a *single* judge, whose hasty opinion at a trial would hardly ever be accepted as final. Hence the immense increase of applications for new trials, either on points of evidence or misdirection, or as against evidence, leading in a large majority of cases to repeated trials and protracted litigation, with renewed vexation,

delay, and expence to the suitor, thus sent back from court to court, and never certain that a verdict would be final.

The evil was far less in the court of equity; for the bill at once stated the whole case, and contained the interrogatories; the answer could be taken in the country: in most cases the admissions in the answer would dispense with further evidence; and the hearing could at once take place on bill and answer. Even if evidence was taken, it was in the same court; it was very rarely that a trial by jury was required; and, with that exception, cases were carried through in the same court in which they were instituted. But, on the other hand, the evil arising from such an inadequate judicature were infinitely greater in equity than at law, because, as the wealth of the country increased, and transactions became more complicated, the proportion of business in equity became far larger than at law, and yet the number of judges was far less. While there were only ten judges at law when the population was tenfold, and the work was a hundredfold what it was, there were only *two* judges in equity to do ten times the amount of work there was at law! Lord Hale avowed, at the end of the seventeenth century, that the judicial system was substantially the same as it had been in the thirteenth, when the population was only a fifth, and the business not the hundredth part of what it then was.\*

Yet, so strong is the influence of professional feeling, though Lord Hale recommended (as did Blackstone a century later) the establishment of local courts in the counties with regular judicature; it was only with a jurisdiction limited to cases under the value of 10*l.*, lest they should encroach on the jurisdiction of the superior courts. All this time the county courts had been left without a regular judicature, in order to force all business into the superior courts. Although in Scotland the sheriff was regarded as the judge in the county courts, and so an excellent system of local courts was secured, a different doctrine was adhered to by our Crown lawyers, and though the difficulty could have been easily remedied, it never was removed. A statute passed, indeed, requiring that in the courts of cities and towns regular judges should be appointed as assessors, but no such Act passed as to the counties, and so for want of a regular judicature they sank into disuse. Thus, except in Wales and the Counties Palatine, the people remained without local courts of first instance. It was only in Wales and the Counties Palatine, in Durham, Lancaster, and Ely, there were provincial courts of first instance; and as to the latter, Lord Keeper North has left on record his testimony to their value and efficiency. They all remained until our own

\* "History of Common Law."

time, those of Wales substantially of the same nature as the provincial courts which existed generally in this country in the thirteenth century. That is, the courts were ambulatory and temporary, but sat long enough in each county to allow of the institution and prosecution of suits. The preparation of the causes took place in the counties during the sittings of the courts, the parties sued having been previously *summoned* and informed of the case; and as the suitors and their attorneys appeared, and the judges were able to give them immediate and continued attention, a comparatively short time sufficed for the business. In the Counties Palatine and Ely, judges held courts periodically at reasonable intervals, substantially in the same way. These provincial jurisdictions also included equity as well as law, though separately administered, and in these counties alone could evidence be locally taken. The cases could at once be sifted; those which were clear upon the admitted facts, could be decided at once. In those which required trial, the issue could be settled and forthwith tried without any useless delay. The witnesses were all in the neighbourhood, and it has already been pointed out, that the sooner issues of fact are tried the better. If, again, any point arose upon the trial it could at once be decided without useless or mischievous delay; while, on the other hand, the court could sit as long as was necessary, and there was nothing to hurry it. If, again, the point was one of doubt, it could easily be decided on ascertained facts for a superior court. If there were anything imperfect in the judicature of these courts, or in the appellate jurisdiction, it could easily have been remedied. As they were, with all their imperfections and defects, they were deemed highly useful and valuable, and they exercised an equitable, as well as a legal jurisdiction.

The judicature of these courts was found adequate for all ordinary cases in the first instance, and cases of difficulty could easily be reserved. The great advantage was, that the suits at law and equity were carried through in the same court, and easily accessible to the suitors and without any undue delay. The cases were sifted and prepared, evidence was taken, and taken orally, and the causes heard and determined all in the same court, and continuously, without unnecessary interruption, and therefore without delay. The other advantages were so great that they more than atoned for any defect in judicature or procedure, while those defects could easily be removed. The *system* was substantially sound, and its faults were only accidental.

The general system of the country, on the other hand, was radically vicious, and its evils were essential to its nature. It had no *base*, and there was no judicial organization. All

causes were crowded into the courts in the metropolis, and the concentration of business was too great to allow of proper judicial attention. The causes were prepared at a distance from the suitor, and the evidence was taken at a distance from the court. In courts of law, cases went to a jury though involving only questions of law, and were tried before superior judges, though involving only questions of fact. In equity, evidence was taken only on written interrogatories, and at law new trials were granted on imperfect notes of oral evidences; and in both jurisdictions the court decided questions of fact without seeing or hearing the witnesses. All these evils, and innumerable others arose from the same cause—an inadequate judicature and a bad judicial organization; having only a few judges, in one place, to do all the judicial business of the country.

Thus, our judicial system was not merely full of practical evils but it was radically vicious and defective, and indeed scarcely deserved the name of a *system* at all; as it had no *base* and no judicial organization. It necessarily failed therefore in the first object of a judicial system to the suitor; and from the same causes it failed still more in the other object, of the ascertainment of the law. The time of the superior judges was so largely taken up in trying questions of fact, including all the business of the country; that they had, of course, little time to apply to the deliberate determination of the law. Through the inadequacy of the judicature and the want of a judicial organization, the appellate jurisdiction, upon which the judicial ascertainment of law so mainly depends, was radically wrong, and presented the most manifest evils and anomalies. At law, indeed, there was, properly speaking, no *appellate* jurisdiction at all; that is, no appeal upon the substantial legal merits, on the whole of the facts admitted or ascertained. When, indeed, single judges were empowered to try causes, there grew up an irregular practice of recourse to the full court, in the nature of an appeal from his direction on the law. But then this practice, which equally applied to any error as to the admission or rejection of evidence, was only by way of application for a new trial: which renewed and prolonged the litigation. And though there also grew up a practice of reserving questions of law for the determination of the court on the whole of the facts, and their decision thereon would be a decision of the cause; on the other hand it was final, and no appeal from it was allowed. The suitor could only resort to a court of error, which had the power of reversing a judgment for error in the proceedings as recorded, and that for *any* error, however technical; while, no point however vital to the real legal merits, if it did not appear on the record, was reviewable in the court of error. The bill of exceptions, as the phrase itself indicated, only in-

volved the validity of certain specific exceptions; and whether allowed or disallowed, there was not necessarily a judgment on the whole case, but only another trial: perhaps to raise further legal exceptions equally collateral to the real legal merits. Again, although there was a power in the judge, when single judges had the power of trying cases, to reserve points of law for the full court, there was no power in the court to reserve questions for the superior court of error; but only a power in the suitor to bring a writ of error; and if he did not do so, a point of law might remain uncertain for a long course of years. This evil became greater when, by reason of the increase of business, all the three courts of law took cognizance of private suits, and there might be contradictory judgments on the same point. The evil also was aggravated by the nature of the judicature in error; for the jurisdiction was vested in the same judges, who exercised ordinary jurisdiction. This was never intended; but, like everything else in our system, arose from casual disturbing causes. Originally the jurisdiction in private suits was only in one court—the Common Pleas; and error lay to another court—the King's Bench, with a different and higher order of judicature. But from the King's Bench there was no recourse except to the peers in Parliament; and this jurisdiction was nugatory; the peers being laymen or ecclesiastical civilians; and the sittings of Parliament being brief, turbulent, and interrupted. A statute passed to construct a better supreme judicature, by selection of the ablest peers, miscarried, from a neglect to provide for sittings out of the session of Parliament, and the attempt was never repeated. When, as already mentioned, all these courts had acquired jurisdiction in private suits, and gave contradictory judgments the risk of uncertainty in the law was serious. It became necessary in the sixteenth century to provide a new court of error, and this was done by making the judges of two courts sit in error upon the judgments of the third. Thus the same judges exercised ordinary jurisdiction and also in error, and the jurisdiction in error was not exercised judges of any higher character or order. Moreover, if the judges in the court below were unanimous, and those in the court of error differed, it might be that the decision in error was that of the *smaller* number of judges. This absurdity was observed as long ago as the reign of Charles II.,\* and yet to this day it has been endured.

The absurdity of the jurisdiction in error only rendered more important the supreme judicature, but this continued in the same state as when in the fourteenth century an abortive attempt was made to improve it. The jurisdiction

\* Pollexfen's Reports.

was exercised by a mixed body of laymen, and Lord Hale in vain recommended its improvement by a means of selection. Its judgments moreover were, until our own time, delivered without *reasons*, merely reversing or affirming the judgment of the court of error. Hence they were of little, if any, use in ascertaining the law, for, as Lord Hale observed, it is only the ground and reasons of a judgment which are of any value for that purpose. Thus the country was actually left, until our own time, without any action of a supreme judicature in declaring the law, and therefore without any means of ascertaining it. It followed, of course, that there were no materials for codification, and Lord Bacon and Lord Hale, though both favourable to it, both saw that in order to remedy it the judicial system must be improved. "Judgments," said Lord Bacon, "are the anchors of the law;" and he made some valuable suggestions to prevent uncertainty in judgments, and also to ensure their authentication and publication. "The judges," he said, "must declare the law," and he proposed to consider how, for that purpose, their declaration of it should be obtained, whether only by judgments in causes, or by responses to questions proposed by the Legislature for consideration. It is evident that he would have combined both means, and Lord Hale added a recommendation for the construction of an efficient *supreme* tribunal, on which it is manifest the authoritative ascertainment of the law must mainly depend. All these recommendations, it is manifest, none of which have been carried out, implied that our system had entirely failed to answer the object of ascertaining the law. And it is too well known what a mass of confusion and inconsistency our judicial decisions have become. The evil was much aggravated at common law, on account of the great number of cases decided on motions for new trial, and therefore with reference to the particular merits. Meanwhile, as regarded the equitable jurisdiction, in which there was an appellate jurisdiction, it was too much mixed up with the facts. Thus both jurisdictions fell in that respect into the fault of the continental systems, complicating questions of law and fact, and so confusing or obscuring the law. Moreover, although in the equity jurisdiction the appellate jurisdiction was exercised by a different and higher order of judges, there was a difficulty in the supreme judicature, as already mentioned; and there was only one equity judge below the Chancellor, and no appeal from the Chancellor except to the House of Lords. Thus our judicial system had not only utterly failed in both the objects to be attained, the administration of justice and the ascertainment of the law; but it was radically defective, and *incapable* of being made to discover either of those objects.

Such was our judicial system at the close of the last century, when Bentham wrote upon it, and, of course, easily exposed its evils and satirized its absurdities. He had not, however, sufficiently studied its history to be able to know the causes of the evil; and reviled the judicature for the vices of a system they did not create and could not alter. In a speculative way, indeed, he laid down the principles of a rational system long ago realized in the Roman, but he failed to adapt these principles to modern institutions, so as to propose a practical remedy. The best and most suggestive passages in his voluminous writings, when put together, show that his ideal of a rational system was embodied in the Roman, and in this lies the chief interest of his works. He laid down one great principle, which the whole history of the subject illustrates: that procedure must depend upon the judicature and the judicial organization; and he borrowed from the Roman system, the idea of a good judicial organization for the administration of justice. He and his school, however, were disposed to restrict the judicial function to the administration of justice and the application of clear and undoubted law; and to ignore its importance in the ascertainment and development of law. For this object they relied rather on legislation in the form of a code. They were led to this conclusion from observing the confused state of our law as compared with the laws of other nations. But they confounded the effect with the cause, not perceiving that it was the consequence of a judicial system radically vicious and defective. They did not perceive that the Legislature, in enacting absolute law, must necessarily be extremely cautious, and restrict itself either to the declaration of law already ascertained, or the enactment of law necessarily, by some obvious exigency, required; and therefore, they failed to understand the necessity of leaving to the judicature the function of carefully deducing, from cases as they arose, principles capable of future application. And thus, ignoring the most important function of a judicature, and assisted in the fancied *panacea* of a code, their theories were crude, impractical, and incomplete.\* On the other hand, Blackstone, whom Bentham ridiculed and reviled, and who had a mind equally enlightened and infinitely more practical, made two suggestions which really involved, if carried out, the construction of a good judicial system, and certainly embraced all the reforms which have since been carried out, the restoration of our local courts, and the improvement of the *superior* courts, by giving to each all

\* Thus Lord Brougham treated with just contempt Bentham's favourite idea of single judges sitting: a very good plan for ordinary cases in the first instance, but utterly unsatisfactory in cases of weight and difficulty.



the powers of the others. However, the country had long to wait even for the commencement of reform, and though the principles of it were laid down, a century elapsed before they were carried out.

Two or three measures, indeed, were passed which involved great principles, but they were only *introduced*, and were not carried out. The statutes, as to bonds and mortgages, introduced the great principle of the union of legal and equitable jurisdiction; but it was *only* introduced. The statute as to arbitration, while recognizing its use and value in aid of judicial institutions, was nearly nugatory, because it did not render submissions to arbitration irrevocable. And the statute slightly extending the action of account, recognized and *only* recognised, the importance of *compulsory* reference. And this was all. The era of legal reform was really inaugurated when, more than forty years ago, Lord Brougham made his celebrated speech. In that speech he laid down one or two simple elementary principles, the practical consequences of which go far, as already shown, to guide to sound conclusions on the subject; yet, from the numerous distractions of his active political career, the difficulty of dealing with existing institutions, he failed to carry these principles out with any completeness and consistency. And this was the more remarkable and the more lamentable, because we had before us, and near us, in Scotland, an example of a judicial system which Lord Brougham more than once alluded to as in many respects far superior to our own. The Scotch system, indeed, with such improvements as were soon introduced into it, contained the best features of our own and of foreign systems. In the first place, it had, as Lord Brougham observed, an excellent system of local courts of first instance, the sheriffs' courts of the counties, with a regular judicature and jurisdiction—all cases subject to a power of *removal* into the superior court for difficulty, and also to a power of appeal. Next, it had one superior court, composed of an adequate number of judges, all forming one body, and exercising all jurisdictions; but divided into chambers, or divisions, like the continental courts, and with the power of delegation to individual judges. This court exercised all jurisdictions, and administered one and the same system of law, and its decisions were final, subject only to appeal to the supreme judicature of the realm.

Thus it had at once the plenitude of judicial power, and at the same time all advantages arising from the division of judicial labour. Every case went, in the first instance, before a single judge—the judge ordinary—and he made as soon as possible a preliminary examination of the case, so as to see what was in dispute, and to direct the right course of procedure. If it was a question of fact he settled the issue, and

it could be at once tried by a jury, if fitted for such a mode of trial; or, if otherwise, either by himself or by its being remitted to some referee. If it was one of law he could upon argument decide it; or, if it was doubtful, he could remit it to one of the divisions of the court, and in any case his decisions, either as to law or procedure, were subject to appeal to such a division.

Here there were all the substantial requisites of a good judicial system; and when Lord Brougham laid down the great and vital principle that the "sooner the truth about a case is known the better," he pointed to the Scotch system as realizing the principle. Yet that example was not followed, and though the right principles were laid down they were not carried out. One reason was, that the subject was not treated as a *whole*, and commissions of *inquiry* were issued on separate parts of a system which led to no general result. Our system, indeed, was such a mass of anomalies, associated with so many long standing prejudices, that its complete reconstruction upon right principles was a work too mighty to be carried out at once; and it could only be done in detail.

Certain it is, that though the principles were then laid down which, if carried out, would have involved the construction of a complete and perfect judicial system, and which embraced all the improvements that have since taken place; none of them to this day have been consistently carried out. Indeed, some of the recommendations then made have never to this hour been carried out at all; and no principle has been carried out with completeness and consistency. In place of this, there was, on the contrary, a series of piecemeal, isolated measures, some of them useful, but many of them inconsistent, and all of them incomplete. Each of them contained the germ of some valuable principle, but not one of them carried it out. These successive measures, however, ultimately embodied all the principles necessary to construct a complete and perfect system, and all that was requisite was to carry them out.

The necessary base of a judicial system, as the example of all nations, including Scotland, had shown, is a diffusion of local courts of first instance, *i.e.*, the institution and prosecution of all ordinary suits in the first instance. The earliest commissions issued were directed to this fundamental question; and one of them recommended the establishment of local inferior courts with a regular and resident judicature, but with a jurisdiction limited by pecuniary amount. There were two principles, one of them sound and the other unsound, and consequently inconsistent, and neither of them was carried out. The first implied a competent judicature, with a capacity for regular procedure; no less could be required for suits of any amount, and no more could be required, in the first instance, for ordi-

nary suits of any amount. The other imposed a limitation on the jurisdiction, the most arbitrary and irrational that could be devised; mere pecuniary amount being no test of importance, difficulty, or weight. Neither principle, however, was carried out, for provincial superior courts then existing were left without that resident judicature which was declared necessary for the minor courts; and when local courts were established they were established *without* a resident judicature. Again, provincial courts of first instance which then existed were abolished, though there was overwhelming evidence of their value and ability; and all that was necessary was that their judicature should be improved. This, however, would have required expenditure; professional interests preferred the increase of the superior judicature; and there was no chance of obtaining it without the sacrifice of the provincial judicature. The courts of Wales, Ely, and Durham, were therefore abolished, and yet at the same time, with gross inconsistency, those of Lancaster were retained. This was in consequence of the powerful representation made by a committee as to the value of the provincial jurisdiction in districts of great extent, population, and wealth. It was pointed out, indeed, at the time, that all these arguments told equally in favour of all other large and wealthy and populous districts; but the inconsistency was disregarded; the courts of Ely, Durham, and Wales were abolished; those of Lancaster were retained; yet the courts thus retained were left without a resident judicature, as was deemed necessary even for inferior courts. The retention of a provincial court of first instance in one district required for consistency the establishment of similar courts in other districts; yet such courts have not yet been established with civil jurisdiction, though they exist at the assizes, in criminal jurisdiction, and the quarter sessions courts, to some extent in this country, and still more so in Ireland, exercise both civil and criminal jurisdiction. However, to this hour there is in this country only one provincial court of first instance. For a quarter of a century the country generally was left without local courts at all; and when they were established, they were not courts of first instance, but only inferior courts, without a resident judicature, and with a jurisdiction limited by pecuniary amount. As there was no resident judicature, there was no capacity for regular procedure; the judge attended only to hear cases; there was no power of preliminary examination or interlocutory application; all cases went to a hearing, and in the crowd of cases the hearing was necessarily hasty and confused. Most of the cases were undefended, and either clogged the sittings of the court, or were irregularly disposed of by the registrar. The judges as a body were fully competent for all

ordinary cases in the first instance: but, without regular procedure and regular officers their courts could not be efficient. Yet a series of statutes conferred upon them every kind of jurisdiction, legal and equitable; Admiralty and bankruptcy, probate and matrimony. Thus there was the anomaly of an inferior judicature exercising all the jurisdictions, and the superior courts, each exercising only one. The judges of the superior courts had, within narrow limits, a power of sending cases to the county courts for trial, but had no general power to send cases to those courts which appeared to be fitted for them. Thus the superior judges were left to try ordinary cases, turning chiefly on questions of fact, or the application of clear and familiar law, upon which the inferior judges were quite qualified, while these latter were left to determine the most difficult and intricate questions of law and equity. Bankruptcy courts were affiliated to a central court, but the county courts were not affiliated to the superior.

So as to the superior judicature their number was increased, but their judicial power was not economized by delegation and division. The common law judges, indeed, had in matters of *practice* a common jurisdiction given to them, with a power of judicial legislation, and a power of delegation to individual judges; and one court, the King's Bench, had a power of division given to it in such matters, but these useful powers were limited to matters of mere *practice*, and the latter was confined to that court. There was indeed a power for single judges to try cases, but there was not, as in the Scotch and continental courts, a power for a single judge to exercise all ordinary judicial functions in the first instance. Yet in the courts of Chancery single judges sat, not only in their exercise of ordinary, but even of appellate jurisdiction. The Court of Chancery, when the number of the judges was increased by the addition of Vice-Chancellors, was composed of a body of several judges, all one judicial body, and yet capable of dividing and sitting separately or singly. But each of the common law courts was left separate and independent, with no power of fusion or common jurisdiction, except as to matters of practice; and, on the other hand, except as to such matters, or the trial of cases, no power of delegation or division. While the courts of law were thus separated from the courts of equity, there was the Exchequer Court, which exercised legal and equitable jurisdictions, though separately. Instead of giving that court the power of exercising the two jurisdictions together, and extending that power to all the courts, its equitable jurisdiction was abolished; and thus the immense advantage of a judicature and a Bar, understanding both equity and law, was thrown away. And when, a great many years afterwards, some equitable powers had been given to courts of law, and it

was proposed to give more, it was objected that the judicature would not understand enough of equity to know how to administer them. Again, in accordance with our ancient practice, the Legislature expressly allowed common law judges to sit in courts of equity, but made no similar provision for equity judges sitting in courts of law, although those courts constantly had, in an indirect way, to decide equitable questions, to administer equitable powers, and to determine questions of conveyancing or title, with which equity judges were far more familiar than judges of the common law. In the more recent Acts, which established the Courts of Probate and Divorce, the common law judges had the like power of sitting in those courts; and under the Divorce Act, the Chancellor and the common law judges were made members of the court. And in the constitution of the Indian High Courts the Legislature enabled them to exercise all the jurisdictions. Yet the courts in this country were not so blended as to form one court exercising all jurisdictions, although indeed a Bill for that purpose has been sanctioned by the House of Lords, and the principle may be said to be adopted. Again, the appellate jurisdiction was marked by anomaly and inconsistency. In Chancery it is exercised by a different and higher order of judges, and so in the Admiralty and in the new jurisdiction of probate and divorce. But at common law the same judges exercise ordinary and appellate jurisdiction, and the defective constitution of the courts of error remained.

And so the judicial organization was thus marked by anomaly and inconsistency as to the judicial powers. Thus, at common law, power was given to a single judge—in one important and difficult class of cases, those of interpleader—either to determine the matter summarily, or to settle an issue for trial; but the power was not extended to all ordinary cases, as it safely might be, subject to power of appeal. Again, power was given in one large and important class of cases, those of bills of exchange, to proceed at once to judgment on the writ, in the absence of an affidavit of defence; but this salutary power was confined to that class of cases alone, though there were many other classes of cases in which it would be equally salutary; even if, indeed, it might not be safely extended to all cases of debt or pecuniary claims. Again, on the other hand, a salutary power was given to defendants in cases of liquidated claims, of letting judgment go by default upon the writ, so as to save all farther litigation. But the power was allowed in no other classes of cases, though it would be equally salutary in others, and a commission had recommended that it should be allowed in all. Again, power was given to a judge, with the *consent* of the parties, to direct a special case to be stated, or an issue to be tried; but *only* by consent, and the power was not given on

the application of one party, however clear it might be that such a course was for the true interest of both. Again, power was given to a judge, *after* a course of pleading, to set aside or amend a pleading as embarrassing or tending to prevent the fair trial of an action; but no power was given in the *first* instance to see if there was any necessity for pleading at all or anything really to try, or anything really in dispute; and if so, to ascertain what it was, and put it in the proper course for determination. Again, power was given to the judge to allow one party, at *any* time after the institution of the suit, to interrogate the other; but only in writing; the answer also being in writing, and drawn up by counsel, so that they were sure to be evasive or nugatory. No power was given, as in foreign systems, to examine the parties *orally* in the *first* instance, and no power was given to the judge to ask the parties, on the institution of the suit, what it was about, so as to ascertain what was the point in dispute. Again, a judge was empowered, on the application of either party, to direct a reference of cases involving matters of account; but no similar power was given to direct a reference, or a special case, or an issue, in cases already requiring such a course to be taken. Again, although in the Scotch courts, and the courts of equity, probate, and divorce, the court has power, within certain limits, to direct whether a case shall be tried by a jury, the courts of law have not that power. The courts of equity have had the power given them of trying cases with juries, when they think such a trial required; the courts of law have not the power of dispensing with a trial when it is not required, even where it is plain that no trial is required at all. Again, the courts of equity have a general power of referring matters fit for such reference to skilled laymen, and the Court of Admiralty also has a similar power; but the courts of law have only such a power in one class of cases, such as involve matters of account. Again, the Court of Admiralty has the power of sitting with skilled paid judicators, the Trinity Masters, who represent the selected judicators of the continental systems; but in the courts of common law there is no such power, and they can only sit with twelve jurors, taken very much at random, and not one of whom may understand anything as to the subject-matter of the suit. This is the more remarkable, because it has been again and again laid down that the principle of trial by jury is *selection* and *nomination*; and successive jury Acts, until the last, expressly reserved the ancient mode of nominating special jurors, which at least *allowed* of selection. But the number of a jury and the jealousy of the parties practically preclude such selection in a jury. And though in the county courts there are juries of five, in the superior courts we adhere in all cases to the unwieldy number of twelve, who are virtually taken at random.

Lastly, two of the most recent measures were in favour of provincial courts of first instance: one of them provided a resident judicial officer for the County Palatine, and the other established a provincial Admiralty Court at Liverpool.

The review of these measures—each of them introducing a valuable principle, and none of them carrying it out—affords a remarkable illustration of the reflection of the Duke of Argyle: “It is characteristic of the cautious and tentative character of our legislation, that it becomes gradually committed to great general principles—not through any perception of their truth and value in the abstract, but gradually and through the compulsion of particular necessities, and to the last possible moment the general application of such principles is always resisted.”\* Yet all that was required to establish a complete and perfect judicial system was to carry out the principles thus successively introduced. That this had not been done was no doubt owing to the difficulty of doing such a work at once, and the necessity of doing it in detail. Commissions had issued again and again for inquiry into separate parts of our judicial system, but it had never been dealt with as a whole.

The time was now arrived for more comprehensive treatment; and in 1867, at the instance of Sir R. Palmer, a commission was issued to inquire into the whole subject of our superior courts. It was, however, restricted to the *superior* courts, and it did not embrace the subject of *local* courts, the necessary *base* of a judicial system. Hence, although its recommendations were all that could be required as to the superior courts, they were necessarily incomplete. It recommended the fusion of the superior courts, and the union of all the jurisdictions in one great court, with power of delegation and division, and all the other judicial powers required. These recommendations, so far, were entirely in accordance with the principles already laid down as deducible from reason and confirmed by experience; but still they did not constitute a judicial system. The difficulty raised by the absence of local courts of first instance was revealed by the division of opinion which arose about the courts of assize, which in civil cases are mere courts of *trial*. The commissioners recommended consolidation of counties for assize purposes; but two of them, Sir J. Coleridge and Sir Montague Smith, recorded their dissent, and their preference for *provincial courts* of first instance for the *institution* and *prosecution* of suits. They expressed their opinion that “either the present system of holding assizes should be retained, or that the present system of circuit should be altogether discontinued, and

\* Reign of Law, 367.

provincial courts established with assigned districts, having judges who should go frequent circuits to convenient places within their district, and with appeal from the provincial courts in certain cases to the metropolitan courts of appeal. Assuming that by this was meant provincial courts for the institution and prosecution of all suits in the first instance, this recommendation would lay the foundation for a good judicial system. Unhappily, however, only two of the commissioners concurred in it, though perhaps rather because it was thought beyond the scope of the commission than because the other commissioners dissented from it. And, indeed, other recommendations of the commissioners appear to involve the same principle of provincial courts. They suggested, for instance, the extension of the jurisdiction of the courts of quarter sessions, in order to relieve the superior judicature. Those courts are provincial courts of *criminal* jurisdiction, and all the arguments in their favour apply quite as forcibly in favour of provincial courts of *civil* jurisdiction.

The commission, however, was reconstituted so as to include the subject of the local courts; and though there was a great division of opinion, yet, on the whole, the tendency of the report is in accordance, as far as it goes, with the principles here laid down. The commissioners, adhering to their former Report, recommend that the county courts should be annexed to and form parts of the proposed court of justice; and that their constitution being improved, they should be subject to the power of removal; have jurisdiction in all cases in the first instance, unlimited in amount, and whatever be the nature of the case; but that above a certain limit, the defendant may as of right remove the case; and that a judge of the high court may in *any* case for good cause, order the removal of a suit. It will be seen that the part of this recommendation which gives the suitor an option to remove the cause in any case above a certain amount, is clearly contrary to first principles, and is obviously a concession to that professional feeling which has alwas exercised an influence so hostile to the improvement of our system. It is to be assumed that there is no just cause for the removal of the suit, or a judge would remove it. It is also to be assumed that the local court is so constituted as to be satisfactory, or otherwise another first principle would be violated, and the spirit of the recommendation itself would not be carried out. And to allow a suitor at his caprice to remove a case from a court quite competent to entertain it, and without any good cause, merely because it is above a certain amount, appears utterly at variance with sound principles. If a court is not fairly competent to exercise the jurisdiction, it ought to be made so; and if it be so, then the suitor



ought not to be permitted capriciously to decline the jurisdiction.

It would seem that the commissioners contemplate the conversion of the county courts into provincial courts of ordinary jurisdiction, for they consider that a "great concentration of the county courts may be effected." What that may mean is doubtful, but coupled with the recommendation that the constitution of the courts should be improved, it appears to imply an extension of jurisdiction, and their construction as provincial courts of first instance. The commissioners recommend the abolition of the provincial court of Lancaster, and this would hardly be suggested unless it were intended that the country generally should have the advantage of provincial courts of first instance. In that event, of course, the inhabitants of the County Palatine would be better off with a resident judicature than they are now without it. But, on the other hand, *unless* there are to be provincial courts of first instance generally, the abolition of the Court of the County Palatine can hardly be intended. It would be a serious loss to that important and populous district, and a loss which certainly could not be endured. One of the most recent Acts of legislation was to establish district prothonotaries for the Court of the County Palatine. No doubt, consistency requires *rather* the abolition of the court, or the *extension* of such courts, and it can hardly be doubted in which direction legislation must now tend.

The most beneficial feature of the superior courts is the constant attendance and attention of their judges, hence they were originally called *resident judges*,\* and it was only, as has been seen, an abuse that they should be sent on the circuits, and so compelled to suspend the sittings of their courts. The radical defect of the county courts, on the other hand, is the *absence* of a resident judicature, and therefore the want of constant judicial attention. The Legislature has, by more than one recent Act, attested its sense of the necessity for resident judicial *officers*, and has provided for their appointment in the Court of the County Palatine. Those courts, however, have not resident judges, and cannot therefore be regarded as efficient, and the principle of a resident judicature is implied in resident judicial officers who exercise judicial functions in the absence of the judge. The Court of the County Palatine is in the same position as a county court, where the judge only attends at the trial or hearing. It has been seen that the powers of prompt attention and preliminary examination are of the essence of a court of first instance, and they necessarily require a resident judicature and resident

\* *Justiciarii residentes in banco*. The true meaning of which is, that they were always at Westminster, exercising their judicial functions.

judicial officer. It has also been seen that they require a distribution of business and division of judicial labour, which can only be ensured by a wide diffusion of courts of first instance. It is manifest, therefore, that the county courts are required as courts of first instance; and it is also manifest what is required to constitute the county courts efficient courts of first instance. A resident judicature was recommended nearly half a century ago when they were first proposed, and resident judicial *officers* have lately been provided by the Legislature for a provincial court. The difficulty of the commissioners appears to be how to deal with the county courts; but as to this, probably sound principle and existing precedents will afford the clearest guidance. The country, it may be concluded, must have local courts of first instance; that is, for the institution, prosecution, and determination in the *first instance* of all *ordinary* suits. Such courts to be made efficient, must, the commissioners say, have a constitution superior to that of the county courts: that is, they must have resident judicature and resident judicial officers accessible, by which is meant judges and judicial officers readily accessible. The *example* of the superior courts and the *experience* of the county courts equally illustrate this, and it is also attested by the most recent legislation. But assuming that the county courts are made good local courts of first instance, the same principles show that *provincial* courts would still be required; they would be required as courts of appeal, and also as courts of first instance in cases fit for removal from the local courts. If all these cases went to the metropolis, there would still be all the evils of delay. Provincial courts, therefore, are required as well as local courts; and the two kinds of court could mutually co-operate. If the Court of the County Palatine had a puisne judge *resident* there—that is, periodically resident for judicial purposes—it would be competent as a court of appeal from the county courts of the surrounding district, and as court of *first* instance for selected cases. For, as it is, single judges sit to try cases of the greatest weight; and at the assizes they sit in capital cases, and give final judgment of life or death. If a plurality of judges were thought proper, when the provincial court sat as a court of appeal, they could be obtained by calling in two of the senior county court judges of the district. This course is taken in some of the American States, and it would have this advantage, that many of the county court judges are equity men, and would form a valuable court of law and equity. This idea may have been in the mind of Mr. Osborne Morgan when he suggested that the country should be divided into a certain number of districts, assigning two, or, if necessary, more judges to each, with a central high court of appeal in London, inter-

weaving therewith the present county court system. This is quite in accordance with the recommendations of the commissioners, so far as they go, and would relieve them from all the difficulties which have caused such division of opinion. Those difficulties, indeed, have arisen from individual opinion, as liable to be affected unconsciously by disturbing influences. One of the most powerful of these disturbing influences, the influence of professional feeling, has suggested the only objection to the plan, the supposed injury to a central Bar. The objection is obviously futile, for as the supreme court would be in London as well as the provincial court for the metropolitan counties, the central Bar would not be affected any more than they are by quarter sessions or the assizes; the very fact that such an objection should have been made only serves to show the strength of the disturbing influences which are at work in men's minds.

There is no clear or safe guidance upon such a subject, save in the light of principle, based upon elementary truth and undoubted facts, tested by the common experience of mankind. And it is a remarkable illustration of the soundness of the conclusions thus arrived at to find that they are confirmed by the whole course of recent legislation and the general tendency of opinion; while, on the other hand, in the absence of such guidance the most eminent authorities are seen lost in the diversities of individual opinion.

The principles here laid down must be sound, for they are attested by the *example* of all other nations and the experience of our own. They have been affirmed by our most recent legislation, and all that is necessary is to carry them out. Hence this country would have a judicial system in harmony with reason and experience, and with the example of all other nations.

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I.—MAINE'S ANCIENT LAW.

By T. E. CLIFFE LESLIE.

THROUGHOUT the whole range of jurisprudence, philosophy, and history, no work published in England in the last twenty years has had a more complete success than "Ancient Law." Its author was known before its publication as one of the best classical scholars of the day, as profoundly versed in Roman law and legal history, and as a man of extraordinary intellectual endowments; yet probably only some who had the good fortune to hear the lectures he delivered at the Middle Temple, as Reader on Jurisprudence and the Civil Law, could foresee the position to which he would attain at one bound, as it were, by the publication of some of the fruits of his researches in historical jurisprudence. Nor, until the appearance of two articles in the October and November numbers of the *Law Magazine*, had any writer questioned the claim of "Ancient Law" to rank among the works which give lustre to the English name in the world of letters and philosophy. Nothing, too, is more certain than that, had any jurist or scholar of eminence thought it right to criticise any of its propositions, he would have done so with every mark of profound respect for its author. Still it was surprising that more than a decade should have passed without an attempt to point out an error of any importance in a work which travels over so vast a field of inquiry, and which had the great disadvantage, as well as the great merit, of being the first book on the subject in this country.

At length a writer, whose signature informs the readers of the *Law Magazine* that he is a Mr. J. O'Connell, and who

seems to assume to speak for Celtic scholars and on behalf of Ireland, has pronounced an adverse judgment, couched in most offensive language, of which it is necessary to give some examples before proceeding to test the qualifications of the judge, together with the soundness of the judgment. The following are some of the sentences in which Mr. O'Connell speaks of "Ancient Law," and of its author, whom he calls "Mr. Maine," declining "to deck his name with *Sir*," as a "feudal incongruity":—

"The very sentences maintain a unity of incoherence with the general structure, and the terms, at least when technical, are commonly inaccurate. . . . All these drawbacks further aggravated by the inverse disorder of his contemplation. . . . Indeed he has not yet collected from the primer called the 'Institutes' the difference they point out plainly between the *jus natura* and the *jus gentium*. . . . The matter is the richest possible, however scandalous the treatment. . . . There are few of the mass of errors into which this writer has been led that I approach with more repugnance than the contents of his fourth essay. . . . But here again he must be crudely mistaken. . . . However poor at explanation, the author well enough observes. . . . He is a commentator or mere critic, and never thinks of rounding his enquiries into reasons. . . . He returns to natural law, but it is to replunge in fresh errors. . . . He can say nothing of the Celtic clans but the sheerest drivel. . . . But remonstrances of this refinement seem out of place with the author. . . . He perhaps tries instinctively to make escape from these blunders by proceeding to define the inheritance. . . . So drawing out still the verbal catenation of feeble fallacy, he once more defines in turn the Universal Succession. . . . Good heavens, can this medley. . . . be English law, or English notions of general law, in even the universities? . . . Here is a sublime sample of his usual verbose moderation, and a good one also of what the French call the English *à plomb* (*sic*), very leaden assuredly in its self-complacency as its intelligence. . . . As I have not the author's space for ceremonious language, he will excuse me for replying bluntly that this is absurd and preposterous. . . . Then, again, we have the occupancy jumbled with capture, the *jus gentium* in general, and the practices thereto appurtenant; but which are all too nauseous for any serious notice. . . . I cautioned at the outset that his technicalities were not exquisite. . . . I would feel indulgent to Mr. Maine's laxity, as precise language in these foreign laws can come but of long study or of large science. But when he goes so far as to intervert those planes of law, and describe contract as an imperfect conveyance, there is no mercy. . . . I am glad, however, to begin at last with a decent pretext for commendation; for Mr. Maine is, after all, a writer of respectability, if not for learning or ability, at least for honesty and aspiration. . . . In conclusion, the wonder is not that there is so much uncouth error (if I am at all right) in the work of Mr. Maine, and I have been unable to adduce a tithe of the portion noted;

the real marvel is that all this crudity should have for years back lain conspicuously and authoritatively before the British Empire, throughout capital and colonies, as in America, and should have reached a new edition. I defy language and evidence to say or show more thoroughly the state of jurisprudence, and its profession, in the English language."

After these examples of the modesty, the courtesy, the classical and polished style of Mr. O'Connell's criticism, let us proceed to inquire whether he is, to use his own words, "at all right," and we may arrive at a conclusion as to the real quarter where "so much uncouth error" lies, as he imputes to "the work of Mr. Maine." I propose accordingly to test Mr. O'Connell's accuracy of statement, his knowledge of Roman jurisprudence, his general learning, and his sagacity and soundness in theorizing on abstruse questions, together with the justice of his criticisms. The judge must now descend from the judgment seat into the dock, to stand his own trial.

I. Of the scrupulous exactness and carefulness of Mr. O'Connell's statements, we have an example at the very beginning of his first article, with reference to the reception of "Ancient Law" by the English public. "Though now before them," he says, "for some score of years, perhaps, it has thus far attained but one re-issue. The legal press have scarcely noticed it at all with any gravity." Now "Ancient Law" was first published not "some score of years" ago, but in 1861, and it is just going into a fifth edition, the number of copies in the third and fourth editions having been very large. It has been reviewed, and in the most favourable manner, by almost every English and American periodical which admits reviews, including the legal periodicals, and among them the *Law Magazine*. Mr. O'Connell seems to attach much importance to French authority, and a recent review in the *Revue des Deux Mondes* of Sir H. Maine's "Village Communities," speaks of the author of that work as *Sir H. Maine, si connu par son livre 'Ancient Law,' essai magistral sur l'histoire philosophique du droit, et sur ses rapports avec les civilisations primitives*. Again, when Mr. O'Connell asks, "By the way, is it not curious that a 'jurist and scholar' in ransacking antiquity and earth for 'archaic codes,' should have overlooked the Irish Brehon laws at his elbow?" The obvious answer is, that so far were the Irish Brehon laws from being "at his elbow," or accessible, when "Ancient Law" was written, that they had not been translated from the Irish MS.; and the first volume of the only yet published portion of them did not appear until 1865, four years after the publication of "Ancient Law," and the second volume not until 1869. I happen to recollect

having spoken to the editor of *Senchus Mor* two years before the publication of the first volume about "Ancient Law." As another instance of Mr. O'Connell's accuracy on external points, it may be noted that Sir H. Maine is not, as alleged, "a pluralist professor," although he has, to his great credit, held different chairs in succession.

II. Let us next try Mr. O'Connell's accuracy on more important points, where we shall obtain at the same time some measure of his knowledge of Roman jurisprudence.

(1). *Jus naturale* and *jus gentium*.—In a sentence quoted above, and in several others, the author of "Ancient Law" is charged with "not having yet collected from the primer called the 'Institutes' the difference they plainly point out between the *jus naturæ* and the *jus gentium*," and is informed that the definition of natural law *quod natura omnia animalia docuit*, which he attributes to Ulpian, is the definition given in the "Institutes," while "the *jus gentium* is defined to be quite the opposite, by the same 'Institutes,' as *quod omni humano generi commune est*." After dilating in his first article on the alleged blunders of which the author of "Ancient Law" has been guilty, in treating the *jus naturale* as no other than the *jus gentium* seen in the light of a peculiar theory, Mr. O'Connell returns to the subject in his second article. "The *jus gentium* our author takes for the same as the *natural law*. But this was only his own error."

What this accusation really establishes is, not that the author of "Ancient Law" did not know his Institutes, but that his critic does not know either his Institutes (Instit. ii. 1, 11), his Digest, or his Cicero. Had Mr. O'Connell ever looked at the beginning of the Digest, he could not have been ignorant that the definition of natural law, which he taunts Sir H. Maine with ascribing to Ulpian, appears there with Ulpian's name, besides being contained in all collections of Ulpian's "Fragments." No jurist or scholar would dream of citing the Institutes for a passage found in the Digest with its author's name. The assertion that Sir H. Maine's treatment of *jus naturale* and *jus gentium* as really identical in Roman jurisprudence, notwithstanding Ulpian's definition, is "only his own error," gives the measure of Mr. O'Connell's acquaintance with the authorities, ancient and modern. Their equivalence is asserted by every modern jurist of repute including Savigny, and belongs to what is called the *duplex divisio juris*, as distinguished from the *triplex divisio*. No claim accordingly is made in "Ancient Law" to a discovery of their equivalence. What is new on the subject in "Ancient Law" is the philosophy of the blending of the terms. Mr. Austin, among other passages to the same effect,

says, "I must remark that the *jus quod natura omnia animalia docuit* is a conceit peculiar to Ulpian; and that this most foolish conceit, though inserted in Justinian's compilations, has no perceptible influence on the detail of the Roman law. The *jus naturale* of the classical jurists generally, and the *jus naturale* occurring in the Pandects, is equivalent to the *natural law* of modern writers upon jurisprudence, and is synonymous with the *jus gentium* or the *jus naturale et gentium*." See authorities cited by Austin, and compare Cicero's "*Naturâ id est, jure gentium*." De Officiis, iii. 5, 23.

(2.) *Fictio*.—Mr. O'Connell scouts the account of a Roman *fictio* in "Ancient Law," and the example there given, adding:—"The Roman law had no fictions proper at all. They were employed at all by the Roman law or lawyers, not in law-making or pleading, but in argument or oratory." It will surprise Mr. O'Connell to learn that Sir H. Maine's account of a *fictio*, and the example he gives, are taken almost literally from Gaius. And so far is it from being true, as Mr. O'Connell asserts, that the Roman lawyers had no such system of artificial pleading as stated in "Ancient Law," that Gaius has elaborately described the mode of pleading *per formulas*, which had various points of resemblance to English special pleading. The great Roman jurist at the same time clearly explains, as Sir H. Maine has done after him, what a Roman *fictio* was, what were its objects, and how it was adapted to the *formula*. Mr. O'Connell has studied his Gaius no better than his Digest. It may be noticed too, in reference to what Mr. O'Connell styles "the Postliminy which is still decanted (*sic*) by public law writers," that it is not the Roman jurists of highest authority who speak of *postliminium* as founded on the fiction to which Mr. O'Connell refers, of the captors never having been absent from home. There is some authority certainly for that explanation, but the jurisconsults of greatest repute chiefly speak of it as a principle of law introduced by natural equity. Both accounts, however, may be true, though one of them only is known to Mr. O'Connell. The *postliminium* may have been first introduced into the law through the agency of a fiction, and then generalized by the prætor, like the mass of beneficial fictions, and worked into the substantive law through the Edict.

(3.) *Universitas juris*.—Part of Mr. O'Connell's polished language on this subject has been already quoted, but I must cite it more at length. After charging the author of "Ancient Law" with "perpetrating a vicious circle by the word inheritance," and with other blunders on the point, Mr. O'Connell proceeds:—

"He, perhaps, tries instinctively to make escape from these blun-



ders, by proceeding in the next place to define the inheritance. So drawing out still the verbal catenation of feeble fallacy, he once more defines in turn the 'Universal Succession' to be a 'succession to a *universitas juris*, or university of rights and duties.' Even this, however, is no definition, but an identical proposition, nor does the *universitas juris* admit of rights, but of duties only. Rambling still 'about' the definition and 'about it,' he comes at last to describe *universitas juris* 'as a bundle of rights and duties, united by the single circumstance of their having belonged at one time to some one person.' Good heavens, can this medley . . . . be English law, or English notions of general law, in even the Universities? Why this generic institution is, on the direct contrary, united, not by the circumstance (which would at all events be an odd tie), but by the negative condition of having belonged, at no time whatever, to any one owner, and more especially one vested with the qualifications of personality. Consequently, it could also be no bundle of 'rights;' nor even of duties in the rigorous sense."

Mr. O'Connell little knew in what company Sir Henry Maine was here assailed. It was noticed some years ago in an article in the *Edinburgh Review*, by Mr. John Stuart Mill,\* who had attended Austin's lectures, that the account of *jus naturale* and *jus gentium* in "Ancient Law," was substantially identical with Austin's; though Austin's lectures (except "The Province of Jurisprudence Determined") had not been published when "Ancient Law" was written. 'The same thing may be said of the analysis of Universal Succession, though that is small matter for surprise, since the same account of it is given by nearly all writers on jurisprudence, of the least repute, whether German or French, as Mr. O'Connell will do well to discover. Thibaut's exposition, for instance, is identical with Sir H. Maine's.

(4.) *Custom*.—After citing a passage in "Ancient Law" relative to the existence, prior to the era of written law, of a period of customary law, preserved in the memory of and delivered by a privileged order or aristocracy, Mr. O'Connell says:—

"Can the writer have really known what he was saying, or what a custom means? A custom to lie in observances, or to be hoarded with an oligarchy! Why, custom by its essence pervades the whole community, as well the ruled as the rulers. . . . Thence it is a sort of law so comparatively tardy, that it was virtually unknown in the great Roman system, as well attested by even the name in its unworn length of half-a-dozen syllables. The length is also a sure sign of the complexity of the notion. This notion was, moreover, alien to the Roman race, as to the law."

It may be useful to Mr. O'Connell to be furnished with some

\* Republished in the third volume of Mr. Mill's "Dissertations and Discussions."

passages in which great Roman jurists have spoken of *consuetudo*, which, by the way, is not a word of half-a-dozen syllables, as coexisting with written law :—

“Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus quod dicitur moribus constitutum.”—*Julian*. “Sed et ea quæ longâ consuetudine comprobata sunt, ac per annos plurimos observata, velut tacita civium conventio, non minus quam ea quæ scripta sunt jura servantur.”—*Hermogenian*. “Diuturna consuetudo pro jure et lege in his quæ non ex scripto descendunt observari solet.”—*Ulpian*.

Sir H. Maine, however, in the passage referred to, speaks of that customary law which precedes the existence of written law. Mr. O'Connell, of course, has not heard of the account of the origin of law given by Pomponius, who says that after the expulsion of the kings of Rome, and before the compilation of the Twelve Tables, “iterum cœpit populus Romanus incerto magis jure et consuetudine aliquâ uti quam perlatâ lege.” Both as to customary law being unknown to the Roman law, and alien to the race, and as to its being of such tardy development, that Roman jurisprudence had not reached it, Mr. O'Connell is, therefore, curiously infelicitous. To his extraordinary assertion that the customary law of a community, which both rulers and ruled obey, cannot be preserved, delivered, and applied by the members of the ruling class, it is unnecessary to say one word in reply.

III. After these examples of Mr. O'Connell's attainments in Roman jurisprudence, and notions of criticism, let us take some of the general learning shown in his article. The following passage is probably unique as a collection of blunders in what is obviously put forward as a great display of scholarship :—

“We are now prepared to measure Mr. Maine upon the whole subject. ‘Wills,’ he tells us, ‘were first executed in the *Comitia Calata*, that is the *Comitia Curiata*, or parliament of the patrician burghers of Rome when assembled on private business.’ . . . The *Comitia Calata* was no parliament but a mere meeting ; not of the patrician burghers (which, beside, would be social centaurs) but of the mass of the citizens without distinction ; nor, consequently, was it ‘assembled for private business’ (which, again, would be rather oddly managed by a public body), but expressly called *ad hoc*, as the very name distinguishes. *Calata* was old Latin, from the Greek *καλεω*, to call. The assembly was thus a *called* one. . . . And what evinces all this, with the composition too of the meeting, is that the call was made, we are told, by horn—*per cornificem*. A magistrate, not a hornblower, convoked the assembly of the patricians.”

Did Mr. O'Connell never read in the Standing Orders of either House of Parliament of the House proceeding to private busi-

ness? Does he suppose the aristocratic class in every state, ancient and modern, to have been a class of great territorial proprietors residing in the country, that he denies the possibility of patrician burghers? On what received authority does he contend that the *Comitia Calata* differed from the *Comitia Curiata*, and was a plebeian assembly? To what period does the philology belong which derives old Latin words from Greek? Where did he learn that *cornificem* is the Latin for a horn, or a hornblower? By what grammarian's authority does he use the preposition "beside" for the adverb "besides," as elsewhere, he uses the preposition "after" for the adverb "afterwards"? So much for the varied learning exhibited in a single passage.

Let us take some other instances. He writes *ἐπι-εικία*, and translates it *super-æquale*. The word is *ἐπιείκεια*, and it signifies "reasonableness." He says: "The poet further proceeds, *θεμιστευε έχαστος παιδων*;" *έχαστος* standing in Mr. O'Connell's Greek for *έκαστος*. He says: "Besides *θημα* in Themistes." In fact, the word *θημα* occurs but once, in a doubtful reference of a lexicographer to a lost drama, and there it means a "sepulchre" or "tomb." One can scarcely believe one's eyes when one reads: "Besides *θημα* in Themistes, there is *ισταω*, to set up or constitute; so that the word means, to a hair, statute laws—*themata statuere*!" This paragon of erudition thus actually derives *θέμιστες* (as though it were *θεμ—ιστες*) from *θημα*, *ιστάω*! After this it is but a trifle to note that he discards not only accents, but also breathings in his Greek. He interprets "loot" as "ransom," and derives it from *λύτρον*, which he writes *lutron*, in Roman characters. In fact, "loot" signifies plunder, was introduced from India into this country, and is a common Hindustani word of pure Sanscrit origin. Attempting to quote Horace on Homer, for *qui nil molitur inepte*, he writes, *qui nihil moliret inepte*; as if the latter could be part of an hexameter, and as if the verb were *molio*. He mangles the well-known line of Terence—

*Homo sum, humani nihil a me alienum puto :*

in place of which he gives us in a sounding period, intended to call attention to his learning—*Homo sum ; et nihil humani me alienum puto*. He construes *voluntatis nostræ justam sententiam*, a just sentiment directed by our will! Let me suggest to him that the meaning is, "the expression of our will in accordance with law." He derives *antestari* from *antetestari*. The derivation rests, according to Mr. O'Connell, on a "natural crasis." In fact, it belongs to the prescientific era in philology, during which Latin words were derived from Greek (as *calare* from *καλεῖν*) instead of from a common root. The element "an" occurs at the beginning of several Latin words,

e.g., *anquirere*, and almost certainly appears in the Greek ἀμφί. The shade of meaning which it communicates seems to be "around," "among," or "about." We shall have to recur to the word *antestari* in a future comment on Mr. O'Connell's theories. Let us take here another of his derivations, namely, the English word "merchant," which he gets from the French *marchant*, (the participle of *marcher*, to walk, I presume,) asserting that it means a "traveller" or "tramp." Is it possible then, that the great Celtic scholar, who is so intimately conversant with all that is either French or Roman, has never heard of the Latin *mercari*, or the French *marchand* derived from it? The same great scholar speaks of *Aquinas* for *Aquinas*, and of *D'Argentrè* for *D'Argentré*. He talks of "what the French call the English *à plomb*, very leaden assuredly in its self-complacency, as its intelligence." Had Mr. O'Connell known that the French say *aplomb*, not *à plomb*, it might have helped him to discover that there is nothing "leaden" in its annotation as applied to denote English collectedness and composure, and that the allusion is to the perpendicularity of the plummet, and not to lead. He says of Sir Henry Maine: "He could, *en vrais Anglais*, (*sic*) extend his real type of the common law back to archaic Greece."

When Mr. O'Connell attempts again to criticize Sir H. Maine, or to ridicule his countrymen, he would do well to keep clear of both ancient Greek and modern French, as well as Latin, and, indeed, English,—in which last he mistakes prepositions for adverbs, transitive for intransitive verbs, confounds the meaning of well-known words, and coins new words that make one shudder. He gives us sentences such as the following:—"For vainly would he refer us to archaic documents or early witnesses, of which his purview, language, the public must be definitely the expositors." "Here we have that English draughtsmanship which is another trait of the same purview." "So intensely ethnical is this whole purview, that it has just been plied upon the vastest scale conceivable, by the two branches of our Anglo Saxons." He is quite unconscious that "purview" is nothing but *pourvu*, and means a provision. He says of the Twelve Tables, that they "were simply laws, or, to use Warburton's phrase, Legation." The reader must admire the learned and apposite reference to the title of Bishop Warburton's treatise: "The Divine Legation of Moses Demonstrated." He says (and doing an injustice to himself, he ascribes the "remark" to Sir H. Maine): "What the English called Equity was a farrago of odds and ends imported from the Roman law, and finally reduced to a grimace of Unity by the Personal or ethnic sympathy with Wolff, Puffendorf, and even Grotius." "Any grimace of doctrine which they have is Hindoo Bhuddism." "They feel the want of

bridging their intercourse with other peoples." Having, in what he terms with characteristic modesty, "a *mappe-monde* of the whole domain of social history and jurisprudence," spoken of the Family, the House, the Gens, as counter systems, he thinks himself entitled to coin a substantive "counters," and to say magniloquently, "the robber houses became pirate Counters." And here, I may observe, that Mr. O'Connell rebukes Sir H. Maine for confounding the House with the Gens, which he calls a "capital confusion." The truth is, Sir H. Maine has translated the word *Gens* by the word *House*, like Arnold, Macaulay, and other great English authors; while Mr. O'Connell chooses to give the name House to what he describes as "the wild medley of hordes, made Houses, who supplanted one another with their robber empires throughout Central Asia;" and who, he says, were of "offal origin." Without detracting from the liberty of Mr. O'Connell to give the name of Houses, if he pleases, to these "refugees and vagrants from the Family empire" of "offal origin," on his familiarity with whom he seems to pride himself so much—may not other writers be permitted to use the name *House* to denote the Gens, without incurring the reproach of confounding different and opposite things?

IV. Slovenly writing, slovenly correction of proofs, confused and imperfect memory, reliance on old and exploded Latin and French dictionaries, to which no scholar at the present day would have recourse, misreading of his own note-book, the bungling of an inexperienced composer, may form the poor excuses for some of Mr. O'Connell's blunders, as, for instance, for that ludicrous one, "the philosophic reveries of Pluto," but, for the great majority, not even such excuses can be offered. It seems to me, I must confess, labour thrown away, to enter into serious argument with a writer of whose erudition and perspicacity we have such indications, on any really difficult question. It is only in deference to the readers of *The Law Magazine* that I venture to offer a few remarks on some more abstruse subjects on which he puts forward his own theories with amazing confidence.

(1.) Θέμις, θεμιστές. I have already noticed some characteristic touches of Mr. O'Connell's scholarship in connection with these terms. "But who," he says, "after Mr. Maine's assurances to the contrary, would suppose that Homer's *Themistēs* mean quite literally, statute laws? The example most relied on by our author himself may vouch for it. The case is the description of the Cyclops in the 'Odyssey': 'They have,' sings the poet, 'neither assemblies for deliberations nor *Themistēs*—οὐτε θεμιστές. Now, by this word is palpably meant, not judgments, but statute laws, as the appropriate

issue from deliberative bodies. The poet further proceeds: *θεμιστευει εχαστος παιδων*, &c. That is, 'each father *legislates* for his children and wives,' &c. Could Homer possibly have meant that the Cyclop fathers *judged* them, or for them; which would be only what the ordinary fathers did all the world over? If he could, he must, at all events, have said it in different terms."

The reader will, I think, attach more weight to Mr. Jowett's answer to Mr. O'Connell's question, than to Mr. O'Connell's own, although the latter, doubtless, would not defer even to the celebrated Professor of Greek at Oxford on the meaning of Greek words. The passage cited by Mr. O'Connell is quoted both by Plato and by Aristotle, and the following is Professor Jowett's translation: "They have neither councils nor *judgments*, but . . . every one is the *judge* of his wife and children." But we have also French authority, to which Mr. O'Connell may be more willing to submit. Cousin translates the first line of the passage quoted in "Ancient Law": *Il n'y a chez eux ni sénats ni tribunaux*. Barthélemy St. Hilaire translates *θεμιστευει*, &c.: *Chacun à part gouverne en maître ses femmes et ses fils*; a rendering which, whether accurate or not, is a very different one from that which Mr. O'Connell orders us to accept on his own *ipse dixit*. The one impossible meaning of Themistes is the one he asserts, namely, "statute law." I need only add that the comparison of *θέμις* with *νομοθέτης* is, to use the mildest term, absurd; that if *θέμις* is to be illustrated by any later Greek word, it should be *θεσμός*, which significantly enough always meant a religious ordinance, as opposed to *νόμος*, a civil law; that the word which is *θέμις* in Greek occurs in the Gothic languages; in English it is "doom," which once had the very shade of meaning assigned to *θέμις* in "Ancient Law," that is, it meant a sentence or award, and also a *rule* known through a sentence or award. The want of power to get an inkling of the process of specialization, which is the key to legal history, prevents Mr. O'Connell from having a glimpse of the truth about *θέμις* and *θεμιοτες*, namely, that all legislative, judicial, and executive power was originally blended, and that its forms only gradually disentangled themselves.

(2.) *Conveyance and Contract*.—The same mental infirmity disables Mr. O'Connell from perceiving the significance of the fact that *nexum* signified both a conveyance and a contract. That a will was originally a conveyance even he will hardly deny. What he cannot see is that the three relatively modern notions of a conveyance, a will, and a contract, were gradually specialized in three different directions, just as the *sac* of the lowest forms of life has become by specialization—the stomach, the lungs, and the organs of reproduction. The truth is, the

opaqueness of mind which shuts out the perception of Sir H. Maine's meaning in speaking of a contract as originally an incomplete conveyance, excludes every ray of light on all such subjects. A contract, leaving something for execution in the future, is a more refined and a later conception than that of an immediate out-and-out conveyance. In "Ancient Law" we find a very interesting exposition of the evolution of the contract from the conveyance. "There seems to have been one solemn ceremonial at first for all solemn transactions, and its name at Rome appears to have been *Nexum*. Precisely the same forms which were in use when a conveyance of property was effected, seem to have been employed in the making of a contract. But we have not very far to move onwards before we come to a period at which the notion of a contract has disengaged itself from the notion of a conveyance. . . . Let us conceive a sale of ready money as the normal type of the *nexum*. . . . So long as the business lasted, it was a *nexum*, and the parties were *nexi*; but the moment it was completed, the *nexum* ended, and the vendor and purchaser ceased to bear the name derived from their momentary relation. But now let us move a step onward in commercial history. Suppose the slave transferred, but the money not paid. In that case the *nexum* is finished so far as the seller is concerned, and when he has once handed over his property, he is no longer *nexus*; but in regard to the purchaser, the *nexum* continues. The transaction as to his part of it is incomplete, and he is still considered to be *nexus*. We may still go forward, and picture to ourselves a proceeding wholly formal, in which nothing is handed over and nothing paid. We are brought at once to a transaction indicative of much higher commercial activity, an *executory contract of sale*. If it be true that, both in the popular and in the professional view, a contract was long regarded as an *incomplete conveyance*, the truth has importance for many reasons," &c. ("Ancient Law," pp. 317-21.) One might well have supposed that Sir H. Maine had here made his meaning clear to the dullest intellect. Certainly, any one to whom it is not clear, is, *ipso facto*, disqualified for the office of a critic. The following is Mr. O'Connell's modest and intelligent comment on the passage:—"I would feel indulgent to Mr. Maine's laxity, as precise language in these foreign laws can come but of long study or of large science. But when he goes so far as to intervert those planes of law, and describe contract as an imperfect conveyance, there is no mercy. For so far as at all related, the case is palpably the reverse, and it is conveyance, as anterior in order, that is the imperfect contract."

(3.) *Antestatus*.—Mr. O'Connell adopts from "Ancient Law" the position that at first a Roman testator parted out and out

with his whole estate when he made his will; but he contemptuously rebukes Sir H. Maine for not having discovered the true proof of his statement. Mr. O'Connell has found out from Mr. Poste (whom he calls, with his usual accuracy, Professor Poste, of Oxford, courteously adding that he "seems no wiser than his Cambridge compeer," whereas he is a barrister residing in London, and no more a professor than Mr. O'Connell is a scholar or a jurist) that in a Gothic code, and also in a Spanish inscription, a person is named who is called *antestatus*. In the first case this person appears in connection with an emancipation; in the second, with a transaction of mortgage. From emancipation and mortgages Mr. O'Connell jumps to testaments, and, without the smallest authority from Gaius, whose account of the formalities is exceedingly full, and who does not mention the *antestatus* at all, asserts that the *antestatus* was the testator. *Antestatus*, he says, means *ante-testatus*, or the testator who made his will by anticipation, or before the time. Now, *antestatus* happens to occur in popular Latin, and is found in a well-known passage of a famous satire of Horace. Does Mr. O'Connell mean to say that the person who delivers Horace from his tiresome companion, asks Horace to make his will before the time? The best explanation of *antestari*, which occurs both actively and passively, is that it means "to summon a witness from among bystanders," or "to be so summoned as a witness." The applicability of this meaning to this passage in Horace, and to the two passages to which Mr. O'Connell refers, will be obvious, if not to him, to every other reader.

(4.) *Nuncupatio*.—Gaius, in describing the ancient mancipation will, or will *per æs et librum*, states that it ended with the employment of a form of words called a *nuncupatio*. He adds that "nuncupation" meant "public declaration"—*nuncupare est palam nominare*. Mr. O'Connell flatly contradicts Gaius, who is our only authority on the subject, and asserts that *nuncupare* meant *nomine-capere*, as opposed to *manu-capere*, and argues that as *nomen* sometimes means a debt, nuncupation was a form of testament by which personalty (!) passed, as distinguished from mancipation, by which realty (!) passed. The passage in Mr. O'Connell's article is noticeable alike for the contradiction of Gaius, for the astonishing theory it propounds, for the modesty with which it is propounded, and for the evidence it affords that Mr. O'Connell conceives that the distinction denoted by the terms realty and personalty existed in Roman law. *Nuncupare*, indeed, possibly, and even probably, contains the same elements as *nomen* and *capere*, and it may well be that its original signification was "to address a person or thing by his or its special name." But there is not a shadow of reason for



supposing that it ever had the particular sense given to it by Mr. O'Connell. The authority of Gaius is conclusive as to the meaning it had acquired in law Latin; and even in popular Latinity this meaning (*palam nominare*) seems to have been very old, for Ennius writes:—*quis est qui meum nomen nuncupat?*

I conclude this division of the subject with two extracts from Mr. O'Connell's articles, which exhibit him first, as philosophizing on his own account; and secondly, in his vein of transcendental criticism. In either character his flight is beyond the reach of comment.

(1.) "It was on both of these vast developments of the Family and the House *genera*, that the Romans came at length to construct their social edifice, under guidance of the Gentile element, as the type of the supreme cycle. *Condere Romanam gentem*, as it was worded by their learned poet. The Romans could of course embrace the cycle but in the lowest or Family section, and by a sort of combination of the Chinese fathers and the Egyptian priesthood [!]. Not—as it must be quite needless to remark to the rudest reader—that there could be any personal or national consciousness of those proceedings; they being merely, as in inert nature, the operations of social progress, through the medium of the supreme organization known as races."

(2.) "Mr. Maine, instead of contiguity or local contiguity, which phrase moreover is plecnastic, should have said *local concentration*; that is, a segmentation by a multitude of serial centres, intersecting each other in all collateral directions; and with thus the points of union not the most contiguous, but the most *distant*—thereby best fortifying each other through the contact of the mere circumferences. This is nature, as may be noted in her simplest structure, which is freezing water."

V. There are in "Ancient Law," it can hardly be doubted, some statements which may require modification in consequence of later researches, some propositions of which the evidence is not complete, and some over-wide generalizations. Considering that it was the first work on the subject published in the English language, and that it sweeps over so vast a field of history, law, and philosophy, the wonder is that it has never been convicted of a single serious error. But it is impossible that there should not be passages of which the progress of historical research and philosophy may not render some change proper; and Sir H. Maine's own later work, "Village Communities," shows that the author of "Ancient Law" has himself been deeply engaged in investigations tending somewhat in that direction in respect of the earlier sources and forms of archaic law. One thing, however, is certain, that it is not from a writer capable of the monstrous mistakes and wild theories with which his two articles

teem, some samples of which have been pointed out in the foregoing pages, that Sir H. Maine or his followers can expect any aid in the shape of correction or of further discovery. Yet it is a writer capable of those blunders who undertakes to give his readers in a few paragraphs "a *mappe monde* of the whole domain of social history and jurisprudence;" who affects to "feel indulgent to Mr. Maine's laxity, as precise language in these foreign laws can come but of long study or of large science;" who, notwithstanding the indulgence of his disposition, charges the author of "Ancient Law" with "capital confusion," the "sheerest drivel," "catenation of feeble fallacy," and "uncouth error;" who denies his "learning or ability;" who professes to discover errors so flagrant in his pages, that "there is no mercy;" and who seems to look forward to superseding him, in Ireland at least, as a standard authority. It is not in vindication of "Ancient Law," or of its author, that I have ventured to reply to Mr. O'Connell's strictures; though, as a very humble member of the English Bar, I might conceive myself entitled to repel an insult to one of its most distinguished members. But it is in vindication of Irish scholarship, Irish intelligence, and Irish manners, that I protest against both the matter and the form of Mr. O'Connell's criticisms. Belonging, indeed, myself, by family connection, to a part of the population of Ireland, which Mr. O'Connell doubtless regards as extraneous, intrusive, and barbarous, I cannot expect his admission of my right to speak in that behalf. Nevertheless, as a graduate in Arts and in Law of the University of Dublin, as a Professor of Jurisprudence in the Queen's University, as acquainted during many years with some of Ireland's best scholars and most promising students, as having often heard Sir Henry Maine and his works spoken of by them with admiration, I feel myself entitled to assert that Mr. O'Connell's language with respect to "Ancient Law" and its author, would be repudiated by all in Ireland who have any claim to a voice on the subject. Before rushing again into paths of criticism where scholars and jurists would fear to tread, Mr. O'Connell, if he be well advised, will make some preliminary preparations for the task. He will enter on a laborious study of the ordinary text-books in jurisprudence, and of the grammar of the languages he parades. He will lay aside his petty system of quibbling and carping. He will cast out, or at least suppress, the evil spirit of ethnical antipathy. If, after this preparation, he will again read "Ancient Law," he may possibly rise from it with a different estimate of that work; and a soberer appreciation of his own attainments and powers, so that he may hesitate to proclaim himself at home in depths of law "unfathomed by either Romans or moderns."

Meantime, there is another suggestion I must venture to offer to him. Count Moltke has been said to be silent in seven languages. There are four in which, for a different reason, Mr. O'Connell would do well to observe silence—Greek, Latin, French, and English—not one of which he can at present employ without affording a melancholy confirmation of the old proverb, that a little knowledge is a dangerous thing.

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## II.—TRIALS AT BAR.

IT is settled that, in the Tichborne case, there is to be a “trial at Bar.” Many persons will ask, What *is* a “trial at Bar?” How does it differ from an ordinary trial? What are the reasons for resorting to it, and what are its practical results? On this point there is the more need of information, because, on account of the course which has been pursued, it has not been discussed. The Attorney-General, in a case in which the Crown authorizes the prosecution, is entitled to such a mode of trial, and on this occasion he asserted his right. This course precluded discussion as to the advantages or disadvantages of the course proposed; but Mr. Justice Blackburn did not hesitate to declare that the inconveniences more than outbalanced the advantages. This makes the inquiry one of some interest—What is a “trial at Bar?” and what its advantages and inconveniences actually are.

The origin and reasons of “trials at Bar” are to be sought far back in our legal history. Our ancestors had great faith in a plurality of judges; partly for the sake of mutual check and control, and partly for the sake of mutual consultation and counsel. For both these reasons—it was peculiarly necessary in criminal cases, especially in times when they were mostly capital. The nature of criminal jurisdiction precludes an appeal as of right, even on points of law; and in such cases a bill of exceptions was not admissible, nor even a writ of error, except with the permission of the Attorney-General, representing the Crown. Hence our ancestors endeavoured to apply the only safeguard in their power by providing a plurality of judges, not only in the jury, but also on the Bench. With the advantage of mutual counsel and control, they could hardly go wrong by inadvertence; and if there was only one honest man among them, the accused had at least one voice in favour of justice.

The history of our criminal judicature shows that there were painful reasons for these precautions. In an age when juries were often ignorant and timid, and judges too often servile and unscrupulous, these were considerations of immense importance, upon which, indeed, the security of men's lands and the safety of their liberties and lives greatly depended.

Hence the principle of association of judges was jealously adhered to, and enforced by the statutes which established our judicial system. In the civil and criminal commission of the assizes, several judges were always associated, and are so to this day. Even when, in the seventeenth century, the pressure of business rendered it necessary that judges should sit singly to try cases, they were long in the habit of sitting with the assistance of one of the serjeants joined in the commission. At length the practice became established, in ordinary cases, of single judges sitting even in capital cases, though the ancient usage was still retained, in special commissions, for cases of importance. At the same time, when single judges sat, there arose the practice of reserving points of law for the consideration of all the judges; and this led, in our own time, to the establishment of the Court for the Consideration of Crown Cases Reserved, to determine, as Lord Campbell said, "difficult questions of law." This was a legislative declaration that single judges were not to be trusted to decide finally difficult questions of law. At the same time the nature of criminal jurisdiction made it imperative that the power of reserving a point should be discretionary, for otherwise there would be an appeal in every case of conviction. As a new trial is never allowed against an accused party who is acquitted, a point can only be reserved in the case of a *conviction*; and, if it is allowed, then the prisoner escapes justice altogether. Hence there were great advantages in having a plurality of judges at the trial, whose decision upon any point might more fitly be taken as final. The reason for this, however, was greater in ancient times, when the number of the judges was much less than it is now; and the real reason for the practice was not always in favour of the prisoner.

In an age when the judicial office was held at the pleasure of the Crown, and judges were subservient ministers of its will, it was for the interest of the Crown to have several judges on the Bench to unite to overawe the jury. This was, no doubt, the reason why, in the sixteenth and seventeenth centuries, special commissions were always issued to try political antagonists, and, whatever the absence of evidence, in scarcely a single instance did a State trial result in an acquittal. The ancient principle of association was turned against the subject, and both the Bench and the jury were packed in order to make convictions more certain. In the constitution of the permanent courts, of course the same principle of a plurality of judges was adhered to. The

number of judges might vary, but there was always a plurality of judges, rarely less than four. In that ancient court, the Old Bailey, the same same principle was adhered to; all the judges were made members of it, and several of them usually sat to try prisoners. That court has always had this great advantage, that as it comprises *all* the judges it can always constitute a court of the best of them. It is not confined to the members of any particular court, and in this respect was far superior to the other great criminal court—the King's Bench. Hence the most important cases have been tried at the Old Bailey; hence, in our own time, the Legislature re-established it with larger jurisdiction; and hence provision was made (in Palmer's Act) for the removal of any difficult case into that court from any part of the country. In all such cases several judges have always sat in that court; the practice has prevailed to this day; three judges sat to try Palmer, and two sat to try Müller. In the superior courts the same practice long prevailed, of a plurality of judges sitting to try cases, civil or criminal. It could not be otherwise at common law, for the courts were so constituted that each court could only sit and act as one judicial body, and this applied to trials, as well as to all other judicial acts.

Hence all trials in those courts were in term, and at the Bar, before all the judges of the court. It was not until the latter part of the sixteenth century, in the reign of Elizabeth, that a statute provided that trials might be taken before the Chief Justice, and that statute provided that trials so taken should be "as good and available as a trial at Bar." This, however, was only a *power* so to try cases, and it was long before it was generally used. After the Revolution, when population, wealth, and business had largely increased, it became necessary to try ordinary cases in those courts before single judges, and gradually a limited power was given to try cases out of term. But the ancient power of trying cases in term and "at Bar"—before the whole court—still continued, and Lord Holt declared it the right of the subject to have such a trial upon good cause shown. That cause, however, rarely arose in criminal cases; they usually went to the Old Bailey; and in that court all the advantages of a trial at Bar were obtained, without its inconveniences. The only advantage was a plurality of judges, and the disadvantage was the interruption of business in one of the superior courts by absorbing all its judges. Hence there were few criminal cases in the King's Bench, and though in those that did arise these trials at Bar could be obtained, such trials were not often granted. It was always a general rule that where the Crown is interested, the Attorney-General, on its behalf, is entitled to a trial at Bar as a matter of right, and of course this applies to any prosecution instituted by him on the part of the Crown. But in most cases the Crown has prose-

cuted at the Old Bailey for the reasons already mentioned. Where, however, the case was in the King's Bench, the Attorney-General as of right was entitled to a trial at Bar, and this whether the Crown defended or prosecuted. Thus, when the Crown defended a governor who was sued, he was allowed on his mere application, a trial at Bar. The defendant, in an information by the Attorney-General, obtained a trial at Bar only by showing cause for it. But the Attorney-General, in a prosecution authorized by the Crown, obtained such a trial on his mere application for it, without stating any reason for it. This was the precedent, no doubt, on which the Attorney-General the other day appeared in court and assented to an application for a trial at Bar in the Tichborne case. The Crown is not interested in it, but it has authorized the prosecution, and that the Court held was sufficient.

Yet, notwithstanding the power of prosecuting on the King's Bench, and having a trial at Bar, it is remarkable how few cases of the kind have occurred. The reason of their rareness is obvious, and has been already pointed out. In trials at the Old Bailey all the advantages of a trial at Bar were obtained, and all its inconveniences were avoided, while in country cases special commissions obtained in the same way the same advantages, without any inconvenience, by taking one judge from each court. A special jury could, indeed, be obtained in the King's Bench, but only in a mere misdemeanour, because the mode of striking special juries with a panel of forty-eight was not applicable to trials for felony or treason, in which the prisoner had peremptory challenges to the number of thirty-six. On the other hand, "good" juries—that is, taken out of jury panels of any number composed of "good" or substantial men—could be obtained at the Old Bailey in cases even of felony. There was no advantage, therefore, to be gained by a trial at Bar in the King's Bench which could not be realized in the Old Bailey, and there were very great practical inconveniences. Hence, for nearly a century and a half there have only been two instances of criminal trials at Bar in the King's Bench. The last but one was the case of the unfortunate Ratcliffe, Earl of Derwentwater, attainted for rebellion, and tried thirty years afterwards—about 1745—in the King's Bench. As he had already been attainted, the only issue was his identity, which he denied. The trial was at Bar; a "good jury," from a panel previously returned by the officer, was empanelled; and the trial took place at once. It is curious that in that, almost the last case of a trial at Bar, the issue should have been, as in the present instance, personal identity. Only there is this great difference, that there the prisoner denied his identity and here he asserts it: though, indeed, he denies it as to one man, and asserts it as to another.

Nearly a century elapsed after the trial of Ratcliffe before another criminal case was tried at the Bar of the King's Bench; and that case was the last so tried. It was the case of the Mayor of Bristol, tried forty years ago for breach of duty in not using due vigour to suppress the riots in that city. That was a case of immense constitutional importance, and, therefore, it was fitly tried at Bar before three of the judges of the court; and the legal direction given by the senior judge in the name of all had a great weight and value. Since then there has been no criminal trial at Bar in the King's Bench. In a century and a half there have only been two such trials, and the last is forty years ago. Yet during that long period there have been many remarkable criminal trials in that Court. Mr. Reeves, the learned historian of the law of England, was tried by order of the House of Commons—it is really difficult to say for what—but for some constitutional opinions they did not like. The case was delicate and difficult, and raised questions of constitutional law, yet he was not tried at Bar. Lord George Gordon was tried for treason, and his trial was as perilous and critical as any that ever occurred; yet he was not tried at Bar. Hardy and Horne Tooke were tried for treason, but they had not a trial at Bar. Sixty years ago the two Hunts were tried for libel; it was a State prosecution, yet the trial was not at Bar. Lord Cochrane was tried in the King's Bench for conspiracy, but the trial was not at Bar. Sir Francis Burdett was tried for sedition, but it was not a trial at Bar. Since the case of the Mayor of Bristol in 1832 there has been no such case.

The reasons are obvious: that the Old Bailey was found an excellent and convenient court, with every possible advantage, and that a trial at Bar realised no greater advantages, while it entailed many great inconveniences. All the advantages of a plurality of judges could be obtained at the Old Bailey, and in a far greater degree. The judges could be selected from all the three Courts, while, on the other hand, the taking of only one judge from each would be no inconvenience to the suitors. The trial being in a different court would not interfere with the business in either of them, and a "good" jury could be obtained, even in treason or felony. No wonder, then, that it was not thought worth while to incur all the inconveniences of a trial at Bar without obtaining any equivalent advantages. Thus it was that during the last century and a half only two such trials have been held in the King's Bench. The only other instances of trials at Bar during that long period have been in civil cases. It has always been considered as a rule, even in times when the inconveniences of trial at Bar were far less than they are now, that such trials ought never to be granted except in very unusual cases, and such as are of extraordinary difficulty.

On one occasion, in 1819, the judges said "such a mode of proceeding is never conceded lightly, because, without considering the inconvenience arising from it to the court (which it will never regard) it delays the other suitors," and so it was considered as an additional reason for not allowing it that the same or a similar case had already been tried before a single judge. In a later case, in 1826, the judges said that when they considered the inconvenience of the course, an absolute necessity ought to be made out before they yielded to the application—that is, when it was made by private parties or defendants. When it was made by the Attorney-General, on the ground that the Crown was concerned, of course, by reason of his peculiar privilege, they had no alternative.

Illustrations, therefore, of the nature of trials at Bar in modern times must be sought in civil rather than criminal cases. And towards the end of the last century a remarkable case arose, in some of its features resembling the present, and affording some illustration of the advantages of this mode of trial. That was the great Huntingdonshire case, in which the legitimacy of the possessor of an estate was disputed. Two trials were held before single judges, and both very unsatisfactory. The first trial was before Lord Loughborough, a great judge, a man of ability and experience. Yet it was not satisfactory, and there was another trial before another judge—Mr. Justice Heath—who proved unequal to the task. His mind wanted grasp and vigour to deal with a vast body of testimony, involving many nice points of evidence. The verdict was for the party in possession. But the result gave general dissatisfaction. Erskine loudly complained of the judge's charge as "a reproach to the administration of English justice," and as "from the beginning to the end of it a mass of absurdity." By his advice an application was made to the Court of King's Bench for a new trial at the Bar of the court, but it was refused, perhaps because another action could be brought. There is no doubt the verdict was wrong, for the successful party, to avoid another action, compromised the claim, and it is stated in the last edition of the report, published in 1826, that the person thus left in possession had, after the compromise secured him, recognized his real mother—a stranger to the family—whom he then ran no risk in acknowledging. Erskine always ascribed this sad miscarriage of justice to the weakness of the judge, and his misapplication of the rules of evidence.

It is impossible not to see that on a trial at Bar there would be far less chance of such a miscarriage. In such a case a trial before a single judge—even although of the highest ability and experience—may not be satisfactory; while, on account of the length to which such cases run, there is an obvious inconvenience in a new trial. In the present case this would have



afforded a strong reason for trying the civil action at Bar, and after the case was over we made the observation. But these reasons fail to apply to a criminal trial, because the advantages of a trial at Bar, without its inconveniences, could be secured at the Old Bailey. In civil cases of this class a trial at Bar has, however, advantages not otherwise obtainable, though those advantages are of less importance than they were in suits which were final. Thus in writs of right—which were the last and final remedy for the recovery of real estates—the trials were always at Bar, and there have been many such trials in our own time. These ancient actions were always so tried until their abolition; and the last writ of right was so tried in 1835, in the Court of Common Pleas, before the late Lord Chief-Justice Tindal and his brethren. Some points of evidence arose in the course of the trial, and were decided by the whole court; and at the close of the trial the Chief-Justice delivered their united opinion and direction to the jury. In that case and in almost all others that have been so tried, the judges have concurred, but they might have differed, and in some instances have differed, though, happily, the dissentient judge has yielded his opinion to the others; otherwise the embarrassment which must have arisen would have been very great indeed. In a more recent case it was very nearly arising. A practical inconvenience may always arise in a trial at Bar; that as each of the presiding judges makes such observations to the jury upon the whole case by way of direction as he considers to be requisite, it is possible that they may differ, and may, even if their number be four, be equally divided, which may cause almost powerful embarrassment, if not an absolute dead lock; for in such a case what are the jury to do? In 1828, a great case which concerned the Duchy of Cornwall was tried in this court at Bar, before Lord Tenterden, Mr. Justice Parke, Mr. Justice Bayley, and Mr. Justice Littledale, all eminent judges. Several important points arose in the course of the trial, on which all the judges delivered their opinions. Happily, they concurred, but they might have differed, and were very near doing so, for on one point Mr. Justice Littledale so far doubted that he took time to consult the authorities, and next morning said he concurred in the opinion expressed by his brethren. But if he had differed, and if one of the others had agreed with him? The difficulty in which the jury would have been placed will be manifest.

It is to be observed that in our own times four judges have always sat on such trials. In 1848, there was a trial at Bar in the Exchequer, in the case of Captain Denman, sued for seizing a ship as a slaver. The act was adopted and approved by the Government, and defended by the Attorney-General on the part of the Crown. The counsel for the Crown in that case were Sir J. Jervis (the Attorney-General), Sir A. Cockburn, and

Mr. Willes; the judges were Baron Barke, Baron Alderson, Baron Rolfe, and Baron Platt. In the course of the case, an important point of law arose, whether the ratification by the Crown was equivalent to a previous command, so as to make the act an act of State. And on this point the senior judge, Baron Parke, rather differed from the others, but, happily, the doubt was not so strong as to lead to a decided dissent on his part, and as he yielded his opinion to theirs, he was able, in summing up, to declare their united opinion, and said, "You may take it as the direction of the Court." It would have been otherwise if he had decidedly dissented. Then he would have been bound to declare his own opinion contrary to theirs, and they would have had to declare theirs contrary to his. The embarrassment which would have been occasioned to the jury by this unseemly conflict of authority may be imagined. And if the Court had been equally divided, two and two, there would have been a deadlock, and the jury would have had to determine what view of the law they would take.

The inconvenience which may arise from trial before several judges may be illustrated by a reference to two cases which have arisen within the last ten years—the one of them a case under the Foreign Enlistment Act; the other that of Mr. Eyre. In the case of the *Alexandra* the four judges of the Court of Exchequer were equally divided, and if the trial had been at Bar, as it ought to have been, there might have been the same division of opinion. In the subsequent case of the *Rappahannock*, which in 1864 came before the Court of Queen's Bench on an indictment, Mr. Justice Crompton, who charged the grand jury, expressed an opinion on the construction of the Act different from that taken by the late Lord Chief Baron on the *Alexandra* case; and although he charged the grand jury in his own name, he was understood to do it in the name and on the behalf of an united Court, or otherwise they would have acquiesced in a direction they believed to be wrong. If all four judges had sat together, as they must have done in a trial at Bar, and they had been equally divided, as the four judges of the Exchequer were in the *Alexandra* case, what would the jury have done? They would have had to determine what the law was, perplexed by opposite judicial opinions, in a Court equally divided! And that dilemma was still more nearly realized in the case of Mr. Eyre. In that case, it will be recollected, Mr. Justice Blackburn declared in his charge that the law he laid down had the assent of all the other judges of the Court, and the Lord Chief Justice a few days afterwards denied that "they had sanctioned all the legal positions asserted in that charge," and went on to say that, as far as he was individually concerned, he must go further and declare that there were propositions in the Charge in which he not only was not

prepared to concur, but from which he altogether dissented. And proceeded to say that he so stated—

“Because he was clearly of opinion that the collective authority of the Court of Queen’s Bench was pledged to every charge delivered in that Court.” . . . “When the senior puisne judge of the Court delivers a charge to the grand jury, the charge he so delivers is that of the Court, and not that of the single judge who delivers it. He speaks not of his own authority, or on his sole responsibility alone. He is the organ and mouthpiece of the Court, and, therefore, in the event of any difference of opinion as to the directions to be given to a grand jury, it will be the right, as well as the duty of each judge to be present and to deliver his own charge, as in the case of a trial at Bar.”

And the Lord Chief Justice added,—

“Assuredly had I known that the law would have been laid down as it is understood to have been stated, I should have felt it my duty to attend my place in Court on the occasion of the charge being delivered, and to declare my view of the law to the jury.”

And, again, still more emphatically :—

“I should certainly have deemed it my duty to declare my own opinion to the grand jury and to apprise them that the statement of the law thus made to them had not the sanction of any other member of the court besides that of the learned judge who made it.”

What would have been the effect upon the minds of the jury and of the public of such a startling exhibition must be left to the imagination ; and it will be observed that the Lord Chief Justice, with entire truth, likened the occasion to that of a trial at Bar, and declared that he should have so acted on a trial at Bar, in the event of any serious difference of opinion. Had Mr. Eyre been tried, there might very properly have been a trial at Bar, and the exhibition which would have resulted, it may be imagined, would not have added much to the dignity of the Court or the majesty of the law. The risk of such an exhibition is one of the evils of trials at Bar ; and it is to be observed that differences of opinion are likely to be far more decided in a criminal than in a civil case, because in a criminal case the party has not, as in a civil case, the power of taking the question to a superior Court ; and justice to the prisoner requires that a judge who differs from a ruling against him should adhere to his opinion. On the other hand, for this reason, finality is secured, in any criminal trial.

The advantage of a trial at Bar it may be considered is, that all points of law or evidence arising in the course of the trial being decided by several judges, on mutual consultation, are decided with more weight and authority ; so that a new trial cannot be applied for with any prospect of success, since the

application must be made to the same judges. But in criminal cases a new trial is hardly ever granted at all, even in cases of misdemeanour; and it cannot be in cases of felony; neither can a bill of exceptions be maintained in a criminal case, so that the advantage of a trial at Bar, in this point of view, is very small in a criminal case; and hence it is that, except in capital cases, such a mode of trial was rarely resorted to in such cases, since there was little to be gained by it. Hence trials at Bar, in criminal cases, have gradually fallen into disuse. In the *British Bank* case, for instance, in the Queen's Bench, fourteen years ago, though a case of great difficulty and importance, a trial at Bar was not applied for on either side, and Lord Campbell tried the case alone, taking up a whole sitting in the trial. A new trial was moved for by the defendants, but was refused, and a new trial is hardly ever allowed in a criminal case; where the verdict turns on the broad merits, rather than on technical legal points. On the other hand, it is by no means clear that if any points of difficulty should arise in the course of the trial of a criminal case at Bar the ruling of the judges would necessarily be final. The Lord Chief Justice has already intimated that, on account of the enormous inconvenience of a trial at Bar, it may be hoped that only three judges will sit, though in no instance have fewer than four presided. And even assuming that four sit, and that they are unanimous on every point—four judges are a very small minority of eighteen, the present number of our judges; and if the point is one of difficulty, the judges may—even if agreed—find it hard to resist a pressing application to reserve it for the court for Crown cases. The Court of Queen's Bench held two or three years ago, that the Court came within the scope of the words used in the Act. And if they should be divided, or if there should be any appearance of doubt, on a ruling of a difficult point against the prisoner, it may be that the Court may feel compelled to reserve the point, and so, even in the event of a conviction, it may not be final after all; and, as already mentioned, if the point is ruled in favour of the prisoner he escapes altogether, since he could not be tried again on the same charge. Nor is it all clear that there might not be an application for a new trial on the part of the prisoner—at all events, if one of the judges differed. For if only three sat and one of them differed, as the other judges might concur with him, it would be obvious injustice to deny him the power of applying for a new trial, against a ruling which the majority of the Court might deem erroneous.

It is an error to imagine that there cannot be a new trial after a trial at Bar. The first new trial ever granted was after a trial at Bar; and in many such cases new trials have been granted. Formerly, indeed, when there were only four judges in a Court,

and four sat to try a case, there was no prospect of success in such an application. But there is no rule of law against it, and now the altered number of the judges would render such an application feasible. In cases of misdemeanour, a defendant can apply for a new trial, though a prosecutor cannot. And there is now no reason why a defendant should not apply after a trial at Bar; at all events, unless four judges sit, and they are always unanimous. But it has been already stated that it would be inconvenient that more than three should sit, and three judges are only the half of six, and the sixth part of eighteen. It cannot be expected that the ruling of three judges on a difficult point should fully satisfy the public or the profession, and very difficult points may possibly arise. Thus, therefore, it may be seen that there are great practical evils or inconveniences in the application of this ancient mode of trial in a criminal case, and there are some grounds for Mr. Justice Blackburn's opinion that the inconveniences outweigh the advantages.

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### III.—CLASSIFICATION OF THE ROMAN CIVIL LAW.

IN an article in this MAGAZINE (No. LXII., August, 1871) I have paved the way, by a criticism of the so-called law concerning persons, for an examination of the method pursued by the Roman institutional writers in the arrangement of the topics of civil law. The chief interest attaching to the subject arises from the great influence that the Roman writers have exercised over the compilers of modern codes, and also from the well-founded hope that their experiment may yield useful lessons. Without repeating the arguments already urged against the claims of the *jus de personis* to an independent position alongside the *jus de rebus*, it will be sufficient here to recapitulate the conclusions of the former paper. Logically, the distinction between the law relating to persons and the law relating to things is untenable: it is a distinction without a difference. Historically, the aggregation of the special topics of the *jus de personis* is not unsuitable, and has even a certain convenience and *elegantia*; but a modern lawyer is not to be tied by the accidents of Roman legal development, and he may respect Gaius without attempting to follow him. It is even doubtful whether a good text-book on Roman civil law would now adhere to the arrangement of Gaius, although it was followed with servile closeness by the authors of Justinian's "Institutes." Throwing out of account, then, for the moment, the law concerning per-

sons, and also the law concerning actions, the real problem centres in what is vaguely called the law relating to things, and may be thus expressed: What principle, if any, underlies the distribution of subjects in that department? Is the principle faithfully carried out; and, if not, what changes are required to give it full play?

The first question to consider is, what is the purpose or object of a classification of legal topics? In answering this question a distinction must be drawn between the work of the legislator and the work of the jurist. It is the business of the legislator to provide rules by which a judge may determine any dispute that comes before him. Apart from the goodness or badness of the rules, with reference to their effect upon society generally, and confining ourselves to their technical merits, it may be said that an ideal system of law would be one that provided a rule for every possible dispute, and a rule that could be applied with certainty and precision. There the task of the lawgiver may be said properly to end; but the jurist finds in this heterogeneous collection of rules some resembling each other in numerous points, either with reference to the persons, or things to which they apply, or the character of the acts dealt with, or the nature of the remedy applied. Some kind of order is manifestly desirable; and the more desirable, the more numerous and imperfect the rules with which the jurist is supplied. The chief ends to be kept in view may be stated thus: (1) Facility of consultation. It is of the highest importance that the rules of law should be so arranged that any one of them may be found when it is wanted, and with as little trouble as possible. For this end a logical arrangement is not indispensable. The Linnæan system in botany is not so satisfactory; on the whole, as the natural system of De Candolle, but it is far easier to use, especially for beginners. Cruden's "Concordance to the Bible" has no pretensions to scientific order, but it is invaluable in the search for texts. The order of the Pandects, following the topics of the Perpetual Edict, is quite arbitrary, but it was doubtless of great assistance to the practising lawyers, and was kept up in preference to attempting a more scientific or logical distribution. But facility of consultation is not the only end to be kept in view. (2) Facility of comprehension should also be considered. The rules of law should be so arranged that their relation one to another may be readily discerned, and thereby the rules themselves be more easily and perfectly understood: thus to state a rule of law in one place, and scatter the exceptions or limitations to it among other rules, would be extremely inconvenient and perplexing. Closely allied to this object is (3) Facility of recollection. The human mind is not capable of holding more than a limited number of unconnected facts; and without some arrangement, enabling one to

hold the fragments together, the most capacious memory soon becomes choked. By a large use of the principle of resemblance, the storehouse of the mind may be almost indefinitely enlarged; for instead of carrying a complete knowledge of the contents of every room, one goes about merely with the keys, and knows exactly where to find what he wants. Another important advantage, which, however, can hardly be conceived as attainable without a logical classification, is (4) the suggestion of appropriate analogies. No one can compare like things with like unless the resemblance has been brought under his notice, or unless he has sufficient insight to find it out for himself. Nothing, of course, will ever dispense with perspicacity and genius in the practitioner, but a great deal might be done to teach him the most common and important analogies, and to avoid the most common and seductive snares. Altogether, the gain from a logical and convenient arrangement of the rules of law, although, of course, very much inferior in importance to the technical and political merits of the rules themselves, must be admitted to be sufficiently great to warrant an earnest and resolute attempt to secure it.

The next question is, How far are the ends of classification attained in the Commentaries of Gaius in regard to his division, "Law concerning Things"? A careful, or even a cursory, inspection reveals three main divisions: the first embracing the subject of property in the widest sense (*dominium*); the second dealing with universal successions, of which only one, inheritance, is treated at length; and, lastly, obligations, in the widest sense, including both contracts and wrongs (*delicta*). To these, Justinian adds obligations arising *quasi ex contractu* and *quasi ex delicto*. The arrangement of the whole topics may be thus represented:—

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|----------------------------|--|
|                            | I.—Law concerning persons ( <i>jus de personis</i> ).  |
| <i>Jus de<br/>rebus.</i> { | II.—Ownership, in the widest sense ( <i>dominium</i> ).  |
|                            | III.—Universal succession. Inheritance ( <i>hereditas</i> , &c.).  |
|                            | IV.—Obligations in the widest sense.   |
|                            | <ol style="list-style-type: none"> <li>1. Contracts.</li> <li>2. Quasi-contracts.</li> <li>3. Delicts.</li> <li>4. Quasi-delicts.</li> </ol> |

V.—Actions, or civil procedure (*jus de actionibus*).

The principle of arrangement is easily detected. It is the logical character of the rights and duties. The civil law has always in view two or more persons; one upon whom it confers a right, another or others upon whom it imposes the duty corresponding to that right. Among the rights and duties created by the law-maker, an important distinction speedily comes to view. Some rights exist through duties imposed upon

all the subjects of the State, others through duties imposed only upon specified individuals. A right of property means that all men are required to abstain from interfering with it, or interrupting the owner in the legitimate use and enjoyment of it. On the other hand, the right that accrues to one man from the promise of another, does not imply a duty resting upon any one except the person who has made the promise. This is a well-known distinction between rights *in rem*, and rights *in personam*. The difference is not so well seen in looking to the rights themselves, but it becomes perfectly clear when we attend to the corresponding duties. These duties are of two kinds, either negative and binding on all men, or binding on specified individuals only, and either positive or negative. To the first class of universal or negative duties corresponds *dominium*, in the widest sense; to the second belongs *obligatio*. It will by-and-by be shown that the group of universal successions includes both kinds of duties in an indivisible unity, and therefore may well stand apart, on the one hand from *obligatio*, and on the other from *dominium*. If the first division, the law concerning persons, be regarded as an historical excrescence, not incapable of removal, then the conclusion is manifest that it is possible to arrange the subject-matter of the civil law into divisions framed on the difference between rights *in rem* and rights *in personam*. Indeed, that is the great merit of the book, and the cause of whatever perspicuity is in it, and whatever value it possesses as a book of instruction for beginners in law. In one part only has the principle of classification been departed from, and that deserves an attentive consideration.

Taking, for shortness, the distribution of Gaius, obligations are said to arise either from contracts or wrongs (*delicta*). A deposits with B a bag of money for safety; B, by accepting the deposit, becomes bound to return the bag when A demands it, and meanwhile to take a certain amount of care to prevent its being lost. The right of A is manifestly a right *in personam*, for the corresponding duty is to do certain acts, and is imposed on the specified person B. Suppose, now, C steals the bag from A, what is the nature of the right that accrues to A against C? According to the Roman law, A could sue C for twice the amount of money in the bag; or, in other words, C, in consequence of the theft, became bound to pay A that amount. Evidently, then, A's right against C is a right *in personam*, and so apparently C's act and B's should be regarded as logically falling under the same category. But the appearance is illusory. The things compared are not the same, and when the transaction is fully explicated, the disparity between them is seen to be profound, and the wrongs or delicts disclose their true character, as related to the extreme opposite division of rights *in rem*. A has a bag of money, to the exclusive custody of which he has,



since it is his own, a legal right; B fraudulently abstracts the bag, and thereby violates A's right; in consequence of this violation, it becomes B's duty to restore the thing stolen with twice its value. Three things, then, have to be kept in view; (a) A's right (*in rem*) to his bag; (b) B's violation of this right; (c) arising out of this, A's right (*in rem*) to the restoration of his bag, and his right (*in personam*) to twice its worth. In the Institutes, no notice is taken of the right of A to recover his property, as affecting the classification of wrongs under rights *in personam*, but it is a point not to be overlooked. In the other case referred to, where A deposits the bag with B, a similar order of facts may be observed. (a) A has a right (*in personam*) to a certain amount of carefulness in the custody of his bag by B. (β) Suppose B does not take that amount of care, and the bag is lost, he violates his own duty and A's right; there is, therefore, (γ) a right (*in personam*) of A against B to be paid the value of the bag. If we compare *a* with *a*, it is clear that one case falls under the logical division of rights *in rem*, the other under the opposite category of rights *in personam*; while comparing *c* with γ, it is equally plain that both are examples of rights *in personam*. Austin calls *a* and *a* primary rights, *c* and γ sanctioning rights; and using his terms, it may be said the primary rights have a totally different logical character, but the sanctioning rights are identical in logical essence.

The objection to this procedure arises when we recur to our initial proposition, for the division into *dominium*, *hereditas*, and *obligatio*, proceeded upon the distinction among the primary rights. This is the basis upon which the Institutes proceed, until they turn round all at once, and take up with the sanctioning rights. Such a procedure is indefensible. It is running with the hare, and hunting with the hounds. The jurist may select whichever he pleases; he may proceed upon the character of primary rights, and adhere to them all through; or he may take his cue from the sanctioning rights; but he must not jump from one to the other. The consequence is inevitable confusion. We may show it thus:—

- I. Rights *in rem*.
- II. Rights *in personam*.
  - 1. Rights *in personam*, really such.
  - 2. Violation of rights *in rem*.

The inconvenience of this arrangement is manifest, but it has a worse fault: it proceeds upon that as a fact which is not a fact; it assumes that the only remedy for a violation of a right *in personam* is another (sanctioning) right *in personam*. This is not correct. Not only in the case of theft has the owner a right *in rem*, as well as *in personam*, but the same fact holds in other

cases. For example, if, as stated, B does not on demand return the bag that A deposited with him, A may either sue B for damages, or he may bring a real action for the recovery of the bag itself. We are told by Ulpian (D. 6., 1, 9) that such was his opinion, although a previous jurist, Pegasus (of much less repute), had said there was no action for the recovery of the thing in such a case. Thus the ground upon which the assumed distinction rests is taken away, and we must return to the original basis of primary rights.

It is not difficult to see how Roman jurists should have fallen into the error of classifying wrongs, or violations of rights *in rem* along with rights *in personam*. There are some rights of which we seldom think as rights, except when they are violated. Thus the right to the exclusive use of land is seldom thought of except when an intruder is to be turned off. Much more is this so with another class of rights. We seldom think of our right to our good name, except when we are libelled; of our right to liberty, except when we are restrained; of our right to personal immunity, till some one tries to hurt us. Nor is it too much to say that we do not appreciate the sweets of liberty, or the comfort of sound limbs, until our liberty is threatened, or we are injured. This is the character of all rights *in rem*. The corresponding duty is a pure negation, not to hurt (*neminem ledere*), of which we take no notice until a positive injurious act is committed. It is not so with rights *in personam*; when we make a bargain with one, our uppermost thought is of the rights we have acquired. The positive duty thrown on the person making a promise is so obvious and striking a fact that it would not be overlooked. Hence jurists fall into the way of speaking of rights *in personam*, and of violation of rights *in rem*, a very natural error, but still an error; hence the confusion. The jurists proceeded so far on a scientific basis, and then gave it up for a loose popular view, over which, with great cleverness, they contrived to throw a veil of sophistical reasoning.

If the foregoing criticism be well founded, it will follow that delicts must be ejected from the head of *obligatio*, and dealt with under rights *in rem*. Many considerations of convenience might be brought forward in favour of an alteration in the place of delicts, but it will perhaps be best to point out how the subject-matter of the civil law should be arranged in conformity with a rigorous adhesion to the logical characteristics of primary rights. Taking, first, rights *in rem*, there emerges a threefold division for the Roman law, according to the object in respect of which the right exists. Foremost comes the class of rights *in rem*, that every freeman enjoyed, with reference to his own person, the right to life, immunity from harm, liberty, reputation. This corresponds to the delict called *injuria*. Next are the

rights *in rem*, that a Roman could have over other human beings. This is a class of which there is scarcely a representative in our law, and includes rights over slaves (*dominium*), children (*potestas*), wives (*manus*), other freemen (*mancipium*). With those rights should be considered the wrongs corresponding to them. In the Institutes we read about the rights of a master under the head of "Law concerning Persons," in the first book; but nothing is said about the violation of those rights until the fourth book, under the general head of delicts. Thus we are supplied with the heads *furtum*, *vi bonorum raptorum*, as applicable to slaves, wives, and children; *damni injuria*, to slaves alone; and *injuria* to wives and children. These topics might, with probably considerable advantage, be at once discussed as part of the exposition of the rights of the slaveowner. Thus a slaveowner's rights *in rem* are divisible into two classes, according as they are against the slave or against other persons. As against other persons he has three several rights, the violation of which constitutes one or other of the delicts. The third division of rights *in rem* consists of those enjoyed in respect, not of one's self or other human beings, but of animals and inanimate objects. This embraces all that Justinian and Gaius have thought proper to include under the head of "*dominium*," and it would correspond with the portions of the Institutes devoted to that subject. The changes necessary to make the division "rights *in rem*" square with the facts may be briefly summed up. First, that part of *injuria* which relates to wrongs done to a freeman is taken from its present position, and made the first independent subdivision of rights *in rem*. It would thus correspond to "Torts to the Person." The second step is to take the bulk of the so-called *jus de personis*, namely, *dominium* over slaves, *potestas*, *manus*, *mancipium*, and adding the delicts corresponding to them, set up the second independent subdivision. The third subdivision remains as it is in the Institutes, with the addition of the relative delicts.

Rights *in personam* may be divided, in the first instance, upon a principle of practical utility as well as of logical precision. It is this. Rights *in personam* arise either from the intention of the party who is bound to come under an obligation, or from the order of the law-maker, who subjects persons to duties without their consent. The first class contains contracts, when A promises to B to give him anything; B's right *in personam* arises from A's intention, without which there would have been no right. Very different is the character of the duties imposed on a child towards its father. The child's consent is not asked, but its duty is attached to the mere filial relation. Such also is the nature of the relation of husband and wife. In this country no one is compelled to enter into marriage, but when married his duties do not arise from any promise made before marriage,

but from the appointment of the law. The rights of the husband against his wife, and of the wife against her husband, are settled not by them, but for them; they arise from the fact of marriage, not from their wish or consent. There is undoubtedly an element of consent beyond what there is in the relation of parent and child. Marriage resembles contracts in so far as it is entered into with the free consent of the parties, but it differs from contracts in this all-important respect, that they cannot alter the terms of a bargain fixed for them by the wisdom of the Legislature, and they have no choice but to take it or avoid it. In the Roman law, the relation of freedmen and patrons may be regarded in a similar light. The rights *in personam*, and they were important, that a master had against the slave to whom he had freely given liberty, were fixed by the law, one of them only being left to the discretion of the parties. To conclude, guardianship, so far as it consists of rights *in personam* and corresponding duties, has manifestly the same characters. Even the Institutes recognise this fact. The *tutela* and *cura* are given (J. 3, 27, 2) as instances of quasi-contract. The authors had a glimpse of the truth, but they did not follow it up. If it is a quasi-contract, why not give it amongst quasi-contracts? The explanation is, that although Gaius and the subsequent writers had the right clue, they held it feebly, and often dropped it. The real character of the quasi-contracts is, that they do not arise from the consent of parties, but by operation of law. The error of the Institutes is in missing by far the most important class of quasi-contracts, and relegating it to the nondescript class of *jus de personis*. Lord Stair (Campbell's Austin, ii. 945 n.) has, it seems, a class of "obediential obligations," the definition of which brings it under the designation of quasi-contract, and which includes the primary duties arising from the domestic conditions. A remark ought to be made here once for all. The relations of patron and freedman, husband and wife, parent and child, guardian and ward, include rights *in rem*, as well as rights *in personam*; the method of the Institutes is to take them up under the class of rights *in rem*, as well as under the other division. The propriety and merits of this arrangement might be shown, but for the brevity of space at disposal.

The classes of rights *in rem*, united inseparably in one whole with rights *in personam*, and called universal succession, must be dismissed with brief notice. In England, a will is substantially a conveyance of property, but in Rome its legal nature was very different. It was simply an instrument by which an heir, one of the universal successors, was appointed. This idea colours and dominates the whole law of wills and legacies, and therefore, if for no other reason, the subject of testamentary or intestate succession ought to be assigned a distinct position.

Here logic and convenience agree. Legacies, in strictness, should be discussed under the head of *dominium*, or *quasi-contract*; but their intimate connection with wills—indeed, the impossibility of separating them—makes a departure from logical exactness unavoidable. This difficulty was perfectly understood by Gaius, who adopts the only possible course under the circumstances.

The proposed rearrangement will be more easily understood by a simple table.

#### THE INSTITUTES ARRANGED ON THE BASIS OF RIGHTS.

##### Rights *in rem*.

In respect of a freeman's self: *injuria*.

In respect of other human beings:

*Dominium* (over slaves). Delicts: *furtum*, *vi. bon. rapt.*, *damni injuria*.

*Potestas*. Delicts: *furtum*, *vi. bon. rapt.*, *injuria*.

*Manus*. ditto ditto.

*Mancipium*.

In respect of animals and inanimate objects:

Independent: existing for their own sake.

*Dominium*. } Delicts. *Furtum*, *vi. bon. rapt.*, *damni*  
*Possessio*. } *injuria*.

*Servitutes* (*personal prædial*).

*Emphyteusis* and *superficies*.

Dependent: as security for rights *in personam*.

*Pignus* and *hypotheca*.

*Ex conventione*.

*Ex lege*.

##### Rights *in personam*.

*Ex lege*.

Permanent relations:

Husband and wife (no *manus*).

Parent and child (no *potestas*).

Patron and freedman.

*Tutela*.

*Cura*.

Occasional or temporary:

*Negotiorum gestio*.

*Condictum indebiti*.

*Ex conventione*.

*Contractus*.

*Pacta legitima* and *prætoriana*.

*Naturales obligationes*.

United rights *in rem* and *in personam*, universal successions.

*Hereditas*:

*Ex testamento*.

*Ab intestato*.

Other successions, arrogation, &c.

Appendix :  
 Legacies, and  
*Fidei-commissa*.

In this arrangement "actions," or procedure, is left out. The subject ought to be treated separately, although in a manner very different from Justinian's and more resembling Gaius's. It is enough to deal with one thing at a time: the table exhausts the substantive law, and procedure may stand over. The table, as it stands, differs from the distribution by the Institutional writers only in carrying out their own principle of division more thoroughly than they thought of. It is a question whether the redistribution has any practical superiority. In one respect it seems at a disadvantage. Slavery and patronage both concern the same persons; a freedman is but a manumitted slave. In the table, however, the whole law of property stands between them. It might be thought, perhaps, that the two things could not be separated, but that is not so; and although one would naturally take them together, there is no practical difficulty in keeping them asunder. By placing the relation of parent and child so far apart from the *potestas* it is indicated in a very emphatic way what a great gulf is between them; and, so far, the distance of the places only correspond with the fact. Apart from this, the distribution has more merits from a practical even than from a theoretical point of view. It brings to the front what is simplest and earliest. Personal injury is probably one of the earliest, and is at least one of the simplest, of judicial conceptions. The powers of masters over slaves, and of fathers over wives and children, are next in simplicity, and are most likely prior in time to private property in land. Property is next in order, and hardly distinguishable from the last either in simplicity or in earliness of development. When we come to obligations *in personam* arising by operation of law, we come to a more complex and later stage of legal progress. The last head, contract, is perhaps, in some shape, earlier in point of time, but, taken as a whole, is the latest and most difficult branch of law. Universal succession ranks along with property in antiquity, but is so complex that it should, perhaps, be postponed in an Institutional treatise until the simple rights *in rem* and rights *in personam* have been separately and fully discussed.

To an English lawyer desirous of knowing how far the arrangement of the Institutes could with advantage be adopted, say in an English civil code, it would not be easy to give a decided answer. All that head of rights *in rem*, embracing slavery, *potestas*, &c., would be omitted in an English code, for its representatives in English law are of trivial importance. The other heads, with necessary changes in detail, would probably be preserved. We should have no *libertinitas*, but instead of it, many judiciary relations, trustee and *cestui-que* trust, &c., so

far as they contain rights *in personam*. Possibly it might be found convenient to give an independent place to wills and intestate successions, but that is a point that could only be determined by actual experiment.

Thus far of the leading subdivisions in the Institutes. Much depends on the questions involved in the distribution of the various topics. To a certain extent they have an importance similar to what genera, families, orders, and classes have to the naturalist. If properly drawn up, they are of great use as aids both to the understanding and memory. But, after all, the great question to a legal expositor is to settle and fix the species. There is a difference between species in nature and in law; one set are given us in nature, the other made by man; but to the legal writer the difference does not count for much, because the species, although made by man, are not made by him. To him they are as unalterable as the various kinds of natural objects. The legal species, the unit of exposition, is in general fixed by custom or law so strongly that scarcely any reasons of *elegantia* could be allowed to affect it. With the species in the Institutes, perhaps little fault is to found; some things are omitted that we should have expected to see; but on the whole the species do not overlap each other, and they are always of sufficient importance to require separate treatment. It is unfortunate, however, that the titles do not coincide with the species, nor with any principle whatever. The order in which they are discussed, and the points selected for remark, seem to have been chosen in a perfectly arbitrary manner. The arrangement can be compared only with a heap of stones turned out of a barrow, a scramble, in which the heaviest generally gets first to the bottom. This is, however, less a matter of surprise when it is remembered that the progress made since the time of Justinian towards a satisfactory and uniform plan of exposition has been very slight. One thing, without which a good arrangement is unattainable, is, that whatever order is adopted for one species, should, if possible, be adhered to in all. But this is a subject too wide to enter upon at the conclusion of an article, and also is hardly susceptible of treatment by mere description; the only course open to those who believe that a better method can be followed is to follow it. Enough to say, that the importance of some method of detailed exposition is even greater than that of a thorough and convenient scheme for the larger divisions.

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## IV.—THE LATE LORD KINLOCH.

THIS sound lawyer and eminent judge, was born in Glasgow, in 1801. He was son of a merchant there, by a daughter of the Rev. David Johnstone, minister of the Established Church of Scotland, North Leith. Several of his brothers secured to themselves prominent positions in life. The late Professor Penney, of the Andersonian University, Glasgow, one of these, obtained a world-wide reputation as an analytical chemist, and Mr. S. M. Penney, an accountant and stock broker in Glasgow, another brother, was distinguished for the devotion of his time, energy, and means to promoting philanthropic and charitable objects. He was twice married; first to a daughter of Charles Campbell, *the laird*, of Lechuary, Argyllshire, who died in 1839; and second, to a daughter of John Campbell, Esq., of Kinloch, Perthshire, who survives to mourn his loss. After attendance at the grammar school of his native city, then celebrated for its teachers, he studied in its university, where he took honours, acquiring at the same time an extensive and accurate knowledge of the arts; at college he was distinguished for close attendance to his studies as well as gentleman-like and winning manners. It was once intended that he should occupy a position in the mercantile world, and it is believed, for a short time was in the office of his father. It has been said that thus he acquired that knowledge of *practical* mercantile law and readiness in cases of accounting, which eminently characterized him both as counsel and judge.

In some of the years of panic which followed the peace of 1815 there was a great stagnation in trade, and hence Mr. Penney directed his mind to the study of law. He began his professional career by serving an apprenticeship in the office of Alexander Morrison, solicitor, Glasgow, and was subsequently engaged in an accountant's office there. In these offices he became minutely acquainted with the methods and principles of accounting, and with the practical details of legal business, acquiring at the University a knowledge of the principles of Scottish jurisprudence. He was called to the Scottish Bar in 1824, and rapidly secured a large and lucrative practice, especially from the metropolis of the West, that great emporium of commerce, with its consequent host of legal conflicts. For many years before his appointment as a judge he held the position of leading counsel, and was the only leader qualified to contend against the well-known genius, learning, and ability of John Inglis, now the Lord Justice-General of Scotland. In the course



of his career he acquired, as might have been expected from his training, special distinction in questions of accounting and in cases involving commercial law. The secret of his success was his methodical habits and untiring industry, in conjunction with much natural ability and ingenuity.

In May, 1858, Mr. Penney was raised to the Bench. He did not pass through the usual preparative stages of Crown counsel or sheriff's-principal. According to the practice of the Scotch courts, he assumed the title of "Lord Kinloch," from a property which then belonged to the brother of his second wife, and now to the Hon. Arthur Kinnaird, the Member of Parliament for Perth.

Mr. Penney's popularity as a counsel continued with him as a judge, and the confidence reposed in him by the profession was exhibited by the great number of causes called before him. That confidence was speedily confirmed by the clearness, soundness, and satisfactory nature of his judgments. After the usual routine of the Outer House, he in his turn became a judge of the first division of the Inner House or appellate tribunal. He was there equally distinguished as when judge-ordinary, for his close study of the causes, the soundness of his judgments, and the lucidity of the style in which they were expressed. He added much to the lustre of the first division of the Inner House, a court which has always had to deal with the largest share of the legal work of the country, seeing that the choice of the judge and the Appeal Court is in Scotland the exclusive privilege of the plaintiff.

Lord Kinloch was in politics a steady but not extreme Conservative, but he never allowed his opinions to disturb or mar his social intercourse, his time being too much occupied and his nature too sensitive to permit his indulging in the turbulent contentions of political life. It is difficult to say whether his friends were more numerous from the one political party than from the other; and certainly he enjoyed the esteem and confidence of both. He was an attached member of the National Church; in early life he belonged to the large and influential congregation of St. George's, Glasgow, then under the pastorate of the well-known Dr. William Muir. When both came to be citizens of Edinburgh, their connection was resumed. The advocate became, and the judge continued, a member of the Kirk Session, which office, under the name of Elder, is somewhat similar to, but ecclesiastically more important than that of vestryman. Unostentatiously pious and charitable, he has frequently enriched the pages of religious periodicals, both in prose and verse, with the effusions of his pen. He was the author of "The Circle of Christian Doctrine," "Times Treasure," "Studies for Sunday Evening," and other works, all of which have acquired considerable

popularity, displaying the author as possessing a mind broad and catholic in its sympathies, and thoroughly imbued with the pure beliefs and aspirations of the Christian religion, and as a man whose labours should long be held in affectionate remembrance. His collected works are an exposition at once of the depth of his religious feelings and the soundness of his taste, as well as demonstrative of the outgoing of his affections to all mankind; and will be the most fitting memorial of the Christian man.

From failing health Lord Kinloch was unable to take his seat on the Bench this session. He died on the 31st of October, at Hartrigge, near Jedburgh, his country residence, where for three weeks previously he was subject to severe intermittent rheumatic pains in the chest, from which he obtained temporary relief, but which returned with greater severity, and ultimately caused his death. He was interred in the cemetery at the West Kirk of Edinburgh, on the 4th of November. His funeral was attended by the judges and the representatives of the legal and civic bodies, all of whom seemed anxious to show respect to one who will be long remembered, and whose place will be difficult to supply.

We cannot refrain, in closing this notice of the departed judge, from adding a few sentences from the Address of the Lord Advocate (Young) in opening the Scots Law Society, on the evening of the day of Lord Kinloch's funeral.

"I do not speak," said his lordship, "of his scholarship, although he was no mean scholar, but I do say that he was an accomplished lawyer and a clear and powerful reasoner. The late Lord Moncrieff, no mean judge, used to say of him, when only a junior, that from the arguments of no man at the Bar did he receive more assistance." . . . "On the Bench, I shall only say that he served his country with fidelity for many years; for it would be unbecoming on my part to speak of his excellence or compare him with others in that high station. I had the happiness of his friendship for above a quarter of a century, and I express my own feelings and the feelings of all who had the privilege of knowing him, when I say that his loss is deplored far beyond the circle of his own family, as the loss to this country, and particularly to this place, where he was known and loved as that of a man of sterling worth and real usefulness."

## LEGAL GOSSIP.

THE Council of Legal Education have at length prepared the scheme which they proposed to substitute for that now in existence. The changes contemplated are very serious, and many of them, as it seems to us, are of doubtful value. After the 1st of January next the present system of lectures, voluntary examinations, exhibitions, and studentships, is to be abolished, so far, that is, as students entering after that time are concerned. In its stead a new system is to be substituted, presided over by a permanent committee of eight members. Four professors are to take the place of the six readers. One of them is to take jurisprudence, including under this term, besides jurisprudence strictly, International law, Roman law, and English constitutional law. The second will take common and criminal law; the third equity; and the fourth real property and conveyancing. These professors are to receive salaries varying from 400 to 600 guineas each, besides a specified portion of students' fees. In addition to the professors there are to be tutors appointed at a salary of 300 guineas a year, with a share of fees. The fees payable by the students will remain as they now are, five guineas on entrance, for the right to attend all the public lectures, and five guineas per annum to attend the private classes of the tutors. Students are recommended to learn the practice of the law as they do at present, in a barrister's or pleader's chambers. Neither attendance at lectures, however, nor in chambers, is to be either necessary to or a qualification for call to the Bar. In future, all students who wish to be called must pass an examination in Roman law, real property law, common law, and equity. The present altogether objectionable system of classification of men after examination is to be abolished. In its place will be a list, including two classes of honours, with the names arranged in alphabetical order. Twelve senior and junior studentships, worth 100 guineas each, are to be given, but only in jurisprudence and Roman law. The council is authorized to receive the law degree of any university within the British dominions as an equivalent for its own examination in any subject except common law and equity, if satisfied that such degrees were granted after a sufficiently stringent examination. Each inn of court is to bear the expense of the studentships awarded to its own students. Such is a summary of the leading recommendations of the Council of Legal Education. In several points it deserves, as it will receive, the approval of the Bar.

The essential clause is that which makes examination compulsory. This of itself is worth every other provision. As to the new arrangement of professorships and tutors we confess that it does not commend itself to our approval. It is simply absurd to suppose that a professor of jurisprudence can be found combining profound knowledge on—1. Jurisprudence, *stricto sensu*; 2. International law; 3. Roman law; 4. Constitutional law and legal history; or, that having been found he would be able to lecture to any useful purpose on these four sets of subjects. The wish of the Council is doubtless to form a species of legal university to which they could attract the highest amount of legal talent. They have already had in Sir Henry Maine an excellent example of the kind of men wanted. But such men could not be induced to devote the whole of their time to preparing and delivering lectures on four sets of subjects, which have no more intimate connection with each other than all the remaining subjects entrusted to the three other professors. The proposal to have tutors is not one either which has much to say for itself. There is really scarcely any principles of law which a student cannot read for himself quite as easily as have instilled into him by the teaching of a tutor; and a diligent student would scarcely care to be bound to attend private classes. The present writer, who has held a position of honour from the Council, unhesitatingly expresses his opinion that while reading for his examination he regarded the time spent at attending the private classes of the readers as mostly wasted. The reader had got nothing better to say than what he could find said—and better said—in half a dozen places. He has heard the same opinion of the valuelessness of lectures and classes of this kind, and in law, expressed by other successful men at the examinations. What is wanted is instruction rather in the art than in the science of law. That which a solicitor gets by practice in an office during the time that he is articled, the barrister, even though he is in chambers with a pleader or a conveyancer, has to pick up. Why should there not be a lecturer whose duty it should be to lecture on the practical part of a barrister's work; to take and give sets of facts, either from actual cases or from imagination; to show how an action is commenced; to trace every step practically throughout the action; give exercises in pleading, in giving opinions, and the like; teaching, in fact, the art instead of the science of law? We promise the Council of Legal Education that, if they will appoint such a lecturer, his class will have the largest attendance. We must reserve further consideration of the new programme until next month.

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The address of Mr. Fitzjames Stephen, Q.C., which we are

enabled to give *in extenso*, is the second valuable contribution which the Social Science Association has made within a few weeks to law reform. After this, and the Attorney-General's address, we hope we shall have heard the last of the necessity of having a digest before we attempt to obtain a code. As Mr. Stephen points out, there are two objections to the course which has hitherto found favour; first, that we have already many good digests, perhaps better than we are likely to get from a commission; such, for example, as "Russell on Crimes," and "Fisher's Digest." And, second, that a digest would take many years to complete, and by the time it was finished would be obsolete. Mr. Stephen's account of the way in which the law has been codified in India, makes one almost wish that Parliament in England could be got rid of for four or five years. The greatest difficulty in obtaining a code seems to us to lie in obtaining the sanction of the two Houses to the codes submitted to them; and our greatest hope is that Parliament will consent to appoint a commission of four or five of the most eminent lawyers of the day, and then practically consent to accept their labour in block.

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Any periodical which is in any way connected with (not to say devoted to) legal matters, would be lamentably deficient if it did not contain a notice of the recent discussions with respect to Mr. Ayrton and his park rules, which *have* occupied so much of public attention. We shall therefore endeavour on the present occasion to briefly *collate* the more remarkable of the various opinions which have recently appeared upon the subject, and at the same time to indicate our own. The diversity of the opinions expressed by the press is indeed something wonderful; and certainly Mr. Odger and his friends, if they have erred in their reading of the law, have erred in good company, and may be excused if they have been wrong in their interpretation of a point so doubtful as this would appear to be. One of our legal papers, indeed, not only altogether condemns the magistrate's decision, but treats the matter as almost too plain for argument. "The matters involved," the writer says, "were very simple matters, and need have given rise to no such elaborate argument as appears to have been devoted to them." Our contemporary expresses a strong opinion that Mr. Odger was quite justified in his complaint that his counsel gave up the only tenable point in the case. "The only line to take and to adhere to strenuously was, that the rules could have no legal force or validity until sanctioned by Parliament. In this view we entirely concur, and think that the decision of the magistrates was wrong." The *Times* disavows the slightest sympathy with

the "Hyde Park orators," but "cannot resist the conclusion that the conviction will be quashed on appeal." The *Pall Mall Gazette* tells us that it is the opinion of nearly all persons who are competent to form an opinion (in which category the writer obviously includes himself) that the conviction cannot be upheld. On the other hand, Mr. Osborne Morgan, M.P., and a writer in the *Solicitors' Journal* (whose earlier dictum would appear to have made no less a personage than Mr. Bradlaugh "put himself to some inconvenience" in order that he might be able to publicly express his opposite opinion), think otherwise. The writer in the *Solicitors' Journal*, while expressing strong disapprobation of the "unwholesome dilemma in which Mr. Ayrton has placed the law," repeats the opinion which he had previously expressed, viz., that "the natural construction of the enactment is that the rules are valid until avoided by the disapproval of Parliament, and not inoperative until affirmed by Parliament, but that the abominable looseness of the phraseology employed leaves the point an arguable one, especially as the enactment is final." Mr. Vernon Harcourt, in his letter to the *Times*, makes a somewhat curious *lapsus plumæ*. At one part of his letter he seems to have forgotten what he had written in another. He declares that he will not offer an opinion on the matter, and yet few persons, we think, who peruse his letter carefully, can have the slightest doubt as to what his opinion is. Near the conclusion he says: "As the matter is *sub judice* I abstain from offering any opinion on the question how far these rules are valid in law. My objection is not that they are invalid, but that their validity has been improperly acquired. Penal laws should not have a mere technical validity, but should have the sanction of public opinion, which gives its powerful support to laws which have been fairly passed and duly considered." In the earlier portion of his letter, however (after noticing the defeat of Mr. Monk's amendment which sought to provide in express terms that no rule made in pursuance of the first schedule of the Act should have any validity till it was approved by Parliament), he proceeded as follows:—"That being so, I think it is difficult to contend that the Government have not a legal right to issue rules in the recess." Mr. Vernon Harcourt then proceeds to comment on what he (in common with so many others) considers the gross breach of faith of which Mr. Ayrton has been guilty, and subsequently (having in his indignation forgotten what he had previously said) writes the passage which we have quoted, in which he declares that he abstains from offering any opinion on the legal bearing of the question! We do not think that we are far astray in claiming him as an authority, against the opinion of the *Times* and *Pall Mall Gazette*, although we quite

approve of his unwillingness to express a direct opinion on the point.

Before we proceed to state our own opinion we must notice a somewhat remarkable contribution to the discussion which was made in a letter recently addressed to the *Pall Mall Gazette*. Mr. Vernon Harcourt had said, in his second letter to the *Times*, that "it has not hitherto been the practice in this country to enact penal laws in the form of *rules nisi*." On this the writer in the *Pall Mall* remarks: "It has been, and is, the constant practice so to do, at least in one very important branch of our constitutional procedure. Every law passed by the legislature of a colony 'which has received the governor's assent (unless it contains a suspending clause) comes into operation immediately, or at the time specified in the law itself. But the Crown retains power to disallow the law; and if such power be exercised at any time afterwards, the law ceases to have operation from the date at which such disallowance is published in the colony.' This was the case under what may be termed colonial common law, and modern Acts of Parliament establishing colonial constitutions follow the same principle in their enactments. The usual form is, that the Crown has power to disallow the law, 'and such disallowance shall make void and annul such law' from or after the day on which the governor shall make it known. Of course, that very consequence follows which the objectors to the Park Rules have denounced as an impossible absurdity under the British Constitution. 'A British subject in a colony might be—probably often has been sentenced and punished under a penal law which was afterwards disallowed.'"

Our own opinion divides itself into two parts; first, our opinion as to the *legal* bearing; and second, our opinion as to the *moral* bearing of the question. With regard to the first point we must own that after very carefully considering the question, we have come to the conclusion, though not without considerable misgiving, that the magistrate could not have come to any other conclusion than that at which he arrived. Of course he had nothing to do with what passed in the debates in Parliament. No principle is, we fancy, better established than that, and it would be an intolerable nuisance if any such mode of interpretation could be established. The words of the Act of Parliament in the final form in which they receive the Royal Assent, are the words, and the only words, which the judge has to interpret. *Littera scripta manet*, when all the discussions to which it has given rise has passed away. This being so, we cannot help thinking that the plain meaning of the words is that the rules, until repealed by Parliament, are to have an *interim* validity. Parliament can repeal them by a mere resolution, and then they *shall* not

(i.e., for the future after that repeal) be enforced. Until submitted to Parliament they are valid. The meaning, in fact, of the clauses of the Act as it now stands, thanks to Mr. Ayrton's manœuvres, as the *Solicitors' Journal* puts it, is merely to provide against the "permanency of oppressive or objectionable rules," and that is all. This, we think, is the *rigid* meaning of the words as they now stand, but of course we quite admit that no such technical triumph as this is to be desired, and that penal laws above all others ought to be so clearly expressed, that he who runs (even though it might be to a Hyde Park meeting), may be able to read and understand, beyond all doubt or question. At the same time we must confess to the very strongest feeling against the course which Mr. Ayrton has adopted, and to something by no means alien from sympathy with a *portion*, at all events, of the cause with which the opposite side has been identified. Mr. Ayrton in his anxiety to strike a blow at the right of public meeting, has endeavoured to give the go-by to a distinct understanding, which, in his anxiety to avoid an imminent defeat, he had arrived at with the opponents of the measure. His conduct is, in fact, we think, little if anything short of a gross breach of all good faith and gentlemanly conduct; and we believe that it thoroughly deserves all the censure and reprobation that it has so generally received.

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*On dit* that Chaffers, the defendant in a case of alleged libel on Lady Twiss, is proceeding with an action for slander against Mr. Ralph Augustus Benson, the magistrate at the Southwark Police Court. The words complained of were used by Mr. Benson when discharging Chaffers on the non-appearance of Lady Twiss. Mr. Henry James, Q.C., is engaged for the defence.

Painful as it has been to watch the spread of discontent among the metropolitan police force, from its first commencement as a respectful remonstrance until its termination in open revolt and wholesale dismissals, still we cannot but think that, like some severe surgical operation, it may result in a more healthy condition of public administration in the future. The events which have occurred since our notes on this subject in last month's Magazine point distinctly to the conclusion at which we then arrived, that some system of judicial inquiry should be held upon the misconduct of individual policemen. The most bitter complaint of Goodchild, the leader of the police agitation, and whose dismissal, in fact, was the immediate cause of the outbreak of the mutiny, was this—That, having appealed from the decision of the District Superintendent to the Commissioner of Police, "he was sent



off to Scotland Yard, but there he was not permitted to do that which was the right of a criminal at the bar—he was not allowed to speak uninterruptedly in his own defence. In fact, before he had commenced to speak, Colonel Labalmondiere had dipped his pen into the ink to write the dismissal." Now, this may or may not be an accurate account of the official inquiry into Goodchild's misconduct, but, anyway, it is a complaint which could not have been made if there had been any semblance of a judicial investigation, or even of the more rapid practice of a court martial. No one could attempt to justify the mutinous conduct of the men, nor to deny the necessity of severe punishment for such mutiny, but every one will, we feel sure, regret that the authorities did not take the claims of the police for increased pay into consideration until the men had adopted a course which is, at least, unusual in the civil service of the State. The sudden and very considerable increase of pay, which was then granted might seem to the men, not the result of the justness of their claim, but of fear for the consequences of their discontent. If the authorities have been taught by the police mutiny to give a readier ear to the respectful memorials of their servants, and to take care that ample justice be done to their claims, then the police revolt of 1872 may be remembered with feelings of satisfaction instead of shame.

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At a time when the Fenian crew are howling for a republic, and talking as if the Government of England were not free, it is satisfactory to find a magistrate using language from the Bench like that employed by Mr. Mansfield, on Saturday last. Ex-police Sergeant Maltby was charged with insubordination in connection with the recent police mutiny. After hearing the evidence, the magistrate strongly censured the police, and reminded them that they were, "like the Queen, servants of this great republic called the British empire." This is the language which we are glad Mr. Mansfield has used. To read the speeches of certain ignorant demagogues, it might be supposed that we were living under a despotic Government. The notion that the Queen is the servant of the State is one which, familiar though it is to educated people, is one hardly current among the poor, and hence a purely Republican orator, who talks as if there were no such thing as representation or Parliament, often gets support from sheer ignorance. Our elementary schools might well spend a portion of their time in giving simple instruction on the English Constitution—such, for example, as is contained in Archbishop Whately's admirable "Lessons on the English Constitution."

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A curious point was raised on the appeal of Lord Beau-

champ, claiming a right to vote for members of the House of Commons. Mr. Wills, Q.C., and the other counsel who followed him on the side of the Lords, were reduced to confess that they could not find any precedents or law in their favour, and they frankly confessed to the court that this was the case. The Lord Chief Justice and another of her Majesty's judges commended them for their frankness, and quoted the example of Lord Justice Mellish as that of a gentleman, who, when at the Bar, would never express an opinion against his convictions, thereby gaining for that opinion great weight with the court. Mr. Justice Grove, on the other hand, dissented from this view of the matter, and held that the function of the Bar was to find arguments for the side on which they were retained. We entirely agree with this latter view. A barrister, who says that he has come to the conclusion that his side of the case is altogether wrong, is usurping the functions of a judge, whose province it is, after having heard all the arguments that can be adduced on both sides, to decide on the merits of what has thus been placed before him. The distinction is great between requiring a barrister to express his judgment on the case before him, and requiring him to furnish all the arguments and the facts which he can adduce in support of a particular view.

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Remarkable as most meetings of the United Kingdom Alliance usually are, perhaps that which was held at Manchester, on the 15th of October last, exceeds any former gathering in its public interest. The Government which the president of the Alliance has characterized too truly, as "well-intentioned but weak," had in the interest of the teetotallers passed an Act of severe pains and penalties on the licensed victuallers, and inflicting great inconvenience on many of the more respectable of their customers. Still, the Alliance is not satisfied. They cannot trust the working classes, as Sir Wilfred Lawson says, to regulate their own affairs in what concerns the happiness of their homes and families. They look upon the Licensing Act only as their "first victory in Parliament of any consequence, and the augury of future victories." They, the autocratic few, will have nothing but total prohibition of the liquor law. Sir Wilfred Lawson, their great leader, as he is called, confessed that their sympathizers had been beaten hollow at every election, and yet he and his friends calmly assume that the advocates of a compulsory abstinence from drink are in the majority. The Pharisaical protest that all abstainers must be superior people, is likely to find favour only with those who can with pleasure waste long hours in a heated atmosphere to listen to the egotistical declamations; and the "great leader" proved

his fitness for the position conferred upon him when, from the warmth of his heated imagination, he can depict the House of Commons as "two parties standing breathless looking at one another, utterly at a loss to raise any cry to delude the people." Let it be borne in mind that one of these parties is that which has given Sir Wilfred Lawson's friends their first victory, and then let us contemplate the victors grateful. What resolution do we find them carrying with acclamation? Not one of thanks to the Government for what it has boldly done, but an aggressive one, pledging the Alliance to support any candidate, whether Tory or Liberal, who would promise to vote for the Permissive Bill; and if no candidate came forward, then that the Alliance itself should supply a partisan. In order to forward its objects, the Alliance have procured a guarantee fund of 90,000*l.*, which can easily, it is said, be raised to a million. This is the present condition of things; but we think the Liberal party will hardly congratulate themselves on the motives which the council of the Alliance attribute to that party with reference to its conduct on the Licensing Bill. We are assured by the report that "Some Governments, in some conditions of political stagnation, are able to maintain an attitude of dignified repose; it is the unhappy fate of others to be expected to do something. The result of *persistent agitation* was to bring about an almost universal cry, 'Something must be done with the licensing question.'" Persistent agitation therefore is, we learn, the main weapon of the Alliance. We must then look in the future for a recurrence of this persistent agitation until on the surface there will appear no consumption of intoxicating liquors within the United Kingdom. We suppose that next we shall have a persistent anti-tobacco agitation, with, as a necessary consequence, total prohibition of smoking. Tea has been said to be hurtful, as also over heating; we therefore may fairly expect that when the Alliance has done with intoxicating liquors, they will turn their attention to these new pastures. It may be contended that all the Alliance asks is, that each locality shall decide for itself what, if any, opportunities of liquor traffic should be permitted; yet the liquor traffic does not only affect the residents in the neighbourhood, but also in many places to a larger extent the visitors. Why, in a country which boasts of individual freedom, should all the visitors be deprived of good wine which on high authority we are told gladdeneth the heart of man, because one or two miserable, weak-minded men might not have the sense to know when to stop? Total abstinence enforced by law we are assured means an absence of self-control. If we are to legislate for every case where a man may ruin himself by that absence of moral discipline, our task is endless, not to say utopian. In the middle classes

of society the irresistible force of higher education and a better moral feeling has almost entirely eradicated the evil of drunkenness; and we may well be assured that if these causes do not, no Parliamentary enactments nor compulsion will ever render an habitual drunkard a worthy member of society.

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#### SCOTLAND.

**THERE** is no end of rumours afloat as to probable legislation in regard to law reform during the next session of Parliament; but they are so diverse and so numerous that one is not entitled to hold them as anything else than the creations of the active imaginations of those who fear, and those who desire legal change. The abolition of feudal tenure, the abolition of the office of the Sheriff Principal, and the conferring of equal rights in all classes of law agents, are the most important law reforms said to be specially intended for the benefit of Scotland. Some say that the abolition of Scotch law and law courts is also contemplated; and we are not quite certain but that one may meet with isolated individuals who expect a Bill to be introduced by the Government for the abolition of Scotland itself. This last view has certainly the charm of simplicity to recommend it.

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The Lord Advocate delivered, some time ago, the opening address at the Scots Law Society, which is composed chiefly of students for both branches of the profession; giving as the subjects of his address some valuable suggestions as to the proper methods of legal study.

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Lord Gifford has for the last fortnight been engaged in the trial of a cause which illustrates the peculiar features of the marriage law of Scotland. The heir (since dead) to one of our oldest baronetcies, and to a splendid highland estate, fell in love with the daughter of an Edinburgh fishing-tackle maker; and one evening at supper, in her father's house, in presence of the assembled family, offered marriage to her. He was accepted, and the parties declared themselves husband and wife there and then. The law requires no formal ceremony for the completion of a marriage, holding it sufficient that the parties did, with a matrimonial purpose, interchange their consent. Marriage is thus allowed to be proved precisely as other contracts may be proved. The real question in dispute is, whether there was a matrimonial purpose in what took place between the parties, and whether the subsequent cohabitation was matrimonial. A son was the issue of the alleged marriage; but the case has lost much of its interest through the boy's death; the money stake being very

much reduced, and nearly all the poetry taken out of the case in consequence of that untimely event.

A marble bust of the late Lord Barcaple, subscribed for by the Bar, was recently presented to the Faculty of Advocates, by whom it was placed in the large hall of the Parliament House. The bust, which is a beautiful work of art by Mr. Brodie, R.S.A., preserves for future generations the pleasing features of one who, so far as human nature made that possible, was in all respects the ideal of a judge, and who died in harness, a martyr for the institution which he loved so well. His commanding abilities—never excelled in the Scotch Bench—drew crowds of suitors to his court; and the virtue of the man was of the kind which spares neither health nor strength in the conscientious performance of duty. He died in the zenith of his greatness, loved and lamented.

William Loggie, Sheriff Substitute of Lanarkshire, for the Airdrie district, died awfully sudden on the 16th ult. He was, in 1839, admitted a member of the ancient faculty of Procurators of Glasgow, a law body which has given several judges to the local Bench of Scotland. He was appointed to his office by Sheriff Sir Archibald Alison in 1859. He presided as stipendiary judge and magistrate, both civil and criminal, over a large and mixed population. The district is the chief centre of minerals and extensive iron works. He thus had often very difficult and even hazardous duties to perform; these he uniformly accomplished with intrepidity and vigour, and yet with so much prudence and tenderness as to gain the favour and confidence alike of employer and employed. Like Justice Talfourd, he died on the judgment seat. He was standing, administering the oath to a witness in the solemn manner adopted in Scotch courts, when repeating the dread appeal to the God of Truth, and His great day of judgment, he fell down, and speedily breathed his last. His judicial character was well summarized by the Dean of the local Bar when, at the next meeting of the court, he spoke for the profession, and "bore testimony to his assiduous attention and zeal in the faithful and efficient discharge of the many duties devolving on him; to his painstaking and forbearance; his strict impartiality, and upright and honourable conduct towards all who came before him in his judicial capacity, making it apparent to all that he was desirous at all times to maintain and administer according to the principles of justice and truth."

## BOOK NOTICES.

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

A Systematic View of the Science of Jurisprudence. By Sheldon Amos, M.A., of the Inner Temple; Professor of Jurisprudence, University College, London; Tutor to the Inner Temple. London: Longmans, Green & Co. 1872.

THE position which jurisprudence shall hold in the legal education of Englishmen is just now in a critical condition. The ablest and most successful practitioners openly express their contempt for such studies as abstract jurisprudence and Roman law. The *Pall Mall Gazette*, in one of those powerful, sledge-hammer kind of articles, for which it is becoming known, and against which it is almost impossible to argue, has set itself against the study of Roman law, and declares that "the conception which lies at the bottom of nearly everything that is said on the subject is that somewhere or other, nearly everywhere, indeed, except in England, there is a vast and noble science of jurisprudence known to partially glorified creatures called jurists (whom the English Philistine is apt to identify in his brutal way with lawyers who cannot get briefs), and that the treasures of this science ought no longer to be withheld from the ingenuous souls who thirst for it." Similar expressions of opinion may be gathered from various other sources, and from men whose opinions have, and deservedly, great weight. Hence it becomes extremely important that whatever goes before the world as jurisprudence should be well deserving of the name; should, above all things, be accurate and scientific. Mr. Austin's "Province of Jurisprudence Determined," a sketchy, fragmentary, altogether imperfect book, is yet one which, with all these faults, and with a style of English which by no means commends itself on the ground of elegance, is accurate and scientific. He works out his definitions as carefully as Euclid works out a problem in geometry, and with even an affectation of mathematical precision. No practical man, who is capable of understanding argument and exact thought, will venture to assert that the careful study of such a writer on such a subject is other than very valuable. Professor Amos is, we believe, the successor of Mr. Austin in the chair of jurisprudence at University College, and

hence we looked into his book with expectations raised perhaps unusually high. We are bound to say that we were disappointed. The volume before us is not without great merit; as we shall hope to show; but the qualities we looked for are wanting. The greatest fault with Mr. Amos, as it seems to us, is that the general treatment of his subject is vague. Instead of clear cut definitions, we have a good deal of mere talk about the subject. The impression after reading a chapter is that we are in a fog, and that no mere reading or analysis of the chapter will get us out of it. It is a book at which "the practical man," of whom all who wish to promote a legal education more extended than can be had from mere practice books, stand in dread, would ask, What is the use of it? and, though a satisfactory answer might be found, it is not one so conclusive as we should like it to have been.

And yet, as we have said, the book has very considerable merits, and is a real step in advance. It is perhaps the most comprehensive attempt which has yet been made in England to grasp the whole subject of jurisprudence. It is the first book of value on which Sir Henry Maine's "Ancient Law," the most important contribution to scientific legal literature of the last twenty years, in spite of Mr. O'Connell's attack on it, has told. Mr. Amos seems to us to have struck out the right course for himself when he declares that "the history of primitive law is the only unfailing key to the logical nature of law in itself, and hence all inquiries into the historical and logical genesis of law do, in fact, resolve themselves into one identical process."\* This idea Mr. Amos has kept steadily before him throughout the volume.

When we come to examine Mr. Amos's chapters in detail, we find many points on which we should differ from him. He states, for example, that "a command always implies a strong expectation on the part of the person issuing it that it will be unhesitatingly obeyed."† We beg leave to say that it does nothing of the kind. When a magistrate commands a crowd to disperse, or he will order the soldiers to charge, it matters not what his expectation about the result of his command may be. He may be perfectly convinced in his own mind that the mob will not disperse, still it is none the less his duty to order them to do so before firing on them, and his asking them is none the less a command because he does not expect that they will obey. To speak of his utterance as a mere wish, or request, or suggestion, because he does not expect that it will be complied with, is either to use words in a totally different sense from that in which they are ordinarily used, or is simply nonsense.

So, also, we are extremely doubtful whether Mr. Amos, in not following Austin's definition of a law, is not only creating an unnecessary diversity, but is not himself wrong. Mr. Austin defines a law as a command which induces to a course of conduct as opposed to an occasional or particular command. Thus, he would say that an order from the sovereign authority that the people should observe a special day as a day of fast belonged to the latter class, and was not a law. Mr. Amos, on the contrary, maintains that every command

\* Page 48.

† Page 73.

issued by the supreme political authority is a true law ; and that all distinctions as to whether commands refer to a long series of acts are wholly valueless and misleading. While, of course, it is equally open to one writer as to another to make new definitions of law, we, for our own part, must say that we prefer Austin's. As nearly as we can tell, Mr. Amos would only allow those commands to be regarded as laws which emanate from a supreme political authority. A command, for example, issued by a father to a child enjoining him, under a penalty, to get out of bed every morning by seven o'clock, or by a colonel to his men to be on parade daily at the same time, would not be recognised as a law.

Mr. Amos defines the legal conception of a person as a "human being looked upon as capable of being invested with rights, or made liable to the performance of duties." It seems to us that this definition is too narrow. That, for example, it is desirable to regard a corporation as a person ; and that the conception of a father or citizen is essentially that of a person ; and that to confine the conception to a *human* being, is to exclude a good many things which have hitherto, and properly, been held as persons. Ortolan's definition of person seems to us so near to that given by Mr. Amos as to have been in his mind when he wrote it ; but Ortolan avoids the narrowness by using the word "being" without "human." His definition is "*tout être considéré comme capable d'avoir et de devoir des droits ; d'être le sujet actif ou passif des droits.*" In another sense, Ortolan points out that the word "person" designates each character man is called upon to play on the judicial stage ; that is to say, each quality which gives him certain rights or certain obligations. For instance, the person of father ; of son, as subject to his father, &c. Mr. Amos apparently feels the awkwardness of his own definitions, for on the very next page he speaks of "the familiar habit in all systems of law of creating what are called 'fictitious' or 'artificial' persons." He maintains, moreover, that the definition referred to is quite compatible with the fact that "things are for other legal purposes looked upon as in some way capable of being invested with rights and made liable to duties, that is, treated as persons." This means, of course, that things are regarded occasionally as persons. The definition, therefore, should, as Ortolan makes it, include things when so regarded. Either the term persons for such "things" is to be kept or got rid of. If it is to be kept, the definition should embrace it. If it is to be got rid of, Mr. Amos should say so.

The chapter on "Public International Law" is, to say the least, interesting reading. It is also clearly the production of a thoughtful man ; and whether we agree or disagree with the conclusions arrived at or the suggestions indicated, we, for our own part, are grateful to any one who will state as clearly as Mr. Amos does what are his views on a number of questions which are brought not improperly within the scope of a treatise on law. Mr. Amos remarks that the improvement in the engines of war points to two conclusions : that as the event of war can be calculated beforehand by one State, so also it may be by another ; and therefore the practical trial of the issue becomes unnecessary ; and, second, that war is becoming more and



more an impotent method of disclosing the moral weight or even the physical powers of two States. We would add that there is also a third result, and perhaps the most beneficial one resulting from the perfection of scientific appliances, that these advances have added much more to the power of defence than to that of offence. In England, for example, the panicmongers are talking about what steam has done towards enabling our enemy to cross the Channel. Say it has doubled their power and speed in doing so. But it has done the same for our fleet, and on land it has probably enabled us to transport our troops from point to point at six times the rate at which they could have been moved before the introduction of steam, to say nothing about the advantages which science has given in shore defence, to men defending as against men attacking a position, and by the introduction of the electric telegraph.

On page 466, Mr. Amos says: "Contrasting a very primitive state of society with a highly advanced one, the former is seen to be composed of elements atomic, mutually repulsive, hateful, and hating one another. The latter is pervaded by facts and notions implying every degree and kind of reciprocity of function, of mutuality of sentiment, and of relationships indefinitely multiplied in the most variegated forms." Surely Mr. Amos can hardly mean what he says. Where does he find this broad distinction? Does the "very primitive state of society" refer to one antecedent to that of men in village communities, or in tribes like those of the North American Indians? Mr. Darwin shows that even in the Simian stage there is a wonderful *esprit du corps*. Our own notion is, that the exactly opposite position to the one taken by Mr. Amos would be more easy of defence; though both are unsound.

We had marked other passages for comment; many of them being for cordial approval. If we have seemed to be too exact in regard to the present work, it is because we attach high importance to the study of jurisprudence, and expect much from one in Professor Amos's position. We must, however, fire a parting shot. Why, in the name of English, will Professor Amos shake-capital letters from his pen as from a pepper-box? There is neither law nor reason in the wholesale way in which he uses them. The pages bristle with capitals. Here, for example, are his opening sentences:—"There is scarcely a Topic in this Work which has not been the subject of repeated Lecturing, Teaching, and Conversational or Critical Disputations with Students. Thus the keen-minded Members of the Author's successive Classes must have their share in the responsibility or the merit of attempted Innovations. It is to serious Students, Professional and Unprofessional,—Men and Women,—that this Book is addressed." That this is not confined to the introduction may be seen from a sentence taken on any page. Here, for example, is one from page 466: "Every Law or Political Institution that has fixed and perpetuated any Differences between Men and Women, except by way of Recognising Marriage as the foundation of Family Life or by way of Protecting Physical Weakness, has retarded Civilization."

**The Administration of Justice under Military and Martial Law.**  
By Charles M. Clode, of the Inner Temple, Barrister-at-Law.  
London : John Murray, Albemarle Street. 1872.

THE pages of the *Law Magazine* may fairly claim to have contained in the articles from the pen of Mr. Finlason, the ablest summary which has yet appeared of martial law ; and it is somewhat to be regretted that Mr. Clode had not the opportunity of seeing these before the issue of the present work. The latter, however, claims to deal with military as well as with martial law. In the minds of most unprofessional readers the two kinds of law are probably the same. The confusion has been perpetuated by most even of our legal writers, and it is still maintained by the fact that even now Parliament sanctions an annual vote for the "Administration of Martial Law;" the fact being, that the law administered is not martial law at all, but military law only. By the latter is meant that body of rules by which the soldier is governed. It is to be found in the Mutiny Act and the Articles of War. These constitute a code of military law. It has only to do with soldiers. Martial law, on the contrary, applies to the whole community, and is not a written law at all. Mr. Finlason pointed out that Hale, in an often quoted passage, denied that there existed a martial law properly so called, and spoke of it as something "indulged rather than allowed as a law." The third Parliament of Charles I. condemned the punishment of persons by a process called the exercise of martial law as illegal, and from that time till the Eyre trials our courts have never clearly defined the boundaries of the thing called martial law. What the decisions amount to may best be seen in Mr. Finlason's articles. The most interesting pages of the work before us deal with military law. It became evident, as soon as standing armies began to be employed, that they must be subjected to certain rules of discipline much more stringent than could be found in the ordinary courts. This was the more necessary, because the new armies consisted of very different materials from the old. An army like that of Germany or Switzerland, or our own volunteers, taking men from all classes of the community, represents the average moral condition of the community. But, from their appointment, the rank and file of the standing army has come from the lowest class. Whenever we get a glimpse of the composition of our early armies, we find that they were recruited largely from the class who must be kept in order by decisive methods. In the time of William III., and down to a period within the memory of those still living, our regiments were recruited largely from our gaols. An army thus formed could hardly be kept to its duty without some speedy method of enforcing discipline. . At the same time, an army is itself so terrific an instrument that, terrible as the alternative would be, it would be better to be without it than not to have it under control. Hence, from the earliest times, there seems to have been some kind of provision for the administration of military law. Following the course of which we find other examples—that of establishing a separate court—just as we had an admiralty court for admiralty questions ; an ecclesiastical court for the clergy, and courts of special jurisdiction in various

parts of the country; so also we find a court recognised in the reign of Richard II. as having cognizance of matters relating to the army. This was the court of the constable and marshal. The office of the constable lapsed in 1521, and nothing more was heard of his court for upwards of a century, until Charles I., in 1625, issued a commission directed to the Lord Marshall of the Army and twenty-four other persons, and gave them power (1) to proceed according to the justice of martial law against soldiers and other persons joining themselves with others for robberies, &c., which ought to be punished by death; and (2) by summary course, as used in armies in times of war, to proceed to trial and condemnation of such offenders. This, of course, included both military law and martial law; and in the Petition of Right, Parliament condemned the commission as illegal. The condemnation, however, did not affect the carrying out of rules for the discipline of the army. Considerable doubt was felt by some of the popular leaders whether any soldier ought to be subject to any other law than that of the common law tribunals. But the leaders of the parliamentary army soon found that discipline could not be maintained in this fashion, and Lord Essex declared that "if Parliament would not allow him a commission of martial law he could not be answerable for what mischief might happen or disorder arise." Parliament granted him the commission he desired, and articles of war were put forth in 1642 with the sanction of the Houses. In the reign of Charles II., the military code assumed the definite outlines in which it was adopted by the Parliament of William III. In William's reign, the open mutiny of the old soldiers of James II. in Scotland compelled the Legislature to confer on the king those statutory powers for the suppression of mutiny which have remained in great measure unchanged to the present time.

The history which we have thus given in briefest outline is very clearly sketched out by Mr. Clode. He follows up his historical narrative with a complete account of the proceedings by military law; their initiation by the arrest of the offender, his arraignment, trial, and sentence, and the confirmation and execution of the sentence. A chapter on Courts of Enquiry follows, in which those readers who are interested in the important points of constitutional law involved in "*Dawkins v. Lord Rokeby*," will find much valuable information, and a useful historical retrospect. In the Appendix are given the Mutiny Act, the Articles of War, and other useful matter, including a note on evidence, by Mr. De Burgh, so well done that we would recommend students, who wish to get up the subject, simply to commit the whole of it to memory.

**A Treatise on the Conflict of Laws, or Private International Law, including a Comparative View of Anglo-American, Roman, German, and French Jurisprudence.** By Francis Wharton, LL.D., Author of a "*Treatise on American Criminal Law*," "*Precedents of Indictments*," "*State Trials of the United States*," &c. Philadelphia: Kay and Brother. 1872.

It is to be expected that in so young a science as private international law the doctrines should require continual examination and revision. This is the more necessary owing to the fact that within quite

recent times, recent even when regard is had to the comparatively short time during which anything worth calling private international law has existed, causes have been in operation which have entirely changed many of the current opinions upon the acceptance of which much of our private international law is based. To our fathers no maxim of jurisprudence seemed more irrefutable than *nemo potest exuere patriam*. From Calvin's case, in the reign of James I. downwards, the doctrine that allegiance could not be got rid of has been accepted as fundamental. So far was this taken that Mr. Reeves, the author of the well-known "History of English Law," expressed his opinion, we believe about 1818, that every citizen of the United States, descended from an English subject, owed allegiance to George III. Carrying out logically his conclusion, President Grant or Chief Justice Chase would be bound by all the liabilities to which ordinary subjects of England are liable. This was, of course, carrying a doctrine to an absurd extent. In more modern times, every one has felt the necessity of getting rid of the old notion of allegiance, and with it of the purely national as opposed to the cosmopolitan notion to which our fathers were so much attached, that the only country which English law could recognise was England. Emigration and the establishment of the United States have compelled us to modify our views of the first, and the hard logic of facts forced upon us by increased communication with foreign countries has done the same for the second. It is now no longer necessary to aver that Calcutta is in the parish of Greenwich, nor to refuse to recognise either foreign criminals who have taken refuge here, or crimes committed on other shores. The recognition of the right of expatriation is one which is quite modern. In the United States the question was only finally settled in 1868. Our own Act was passed in 1870. Another cause which has modified private international law is the growing sense of the duty imposed upon nations of effecting an extradition of criminals. We in England have at length come to recognise that it is not merely in accordance with our duty, but with our interest to acquiesce in treaties of extradition, and probably before long we may anticipate that every civilized nation will be closed against the murderer, the forger, or generally against the felon. Whilst these considerations give additional and yearly increasing importance to private international law, and make a conflict of laws undesirable, the ever-increasing means of international communication are causing the isolation of each country to be less and less possible. Probably we may look forward to the time when the conflict of laws shall be greatly diminished; when whole provinces of law in several countries shall be assimilated. A serious proposal, for example, has been made to establish an international code for joint-stock companies. The laws relating to the subject of general average, and shipping generally, have also been pointed out as one on which uniformity is both possible and desirable. Chambers of commerce, representing the public opinion which legislation follows on such subjects, have already discussed the question, and an international average congress met, under the presidency of Lord Penzance, as far back as 1864. Other subjects will at once recur to the reader as capable of

being beneficially brought under discussion with a view to the unification of the law in various countries. International congresses on weights and measures, statistical congresses, and other similar gatherings, are probably doing more, inasmuch as they are attended by practical men, to bring about such a result, than even the discussions in newspapers and public journals, which on such subjects are often written by men who know nothing beyond superficialities about what they are writing. There will, however, remain for long enough a very considerable number of subjects on which it is impossible but that the laws of various countries should conflict. So long, for example, as Roman Catholicism and Protestantism maintain their present attitude towards each other, so long will uniformity in the marriage laws of Protestant and Roman Catholic countries be impossible. There will hence be for some time to come ample room for books like this by Dr. Wharton. It is a work in which, added to a careful collection of facts, and of the law of each country down to the present time, there is an attempt to deal scientifically with the law, and to lay down principles rather than mere *dicta*. The mere labour of getting together the materials on such a subject is great; for the pathway of the worker is not strewn with the works of his predecessors, so that he may simply choose where he likes, as in some departments of legal book-making. Dr. Wharton possesses a clear way of marshalling his arguments and his facts, and great acuteness in getting at the principles involved, and he has made use freely of the few valuable works which have preceded his own. For those who have to make themselves acquainted with questions involving a conflict of law, we should say, refer to Westlake and to Wharton.

Commentaries on the Criminal Law. By Joel Prentiss Bishop. Fifth edition, revised, rearranged, and enlarged. Vol. II. Boston: Little, Brown & Co. London: Sampson, Low & Co. 1872.

How is it that American lawyers are able to produce so many good, or fairly good, books on the scientific aspects of law? One of our journals hinted, a few days ago, that the persons in this country who write books, and consider themselves jurists, are those who cannot get briefs; and the suggestion, we suspect, is too near the truth in many instances to be pleasant. At any rate the proportion of the briefless in England must be much greater than that which exists in America; and in addition, most people believe, rightly or wrongly, that the standard of education is higher here than there, and yet America is continually sending us books such as we have indicated. Wheaton's "International Law," in either of its two editions, by Laurance or Dana, remains the best book we have on the subject. Storey and Kent's "Commentaries," and Townshend's "Libel," with several others, will recur to the recollection of our readers. They are all books which make honest attempts to get out of the grooves into which books written for practical men usually run. In many cases it would seem that when our lawyers have succeeded in getting out of the mere grooves worn by practice, they have found every discouragement for so doing. Archbold's "Pleading" has run through eighteen editions. Archbold's "New System of Criminal Procedure" has not, in England, reached a second edition; but it furnishes a

curious illustration of the condition of criminal jurisprudence in America, and of the desire of Americans for information on such subjects, that though the system of criminal procedure had not, to any considerable extent, been adopted in the United States, two successive editions were published in New York. English law has had a tendency to become a mere collection of facts, from which the practitioner selects those which are requisite for his immediate purpose, without any attempt to seize the principle by which their vast array may be set in order. Busy men have not time to extract the principle from the host of cases which come before them. It is enough for them if they can show a precedent for what they are doing; and, as every one who attends our courts knows, an accumulation of cases is much more relied on than an appeal to principle. This being so, and decision according to principle rather than mere precedent appearing to us to be desirable—the enunciation of principle, too, being of the highest importance to the legislator, and especially on crime—we are exceedingly glad to welcome such books as the one before us. Mr. Bishop's book is not new. It has now reached a fifth edition, and fills two volumes of nearly 800 pages each. It contains an attempt to deal scientifically with criminal law. In so doing it is not dealing merely theoretically with the subject, theory being, neither here nor elsewhere, opposed to practice. It endeavours to lay down scientific principles on crime generally, distinguishing between the criminal law and military or martial law, and assigning the former to the exact places in relation to other portions of municipal law. It treats of the several elements of crime; of the doctrine requiring an evil intent and an evil act as separate elements in a crime, and having thus dealt through nearly 600 pp. with the purely scientific aspect of the question, treats of the technical divisions and distinctions. Mr. Bishop complains that writers on law hitherto, if they have noticed differences of judicial opinion upon particular questions, have contented themselves with stating the one side and the other of what they have assumed to be "*the argument*"—that is, what the judges, who had argued the question, had said on one side or the other. This assumes that the whole of the ground has been covered by the *dicta* of the judges; the truth being that in very few instances do the particular set of facts on which the judges have to decide warrant the conclusion that the decisions are the assertions of opposing principles. Lord Stowell, whom Mr. Bishop professedly follows, remarks on this point, "With regard to the decided cases, I must observe generally, that very few are to be found in any administration of law in any country upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decisions; they are found in the maxims and rules of books of text law. Following him, Mr. Bishop has endeavoured, and with great success, to render his book of the highest practical utility by deducing for the reader the principles which past decisions furnish for the determination of future cases. The second volume is wholly devoted to the more practical portion of the subject, and gives the law, English and American, on each of the specific offences which the laws of the two countries regard as crimes. We do not profess

to have seen the whole of the two large volumes before us, but we have endeavoured to get at the writer's intentions, and to judge of his execution. We believe that his work deserves the highest credit for both. We have taken certain specific offences, and carefully looked to see what would be the value of his treatment of the subject to an English student and practitioner. Our conviction is, that the English student of criminal law could have no better book put into his hand than the present. It is a complete treatise on the science of criminal jurisprudence, and leads up to the subject in a more scientific and sensible way than any other book with which we are acquainted. The book would also be of value to the English practitioner, though not so indispensable as Archbold or Russell. One of the portions which we have carefully examined is that which treats of the law of libel and slander, as far as these are crimes. We have found the law carefully stated, and not a single English case of importance seems to have been overlooked.

**The Arrangement of the Law.** By O. W. Holmes. American Law Review. Boston: Little, Brown & Co., 1872.

WHENEVER the great work of codifying our laws shall have been seriously taken in hand, the first, if not the most important, matter to be considered will unquestionably be that of the arrangement of law; in other words, the selection of the headings or titles under which legal rules are to be classed, so that every proposition shall readily fall into its proper place, be safely stated in the most general terms, and not need to be repeated elsewhere in a more limited or qualified shape. We, therefore, are ready to welcome all efforts to cast light on this topic; and we are glad to find that it attracts attention in America as well as in this country.

We have been favoured with a portion of a work by Mr. Holmes, of Boston, treating of this subject, which, as we understand, formed part of a course of lectures delivered at Boston last spring. Of course, until the whole work shall have been before us, it is impossible to form a judgment as to the success or failure of Mr. Holmes's performance; but this much at least is certain, that there is ample room in legal literature for even an elaborate treatise on the subject, and that Mr. Holmes is not a copyist or a mere retailer of others' thoughts.

Mr. Holmes founds his proposed arrangement on the basis of "the ultimate conception *duty*, instead of the derivative notion *rights*, which is the foundation of existing systems;" and in doing so, at first, he believed himself to be original; but since his lecture putting forward this view was published, he has found in Mr. Hodgson's work on the "Theory of Practice," a reference to "Comte's Philosophic Routine," urging the same view. But it really matters little whether or not the proposed legal classification rests on a basis itself original or not; and if in Mr. Holmes's hands it really accomplishes his object of making law knowable, he will have done good service, even though he cannot claim the merit of a discovery.

But it is not, *à priori*, easy to see how the substitution of a table of duties for a table of rights can much simplify legal arrangement.

No doubt, logically, rights cannot be taken to be undecomposable phenomena, and they admit, or rather sometimes admit, analysis into duties. But often the process is not one of analysis properly so called, but simply an alteration of the language in which the same thing is described. The simplest and most obvious notion of a right is when A is bound by contract to B to do something, or forbear from doing something. It is B's right to have the contract performed, while it is A's duty to perform it. The contract looked at from A's point of view presents the aspect of a duty; from B, that of a right. It cannot be said that the substitution of A is bound to, for B has a right to, is in any time an analysis; or that much can be gained by substituting the one for the other. And there is a presumption that when writers of the stamp of Falcok and Austin, while they saw the possibility of an arrangement of duties, yet preferred that of rights, there must be some good reason for their choosing the latter.

In the sheet before us, the author gives two tables, indicating the ground plan of his proposed arrangement. The one being a table of duties, and the other of successions.

This twofold arrangement reminds one of Domat's division of laws into "engagements" and "successions," which has long since come to be regarded as both arbitrary and incorrect; but Mr. Holmes unquestionably includes under successions titles which Domat would have regarded as belonging to "engagements." The table of duties is divided, primarily, with reference to the classes upon whom burdens are imposed, while the subdivisions have reference to those in favour of whom the burdens are imposed. Thus the subdivisions when worked out can hardly fail to run back into a classification of rights.

However, we repeat that we have not got materials to form a final judgment as to the merits of this performance, and that, at all events, the discussion of the topics it embraces is most opportune just now. Whether we ultimately agree with Mr. Holmes or not, judging from the specimen before us we are quite sure to have clear and precise writing—a reflection of similar thinking.

**The Intermediate Examination Guide; containing a Digest of the Examination Questions on Common Law, Conveyancing, and Equity, with the Answers. By Edward Henslowe Bedford. London: Butterworths. 1872.**

THIS is a book a little out of our usual way. But it is none the less a useful book. As our readers know, we have never given in to the weakness of the outcry against examinations. An examination being necessary, such a book as this is indispensable. A student will always find the answering of a set of questions which have actually been put the best preparation for examination. Of course, unless he is an idiot, he will not imagine that the merely getting up a set of answers such as this is the legal instruction which it is the object of the examination to test. But when he has read his subject, and wishes to find out his weak places and his strength, such a book is invaluable. By comparing his answers with those here furnished him, he will be able to judge whether his knowledge of the subject



is of that exact and accurate character which all examiners who know their duty insist upon. So much for this class of books. The one before us, wherever we have tested it, is carefully written, precise, and complete. We can recommend it thoroughly to those law students who are preparing for the "Intermediate."

**The Rule of the Law of Fixtures.** By Archibald Brown, M.A., &c. Second Edition. London: Stevens and Haynes. 1872.

WE are glad to find that Mr. Brown's book has so soon reached a second edition, as it first appeared in the pages of the *Law Magazine*. The singular clearness with which the law was stated at once arrested attention, and the then editor of the *Magazine*, to whom the author was a perfect stranger, suggested the publication of the articles in a separate form. The suggestion was adopted, and the public and the profession have shown their appreciation of the work by buying a small first edition within little more than a twelve-month. In the second the original articles have been more elaborated, and a valuable addition has been made by the insertion of the principal American decisions on the subject. The edition deserves to go off as successfully as the first.

#### BOOKS RECEIVED.

**Biographia Juridica.** A Biographical Dictionary of the Judges of England, from the Conquest to the Present Time. 1066 to 1870. London: John Murray. 1872.

**Causality; or, the Philosophy of Law Investigated.** By the Rev. George Jamieson, B.D. London: Longmans. 1872.

**Full Report of the Proceedings of the First General Congress of Law Students' Societies.** London: Butterworths. 1872.

**Observations on the First and Second Reports of the Judicature Commissioners.** By W. T. S. Daniel, Q.C.

**Townshend's Law of Libel.** London: Stevens and Sons. 1872.

**May's Constitutional History.** London: Longmans. 1872.

**Legal Periodicals.** ———

Several important articles must necessarily stand over for the present for want of space.

#### LAW DEGREES AT THE UNIVERSITY OF LONDON.

THE Senate of this University has made a further augmentation of the staff of examiners with a view to render it as complete as possible in all its departments. Previously to the year 1867 the degree of LL.B. in the University of London was obtainable by a Bachelor of Arts of any British university on passing an examination in Stephen's "Blackstone" and Bentham's "Principles of Legislation." The degree of LL.D., on the other hand, could only be obtained by a candidate who succeeded in passing a very stringent examination

in common law, together with some other branch of positive law, and with either Roman law or some special application of the "Principles of Legislation." The examinations for these degrees were chiefly conducted by Mr. Nassau Senior, with the assistance of Mr. Tomlinson in common law. Thus no candidate could obtain a degree in law except on the condition of having previously graduated in arts, and it thus happened that the great mass of law students found themselves excluded from taking advantage of the facilities for graduation in their own subject afforded by the university; while the easy terms on which the LL.B. degree could be obtained by any graduate in arts, caused it to be sought quite as much by clergymen and dissenting ministers as by those who followed law as a profession. Candidates for the degree of LL.B. are now required to pass two examinations; the first of which embraces jurisprudence, Roman law, and the constitutional history of England; while of the second, the subjects are common law, certain departments of equity and real property law, the law and principles of evidence, and a special department of Roman law. The first of these examinations may be passed a year after matriculation; the second at an interval of two years after the first. Following each of the LL.B. examinations is an examination for honours; at the first, in jurisprudence and Roman law, to which is attached an exhibition of 40% a year for two years; at the second, in common law and equity, to which is attached a scholarship of 50% a year for two years. At the examination for the degree of Doctor of Laws, every candidate is required to pass (1) in Roman law, (2) either in common law, real property law, or equity, and (3) either in international law or in jurisprudence and the principles of legislation. For the conduct of these examinations the following staff of examiners has been constituted: jurisprudence, Roman law, international law, and the principles of legislation, Mr. James Bryce, D.C.L., and Mr. T. Erskine Holland, B.C.L., M.A.; common law and law of evidence, Mr. Farrer Herschel, Q.C., B.A., and Mr. Henry Matthews, Q.C., M.P., B.A., LL.B.; equity and real property law, Mr. Edward Fry, Q.C., B.A., and Mr. Herbert H. Cozens-Hardy, B.A., LL.B.; constitutional history of England, Professor Sheldon A. Mos, M.A., and Professor Leonard Courtney, M.A.

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### THE INNS OF COURT EXAMINATION.

At a general examination of students of the Inns of Court, held at Lincoln's Inn Hall, on October 30 and 31, and November 1, 1872, the Council of Legal Education awarded to George Serrell, Esq., student of Lincoln's Inn, a studentship of fifty guineas per annum, to continue for a period of three years; Edward Denny Fairfield, Esq., student of the Inner Temple, an exhibition of twenty-five guineas per annum, to continue for a period of three years; Christopher Venn Childe, Esq., student of the Inner Temple; William Douglas Edwards, Esq., student of Lincoln's Inn; and James Mulligan, Esq., student of Gray's Inn, certificates of honour of the first class; Henry Bell, Esq., student of the Middle Temple; Arthur Bovell, Esq., student of the Inner Temple; George Brooke, Esq.,

student of the Middle Temple; Fitzroy Francis Booker Cowper, Esq., student of the Inner Temple; Kishori Mohan Chatterjea, Esq., William Croasdill, Esq., students of the Middle Temple; Fendall Currie, Esq., George William Melville Dale, Esq., Arthur Houssemayne Du Boulay, Esq., students of Lincoln's Inn; Edward Arthur Dunn, Esq., William Erskine, Esq., Clement William Govett, Esq., students of the Middle Temple; Thomas Colpitts Granger, Esq., James Winterbottom Hamilton, Esq., George Frederic Holroyd, Esq., Pearson Robert Irvine, Esq., George Jamieson, Esq., students of the Inner Temple; William Austen Leigh, Esq., student of Lincoln's Inn; William Alexander Lindsay, Esq., Robert Bovell Neblett, Esq., students of the Middle Temple; C. W. Pinkstan Overend, Esq., student of Lincoln's Inn; Sitarem Narayan Pandit, Esq., Arthur Daniel Pollen, Esq., students of the Middle Temple; William Edward Sanger, Esq., Lewis Charles Sayles, Esq., students of Lincoln's Inn; William Jamieson Soulsby, Esq., student of the Middle Temple; Charles Agnew Turner, Esq., student of the Inner Temple; Arthur Weekes, Esq., and Edward Albert Wurtzburg, Esq., students of Lincoln's Inn, certificates that they have satisfactorily passed a public examination.

At an examination of students of the Inns of Court in Hindu and Mahomedan law, and in the laws in force in British India, held at Lincoln's Inn Hall, on October 28 and 29, 1872, the Council of Legal Education have awarded to Thomas Joseph Greenfield, Esq., student of Gray's Inn; James Keith Grosjean, Esq., Ardesheer Byramjee Kapadia, Esq., Samuel Archibald Locke, Esq., students of the Middle Temple; Pokala Venkatakrishnama Naidu, Esq., student of Lincoln's Inn; Arthur Daniel Pollen, Esq., James Hermann de Ricci, Esq., students of the Middle Temple; Iyah Cumbumpati Sabapathi, Esq., George Serrell, Esq., students of Lincoln's Inn; Patrick Dunlop Shaw, Esq., student of the Middle Temple; Arthur Weekes, Esq., student of Lincoln's Inn; and William Young, Esq., student of the Middle Temple, certificates that they have satisfactorily passed an examination in the subjects above-mentioned.

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### CALLS TO THE BAR.

*Lincoln's Inn*.—George Serrell, jun. (holder of the Studentship, C.L.E., Michaelmas Term, 1872, Exhibitioner Constitutional Law and Legal History, and Senior Exhibitioner Equity and Real Property, 1872), M.A., London University; Charles Arthur Duncan, LL.B., Cambridge; Thomas Nash, M.A., Oxford; James Edward Lloyd, B.A., Cambridge; Thomas Palmer Abraham, LL.B., Cambridge; William Henry Lipscombe, jun., B.A., Oxford; Frederick Robert Frith Banbury; Edmund Henry Stuart Nugent, B.A., Cambridge; John Maitland Reed, M.A., Oxford; Walter Henry Blake, B.A., Cambridge; William Thomas Langford, B.A., Oxford; Stewart Dawson; Godlieb Georgé Bennett van Someren, University of London; Krishnarao Gopal Deshmukh, B.A., Bombay University; John Winfield Bonser, B.A., Cambridge, Fellow of Christ's College, Tancred Law Student; Emerson Dawson, LL.B., Dublin; Joscelyn

Augustus De Morgan, B.A., Cambridge; Allen Chandler, jun.; Hon. J. Hamilton Lawrence, B.A., Cambridge; Soorjbal Munphool Pandit, Calcutta University, and Oriel College, Oxford; Arthur à Beckett Terrell; Frederick Anthony Walroth, M.A., Oxford; and Henry Mortimer Durand.

*Inner Temple.*—Robert Montague Hume; Frederick George Carey (holder of an Exhibition awarded in last Trinity Term, of an Exhibition awarded July, 1870, and of two Exhibitions awarded July, 1871), University of London, LL.B.; Edward Denny Bairfield (holder of an Exhibition awarded in this present Michaelmas Term, and of a certificate of honour, first class, awarded in last Trinity Term); Francis Harvey Murphy, B.A., London; Vincent Hunter Barrington Kennett, M.A., LL.B., Cambridge; John Lancelot Stirling, B.A., LL.B., Cambridge; Francis Robert Steele Bowen-Graves, B.A., Cambridge; John Henry Locke, B.A., Cambridge; Philip Arthur Scratchley, B.A., Oxford; William James Brooks, M.A., Oxford; John Smalman-Smith, B.A., Cambridge; Rowland George Venables, B.A., Oxford; Jonathan Field, B.A., Cambridge; Kirkman Finlay; Frederick William Hollams, B.A., Oxford; Henry Martin Lindsell, B.A., Oxford; Charles William Leathley Jackson, B.A., Cambridge; William Bennett Rickman (holder of an Exhibition awarded July, 1870); Louis Addin Kershaw, B.A., Oxford; William Alexander Baillie Hamilton; Pearson Robert Irvine, Cambridge; John Leonard Matthews, B.A., Oxford; Jefferys Charles Allen, B.A., Cambridge; Theodore Elhs Williams, B.A., Cambridge; Alfred Edmund Bateman; the Hon. Hamilton John Agmondesham Cuffe, B.A., Cambridge; Francis William Raikes, B.A., Cambridge; Edward James Pollock; the Hon. Richard Cecil Grosvenor, Oxford; Vernon Russell Smith, B.A., Cambridge; Richard Henry Cole; William James Ingram, B.A., Cambridge; Francis Holdsworth Hunt, B.A., Cambridge; Frederick Gordon Templer, B.A., Cambridge; and Clement Buesnell.

*Middle Temple.*—Edward Henry Whinfield, B.A., Magdalen College, Oxford; Frederick Dunlop Shaw; Richard Duncan Radcliffe, M.A., Christ Church, Oxford; Arthur Daniel Pollen, B.A., Dublin; Robert William Andrews, B.A., Dublin; Frederick Jennings Armstrong; Joseph John Chapman, M.A., Emmanuel College, Cambridge; Joseph Hunt Dunn; Frederick Barker; Henry Winch; Alfred St. George Hammersley; Jean Alexis Jules Piguéguy; James Herman de Ricci; and Ardesheer Byramjee Kapadid.

*Gray's Inn.*—Gustave Adolphus Smith (certificate of honour, first class, Michaelmas Term, 1871).

## APPOINTMENTS.

Sir Roundell Palmer, Q.C., M.P., has been appointed Lord Chancellor of England, under the title of Lord Selborne; Mr. Justice Hannen has been appointed Judge of the Divorce Court; Mr. T. D. Archibald, of the Home Circuit, Judge of the Court of Queen's Bench in his place; and Mr. S. C. Bowen, Junior Counsel to the

Treasury, in the place of the latter. Mr. Carrington Francis has been appointed Private Secretary to Lord Selborne ; Mr. Thomas Fooks, Solicitor, has been appointed Clerk of the Peace for Dorset ; Mr. John Hassard, Solicitor, Notary Public for Ecclesiastical purposes in England and Wales, Mr. Robert Collinson, Solicitor, Coroner for the Borough of Scarborough ; Mr. H. G. Goldingham, Solicitor, Sheriff of Worcester ; Mr. G. A. Cayley, Registrar of Deeds for the North Riding of Yorkshire ; Mr. G. C. Whiteley, B.A., Barrister-at-Law, Clerk to the Justices of the Newington Division.

**IRELAND.**—The judges for the trial of election petitions during the next twelve months are : The Right Hon. Mr. Justice Fitzgerald, the Right Hon. Baron Deasy, and the Right Hon. Mr. Justice Morris.

**SCOTLAND.**—Mr. T. H. Orphoot has been appointed Sheriff Substitute for Peeblesshire.

## OBITUARY.

### *September.*

26th. **TAHOURLIN, Harry, Esq.,** Solicitor, aged 29.

### *October.*

25th. **STOCKEN, William, Esq.,** Solicitor, aged 54

26th. **TEED, Edward, Esq.,** Barrister-at-Law, aged 61.

### *November.*

4th. **NELSON, John, Esq.,** Solicitor, aged 77.

4th. **LEE, Thomas Yate, Esq.,** Barrister-at-Law, aged 53.

11th. **LEEMAN, Joseph, Esq.,** Solicitor, aged 72.

13th. **BREAREY, John J., Esq.,** Solicitor, aged 35.

14th. **RAYMOND, John, Esq.,** Barrister at-Law, aged 55.

19th **BENNETT, Risdon D., Esq.,** Barrister-at Law, aged 30.











